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THE

COMPILED STATUTES OF IDAHO

VOLUME II

CIVIL CODE
CODE OF CIVIL PROCEDURE
PENAL CODE
GENERAL CODE PROVISIONS

Prepared by
B. W. Oppenheim, Code Commissioner,
and adopted at the 1919 session of the legislature under
the title of Compiled Laws.

Revised by
I. W. Hart, Clerk of the Supreme Court,
to incorporate the permanent laws of the 1919 session under
the authorized title of Compiled Statutes.

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PART II. CIVIL CODE.

TITLE XXXVI. DOMESTIC RELATIONS.

CHAPTER 181.

PERSONS.

§ 4583. [2601] **Minors defined.** Minors are:

1. Males under 21 years of age.
2. Females under 18 years of age. [R. S. § 2405.]

Hist. (See '64, p. 515) R. S. § 2405, reen. R. C. § 2601, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 25, Kerr's C. ib.

§ 4584. [2602] **Unborn child as existing person.** A child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests, in the event of its subsequent birth. [R. S. § 2406.]

Hist. R. S. § 2406, reen. R. C. § 2602, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 29; Kerr's C. ib.

Cross ref. Inheritance by posthumous children: § 5332.

§ 4585. [2603] **Contracts of minors: Disaffirmance.** In all cases other than those specified in the next two sections the contract of a minor, if made whilst he is under the age of 18, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterward; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of 18, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent. [R. S. § 2407.]

Hist. R. S. § 2407, reen. R. C. § 2603, reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. C. 1872, § 35; Kerrs' C. ib.

Cross ref. Minor may make marriage settlement: § 4674.

§ 4586. [2604] **Same: Contracts for necessaries.** A minor can not disaffirm a contract otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them. [R. S. § 2408.]

Hist. R. S. § 2408, reen. R. C. § 2604, reen. C. L. ib.

Cross ref. Minors must pay reasonable price for necessaries: § 5674.

Comp. leg.—Cal. Same except "or a person of unsound mind of whatever degree" inserted after "minor," and "or them" last words, omitted: Civ. C. 1872, § 36; Kerr's C. ib.

§ 4587. [2605] **Same: Contracts authorized by statute.** A minor can not disaffirm an obligation otherwise valid, entered into by him under the express authority or direction of a statute. [R. S. § 2409.]

Hist. R. S. § 2409, reen. R. C. § 2605, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 37; Kerr's C. ib.

Cross ref. Minors may hold and transfer stock in land and building corporations: § 4915.

§ 4588. [2606] **Contracts of idiots.** A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family. [R. S. § 2410.]

Hist. R. C. § 2410, reen. R. C. § 2606, reen. C. L. ib.

Cross ref. Persons incompetent to contract must pay reasonable price for necessaries: § 5674.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 38; Kerr's C. ib. Ratliff v. Baltzer's Admr. (1907) 13 I. 152, 89 P. 71.

Cited: Ratliff v. Baltzer's Admr. (1907) 13 I. 152, 89 P. 71.

§ 4589. [2607] **Contracts of insane persons.** A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission. [R. S. § 2411.]

Hist. R. S. § 2411, reen. R. C. § 2607, reen. C. L. ib.

Comp. leg.—Cal. Same except "as provided in the chapter on rescission of this code" added: Civ. C. 1872, § 39; Kerr's C. ib. Ratliff v. Baltzer's Admr. (1907) 13 I. 152, 89 P. 71.

Contracts of partially insane person: Where it is made to appear that a person is insane upon one subject his contracts in regard to other matters will be scrutinized closely by the court when their validity and his competency to make them are questioned. Ratliff v. Baltzer's Admr. (1907) 13 I. 152, 89 P. 71.

A conveyance or other contract made by a person who is of unsound mind but who is not entirely without understanding, and before his incapacity has been judicially determined is not absolutely void but is only voidable and subject to rescission. Ib.

A contract made by a person of defective mind but not entirely without understanding, who comprehends the full force and effect of such contract and upon whom no fraud or deception has been practiced, will not be rescinded. Ib.

§ 4590. [2608] **Same: After adjudication of incapacity.** After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge. [R. S. § 2412.]

Hist. R. S. § 2412, reen. R. C. § 2608, reen. C. L. ib.

Comp. leg.—Cal. Same in part: Civ. C. 1872, § 40; Kerr's C. ib.

CHAPTER 182.

MARRIAGE.

ARTICLE 1.

NATURE AND VALIDITY OF MARRIAGE CONTRACT.

§ 4591. [2611] **What constitutes marriage.** Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations. [R. S. § 2420.]

Hist. (See '77, p. 24, § 1) R. S. § 2420, reen. R. C. § 2611, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 55; similar as am. Kerr's C. ib.

Presumption of marriage: Though there was a legal impediment to prevent a valid marriage, as where there was a former husband or wife living at the time, still a valid marriage will be presumed to have occurred after the removal of such impediment by death or divorce, where the parties continue their marital duties, rights and obligations. Huff v. Huff (1911) 20 I. 450, 462, 118 P. 1080.

§ 4592. [2612] **Persons who may marry.** Any unmarried male of the age of 18 years or upward, and any unmarried female of the age

of 18 years or upward, and not otherwise disqualified, are capable of consenting to and consummating marriage. ['88-89, p. 44.]

Hist. (See '64, p. 613, § 2) R. S. § 2421; am. '88-89, p. 44, reen. R. C. § 2612, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 56; Kerr's C. ib.

§ 4593. [2613] **Proof of consent and consummation.** Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases. [R. S. § 2422.]

Hist. (See '77, p. 25, § 3) R. S. § 2422, reen. R. C. § 2613, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 57; different as am. Kerr's C. ib.

§ 4594. [2614] **When voidable.** If either party to a marriage be incapable from physical causes of entering into the marriage state, or if the consent of either be obtained by fraud or force, the marriage is voidable. [R. S. § 2423.]

Hist. (See '77, p. 24, § 4) R. S. § 2423, reen. R. C. § 2614, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 58; repealed: Kerr's C. ib.

§ 4595. [2615] **Incestuous marriages.** Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate. [R. S. § 2424.]

Hist. (See '67, p. 71, § 2) R. S. § 2424, reen. R. C. § 2615, reen. C. L. ib.

Cross ref. Penalty for incestuous marriages: § 8286.

Comp. leg.—Cal. Same: Civ. C. 1872, § 59; Kerr's C. ib.

Construed with § 8286: The definition herein contained applies to § 8286, prescribing the penalty for incest. S. v. Andrus (1916) 29 I. 1, 156 P. 421.

§ 4596. [2616] **Marriages of Caucasians with negroes.** All marriages of white persons with negroes or mulattoes are illegal and void. [R. S. § 2425.]

Hist. (See '67, p. 71, § 3) R. S. § 2425, reen. R. C. § 2616, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 60; same except "Mongolians" inserted after "negroes": Kerr's C. ib.

§ 4597. [2617] **Polygamous marriages.** A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning unless:

1. The former marriage of either party has been annulled or dissolved more than six months; or

2. Such former husband or wife was absent and not known to such person to be living for the space of five successive years immediately preceding, or was generally reputed, and was believed by such person, to be dead at the time such subsequent marriage was contracted.

In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal. ['03, p. 10, § 1.]

Hist. (See '77, p. 24, § 6) R. S. § 2426; am. '03, p. 10, § 1, reen. R. C. § 2617, reen. C. L. ib.

Cross ref. Penalty for polygamous marriages: § 8283.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 61; as am. Kerr's C. ib.

Allegations: The complaint must allege, in order to state an offense under the laws of this state, that the other party charged to have contracted a subsequent marriage is not the former husband or wife of the divorced person so subsequently married. S. v. Cole, 31 I. 603, 174 P. 131.

Limitation not applicable to agreement to marry: An agreement to marry entered into within six months after the date of a decree of divorce, to be consummated and the marriage contract actually made after the expiration of the six months from the date of the decree, is valid, and damages for a breach thereof may be recovered in a proper action. (On rehearing) Harpold v. Doyle (1908) 16 I. 671, 102 P. 158.

§ 4598. [2618] **Release from contract for unchastity.** Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein. [R. S. § 2427.]

Hist. R. S. § 2427, reen. R. C. § 2618, reen. C. L. ib.

Comp. leg.—Cal. Same except "unless both parties participate therein" omitted: Civ. C. 1872, § 62; Kerr's C. ib.

§ 4599. [2619] **Recognition of foreign marriages.** All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state. [R. S. § 2428.]

Hist. (See '67, p. 71, § 5) R. S. § 2428, reen. R. C. § 2619, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 63; Kerr's C. ib.

Applied: Marriages in Montana. Huff v. Huff (1911) 20 I. 450, 118 P. 1080. Marriage in Utah. Hilton v. Stewart (1908) 15 I. 150, 96 P. 579, 128 A. S. R. 48.

ARTICLE 2.

SOLEMNIZATION OF MARRIAGE.

§ 4600. [2620] **How solemnized.** Marriage must be solemnized, authenticated and recorded as provided in this chapter, but noncompliance with its provisions does not invalidate any lawful marriage. [R. S. § 2425.]

Hist. (See '77, p. 24, § 8) R. S. § 2425, reen. R. C. § 2620, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 68; similar as am. Kerr's C. ib.

Common-law marriage recognized: Where after the death of a former spouse a couple recognize their union as husband and wife and enter upon the marriage relation and children are born to them thereafter such relationship develops into a common-law marriage. Huff v. Huff (1911) 20 I. 450, 118 P. 1080.

§ 4601. [2621] **Duty of person officiating.** All persons herein authorized to solemnize marriages must ascertain and be assured of:

1. The identity of the parties.
2. Their real and full names and places of residence.
3. That they are of sufficient age to be capable of contracting marriage.
4. If the male is under the age of 18 or the female under the age of 18 years, the consent of the father, mother or guardian, if any such, is given, or that such nonaged person has been previously but is not at the time married; and that the parties applying for the rites of marriage, and making such contract, have a legal right so to do. ['88-89, p. 44.]

Hist. (See '77, p. 24, § 9) R. S. § 2430; am. '88-89, p. 44, reen. R. C. § 2621, reen. C. L. ib.

Cross ref. Person officiating must keep and report record of marriage: § 1649 et seq.

Comp. leg.—Cal. See Civ. C. 1872, § 72: similar as am. Kerr's C. ib.

§ 4602. [2622] **By whom solemnized.** Marriage may be solemnized by either a justice of the supreme court, district or probate judge, the governor, a justice of the peace, mayor, priest or minister of the gospel of any denomination. [R. S. § 2431.]

Hist. (See '64, p. 613, § 4) R. S. § 2431, reen. R. C. § 2622, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 70; further am. Kerr's C. ib.

§ 4603. [2623] **Form of ceremony.** No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage that they take each other as husband and wife. [R. S. § 2432.]

Hist. (See '64, p. 614, § 6) R. S. § 2432, reen. R. C. § 2623, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 71; Kerr's C. ib.

§ 4604. [2624] **Examination of witnesses.** The person solemnizing the marriage may administer oaths and examine the parties and witnesses for the purpose of satisfying himself that the contracting parties are qualified under the requirements of this chapter. [R. S. § 2433.]

Hist. (See '77, p. 24, § 11) R. S. § 2433, reen. R. C. § 2624, reen. C. L. ib.

Comp. leg. Cal. See Civ. C. 1872, § 72; similar as am. Kerr's C. ib.

§ 4605. [2625] **Certificate to parties.** When a marriage has been solemnized the person solemnizing the same must give to each of the parties, if required, a certificate thereof. [R. S. § 2436.]

Hist. (See '64, p. 614, § 7) R. S. § 2436, reen. R. C. § 2625, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 74; Kerr's C. ib.

§ 4606. [2626] **Fees of officer.** The person solemnizing a marriage is for such service entitled to receive from the parties married the sum of $5, but may receive any other or greater sum voluntarily given by the parties to such marriage. [R. S. § 2438.]

Hist. (See '77, p. 24, § 16); R. S. § 2438, reen. R. C. § 2626, reen. C. L. ib.

Disposition of fees: Fees received by the probate judge for solemnizing marriages must be turned into the county treasury, but any gratuities given him by the parties over and above the amount of the legal fee, may be retained for his individual use. Rhea v. Bd. of Comrs. (1906) 12 I. 455, 88 P. 89; (on rehearing) 13 I. 59, 88 P. 89.

§ 4607. [2627] **Validity not affected by want of authority.** No marriage solemnized by any person professing to be a judge, justice, or minister, is deemed or regarded void, nor is the validity thereof to be in any way affected on account of any want of jurisdiction or authority: *Provided,* It be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. [R. S. § 2439.]

Hist. (See '64, p. 615, § 13) R. S. § 2439; reen. R. C. § 2627, reen. C. L. ib.

§ 4608. [2628] **Marriage certificate as evidence.** The original certificate, and record of marriage made by the judge, justice or minister, as prescribed in this chapter, and the record thereof by the recorder of the county, or a copy of such record duly certified by such recorder, must be received in all courts and places as presumptive evidence of the fact of such marriage. [R. C. § 2628.]

Hist. (See '64, p. 615, § 14) R. S. § 2440; am. '88-89, p. 44; am. R. C. § 2628, reen. C. L. ib.

ARTICLE 3.

LICENSES, CERTIFICATES AND RECORDS.

§ 4609. [2629] **Marriage license: Contents.** The county recorder of any county in this state shall have authority to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to contract matrimony, authorizing the marriage of such parties, which licenses shall be substantially in the following form:

> Know all men by this certificate that any regularly ordained minister of the gospel, authorized by the rites and usages of the church or denomination of Christians, Hebrews, or religious body of which he may be a member, or any judge or justice of the peace or competent officer to whom this may come, he not knowing of any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between....., of.....of the county of ....., and the state of....., and....., of.....of the county of....., state of.....,

and to certify the same to said parties, or either of them, under his hand and seal, in his ministerial or official capacity, and thereupon he is required to return his certificate in form following as hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at....., this.....day of ....., A. D. 19.....

.....

Recorder.

[R. C. § 2629.]

Hist. '95, p. 166, § 1, reen. '99, p. 278, § 1; am. R. C. § 2629, reen. C. L. ib.

§ 4610. Same: Certificate and return. The form of certificate annexed to said license, and therein referred to, shall be as follows:

I, ..., a....., residing at....., in the county of....., in the state of Idaho, do certify that, in accordance with the authority on me conferred by the above license, I did on this.....day of....., in the year A. D. 19....., at....., in the county of....., in the state of Idaho, solemnize the rights of matrimony between ....., of....., in the county of....., of the state of....., and ....., of....., of the county of....., of the state of....., in the presence of.....and.....

Witness my hand and seal at the county aforesaid, this..... day of....., A. D. 19.....

In the presence of..... .....[Seal.]

.....

The license and certificate, duly executed by the minister or officer who shall have solemnized the marriage authorized, shall be returned by him to the office of the recorder who issued the same, within 30 days from the date of solemnizing the marriage therein authorized; and a neglect to make such return shall be deemed a misdemeanor, and the person whose duty it shall be to make such return, who shall neglect to make such return within the time above specified, shall, upon conviction thereof, be punished by a fine of not less than $20 nor more than $50 to be assessed by any justice of the peace or other court having jurisdiction. [C. L. § 2630.]

Hist. '95, p. 166, § 2, reen. '99, p. 278, § 2, reen. R. C. § 2630; compiled and reen. C. L. ib.

§ 4611. [2631] **Application for and issuance of license.** Every county recorder who shall have personal knowledge of the competency of the parties for whose marriage a license is applied for, shall issue such license upon payment or tender to him of his legal fee therefor; and if such recorder does not know of his own knowledge that the parties are competent under the laws of the state to contract matrimony, he shall take the affidavit in writing of the person or persons applying for such license, and of other persons as he may see proper, and of any persons whose testimony may be offered; and if it appear from the affidavit so taken that the parties for whose marriage the license in question is demanded are legally competent to marry, the recorder shall issue such license, and the affidavits so taken shall be his warrant against any fine or forfeiture for issuing such license. Any county recorder who shall issue a license to marry to parties, one or both of whom shall not be, at the time of marriage under such license, legally compe-

tent to marry, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in the sum of $100 before any court having jurisdiction. ['95, p. 166, § 3.]

Hist. '95, p. 166, § 3, reen. '99, p. 278, § 3, reen. R. C. § 2631, reen. C. L. ib.

§ 4612. [2632] **Same: Administration of oaths.** The county recorder shall have power to administer all oaths required or provided for in this article, and if any person in any such affidavit shall wilfully and corruptly swear falsely to any material fact as to the competency of any person for whose marriage the license in question refers, or concerning the procuring or issuing of which such affidavit may be made, shall be guilty of perjury, and, upon conviction thereof, shall be punished as provided by statute in other cases of perjury. ['95, p. 166, § 4.]

Hist. '95, p. 166, § 4, reen. '99, p. 278, § 4, reen. R. C. § 2632, reen. C. L. ib.

Cross ref. Punishment for perjury: § 8168.

§ 4613. [2633] **Minister or officer may solemnize marriage.** Any authorized minister or officer to whom any such license, duly issued, may come, not having personal knowledge of the incompetency of either party therein named to contract matrimony, may lawfully solemnize matrimony between them. ['95, p. 166, § 5.]

Hist. '95, p. 166, § 5, reen. '99, p. 278, § 5, reen. R. C. § 2633, reen. C. L. ib.

§ 4614. [2634] **Solemnization without license: Penalty.** If any such minister or officer shall presume to solemnize any marriage between parties without such a license, or with knowledge that either party is legally incompetent to contract mtarimony as is provided for by the laws of this state, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $50 nor more than $200 before any court having jurisdiction. ['95, p. 166, § 6.]

Hist. '95, p. 166, § 6, reen. '99, p. 278, § 6, reen. R. C. § 2634, reen. C. L. ib.

§ 4615. [2635] **Record of return of license.** The recorder shall record all such returns of marriage licenses in a book to be kept for that purpose, within one month after receiving the same. If any recorder shall neglect or refuse to record within the said time any return to him made, he shall forfeit $100, to be recovered, with costs, by any person who will prosecute for the same. ['95, p. 166, § 7.]

Hist. '95, p. 166, § 7, reen. '99, p. 278, § 7, reen. R. C. § 2635, reen. C. L. ib.

Cross ref. Register and report of marriages: § 1651 et seq.

§ 4616. Fees for issuing licenses. The recorder of each county of this state shall be entitled to a fee of $3 for each license issued, which fee he shall demand and receive from the person applying for the same, and he may refuse to issue any such license until such fee is paid to him. Said fee shall include the payment for the service of taking affidavit, filing affidavit and recording the license upon its return from the minister or officer solemnizing the marriage for which it was issued. ['11, c. 137, p. 430.]

Hist. '95, p. 166, § 8, reen. '99, p. 278, § 8, reen. R. C. § 2636; am. '11, c. 137, p. 430, reen. C. L. § 2636.

§ 4617. [2637] **Marriage books as evidence.** The books of marriages and copies of entries therein, certified by the recorder under his official seal, shall be evidence in all courts. ['95, p. 166, § 9.]

Hist. (See '67, p. 71, § 10) '95, p. 166, § 9, reen. '99, p. 278, § 9, reen. R. C. § 2637, reen. C. L. ib.

§ **4618.** [2638] **Penalty for false return.** If any person, authorized to solemnize marriage, shall wilfully make a false return of any marriage or pretended marriage to the recorder; or, if the recorder shall wilfully record a false return of any marriage, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $100, and by imprisonment for not less than three months. ['95, p. 166, § 10.]

Hist. '95, p. 166, § 10, reen. '99, p. 278, § 10, reen. R. C. § 2638, reen. C. L. ib.

§ **4619.** [2639] **Disposition of penalties.** All fines and penalties accruing under the provisions of this article shall be paid into the county treasury for the use of the common schools in the county where the offense was committed. ['95, p. 166, § 11.]

Hist. '95, p. 166, § 11, reen. '99, p. 278, § 11, reen. R. C. § 2639, reen. C. L. ib.

CHAPTER 183.

DIVORCE.

ARTICLE 1.

ANNULMENT OF MARRIAGE.

§ **4620.** [2640] **Annulment of marriage: Grounds.** A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or persons having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabits with the other as husband or wife;
2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force;
3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband or wife;
4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife;
5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife;
6. That either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable. [R. S. § 2450.]

Hist. (See '75, p. 639, § 4) R. S. § 2450, reen. R. C. § 2640, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 82; same as amended: Kerr's C. ib.

§ **4621.** [2641] **Action to annul: Parties and limitations.** An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows:

1. For causes mentioned in subdivision one; by the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such nonaged male or female, at any time before such married minor has arrived at the age of legal consent;

2. For causes mentioned in subdivision two; by either party during the life of the other, or by such former husband or wife;

3. For causes mentioned in subdivision three; by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party;

4. For causes mentioned in subdivision four; by the party injured, within four years after the discovery of the facts constituting the fraud;

5. For causes mentioned in subdivision five; by the injured party, within four years after the marriage;

6. For causes mentioned in subdivision six; by the injured party, within four years after the marriage. [R. S. § 2451.]

Hist. R. S. § 2451, reen. R. C. § 2641, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 83; same as amended: Kerr's C. ib.

§ 4622. [2642] **Legitimacy of children.** When a marriage is annulled on the ground that a former husband or wife is living, or on the ground of insanity, children begotten before the judgment are legitimate and succeed to the estate of both parents. [R. S. § 2452.]

Hist. R. S. § 2452, reen. R. C. § 2642, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 84; similar as amended: Kerr's C. ib.

§ 4623. Custody of children. The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party. [C. L. § 2643.]

Hist. R. S. § 2453, reen. R. C. § 2643; compiled and reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 85; Kerr's C. ib.

§ 4624. [2644] **Conclusiveness of judgment.** A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them. [R. S. § 2454.]

Hist. R. S. § 2454, reen. R. C. § 2644, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 86; Kerr's C. ib.

ARTICLE 2.

GROUNDS FOR AND DEFENSES AGAINST DIVORCE.

§ 4625. [2645] **Dissolution of marriage.** Marriage is dissolved only:

1. By the death of one of the parties; or

2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties. [R. S. § 2455.]

Hist. R. S. § 2455, reen. R. C. § 2645, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 90; same as amended: Kerr's C. ib.

§ 4626. [2646] **Effect of decree.** The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. [R. S. § 2456.]

Hist. R. S. § 2456, reen. R. C. § 2646, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 91; same as amended: Kerr's C. ib.

§ 4627. [2647] **Causes for divorce.** Divorces may be granted for any of the following causes:

1. Adultery.
2. Extreme cruelty.
3. Wilful desertion.
4. Wilful neglect.
5. Habitual intemperance.
6. Conviction of felony.
7. When either the husband or wife has become permanently insane, as provided in sections 7037 to 7041, inclusive, of the Code of Civil Procedure. [R. C. § 2647.]

Hist. (See '64, p. 616, § 22) R. S. § 2457; am. '99, p. 232, § 1 and '03, p. 332, § 1 (§7037 herein); compiled and reen. R. C. § 2647, reen. C. L. ib.

Cross ref. Divorces on the ground of insanity: §§ 7037-41.

Comp. leg.—Cal. Same: Civ. C. 1872, § 92; same as amended: Kerr's C. ib.

Cited: Bell v. Bell (1908) 15 I. 7, 96 P. 196; DeCloedt v. DeCloedt (1913) 24 I. 277, 133 P. 664.

§ 4628. [2648] **Adultery.** Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. [R. S. § 2458.]

Hist. R. S. § 2458, reen. R. C. § 2648, reen. C. L. ib.

Cross ref. Penalty for adultery: § 6807.

Comp. leg.—Cal. Same: Civ. C. 1872, § 93; Kerr's C. ib.

Evidence: Divorces on the ground of adultery should be granted only upon very clear and conclusive evidence. Brown v. Brown (1915) 27 I. 205, 148 P. 45.

§ 4629. [2649] **Extreme cruelty.** Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage. [R. S. § 2459.]

Hist. R. S. § 2459, reen. R. C. § 2649, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 94; "wrongful" inserted before "infliction," as amended: Kerr's C. ib.

Cited: DeCloedt v. DeCloedt (1913) 24 I. 277, 133 P. 664.

When conduct is excusable: Where cruelty is alleged to have consisted in the wife's hostile demonstrations and lecturing, nagging and hectoring the husband and the evidence discloses that he has been so indiscreet in his conduct toward others as to arouse suspicion on the part of his wife, the conduct of the wife in her protests and outbursts of feeling will not be viewed with the same severity and rigidity by the law as it would be in a case where no such apparent provocation existed. Spofford v. Spofford (1910) 18 I. 115, 108 P. 1054.

The party to the marital contract who by his acts and conduct invites a remonstrance, protest or demonstration from the other party, must expect to exercise a degree of forebearance which the law and good morals would not expect of him under more favorable circumstances. Boeck v. Boeck (1916) 29 I. 639, 161 P. 576.

Test: The question as to whether the acts of cruelty cause grievous mental suffering on the part of the innocent party is the determining question. Donaldson v. Donaldson (1917) 31 I. 180, 170 P. 94.

§ 4630. [2650] **Desertion.** Wilful desertion is the voluntary separation of one of the married parties from the other with intent to desert. [R. S. § 2460.]

Hist. R. S. § 2460, reen. R. C. § 2650, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 95; Kerr's C. ib.

What constitutes desertion: Where the husband establishes a new home and requests his wife to follow him and furnishes her the means with which to travel, and she declines to take up her residence with him, the husband is not guilty of desertion because he fails to support his wife during her absence. Roby v. Roby (1904) 10 I. 139, 77 P. 213.

Enforced absence not desertion: A husband who fails, neglects or refuses to furnish his wife with a suitable home, according to his condition, and refuses to support her, is not in a position to successfully charge her with desertion if she leaves him and seeks employment whereby she may support herself. Bell v. Bell (1908) 15 I. 7, 96 P. 196.

§ 4631. [2651] **Wilful neglect.** Wilful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so, or it is the failure to do so by reason of idleness, profligacy or dissipation. [R. S. § 2461.]

Hist. R. S. § 2461, reen. R. C. § 2651, reen. C. L. ib.

Cross ref. Penalty for neglect of wife and children: §§ 8278-9.

Comp. leg.—Cal. Same: Civ. C. 1872, § 105; Kerr's C. ib.

§ 4632. [2652] **Habitual intemperance.** Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party. [R. S. § 2462.]

Hist. R. S. § 2462, reen. R. C. § 2652, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 106; Kerr's C. ib.

Construed: The statute does not mean that a person would have to be drunk all the time, neither does it provide that he shall be incapacitated from pursuing his

usual labors during any particular hours, or any time, but it does mean one who has a fixed habit of frequently getting drunk, and that such drunkenness causes the innocent party to suffer great mental anguish and suffering. The statute does not provide that the person shall be generally drunk, or that he is drunk more hours than he is sober. It is sufficient that he have the habit and that the habit is firmly fixed upon him; that he gets drunk with recurring frequency periodically, or that he is unable to resist when opportunity and temptation is presented. DeCloedt v. DeCloedt (1913) 24 I. 277, 133 P. 664.

§ 4633. [2653] **Continuation of cause.** Wilful desertion, wilful neglect or habitual intemperance must continue for one year before either is a ground for divorce. [R. S. § 2463.]

Hist. R. S. § 2463, reen. R. C. § 2653, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 107; Kerr's C. ib.

Cited: Bell v. Bell (1908) 15 I. 7, 96 P. 196.

Desertion by husband: Where a husband first deserts his wife and remains absent from her for a period in excess of that prescribed by this section, she may thereafter refuse to live with him and can maintain an action against him for a divorce, or defeat an action brought by him against her for such divorce. Stoneburner v. Stoneburner (1905) 11 I. 603, 83 P. 938.

§ 4634. [2654] **Denial of divorce.** Divorces must be denied upon showing:

1. Collusion.
2. Condonation.
3. Recrimination, or
4. Limitation and lapse of time. [R. S. § 2464.]

Hist. R. S. § 2464, reen. R. C. § 2654, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 111; Kerr's C. ib.

Cited: Stoneburner v. Stoneburner (1905) 11 I. 603, 83 P. 938.

§ 4635. [2655] **Collusion.** Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court as having committed, acts constituting a cause of divorce for the purpose of enabling the other to obtain a divorce, and is a bar to an action for such acts. [R. S. § 2465.]

Hist. R. S. § 2465, reen. R. C. § 2655, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 114; Kerr's C. ib.

§ 4636. [2656] **Recrimination.** Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce. [R. S. § 2466.]

Hist. R. S. § 2466, reen. R. C. § 2656, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 122; Kerr's C. ib.

Cited: (In brief of counsel) Brown v. Brown (1915) 27 I. 205, 206.

Recrimination a defense: The defense of recrimination constitutes a complete bar to a divorce, when the defendant shows a valid existing cause of action for divorce against the plaintiff. Stoneburner v. Stoneburner (1905) 11 I. 603, 83 P. 938.

§ 4637. [2657] **Condonation.** Condonation of a cause of divorce shown in the answer as a recriminatory defense, is a bar to such defense when the condonee has fully performed the marital duties, and is without reproach since the condonation, or if two years or more have elapsed after the condonation. [R. S. § 2467.]

Hist. R. S. § 2467, reen. R. C. § 2657, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 123; similar as amended: Kerr's C. ib.

§ 4638. [2658] **Limitations.** A divorce must be denied:

1. When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party.

2. When the cause is conviction of felony, and the action is not commenced before the expiration of one year after a pardon or the termination of the period of sentence.

3. In all other cases when there is an unreasonable lapse of time before the commencement of the action. [R. S. § 2468.]

Hist. R. S. § 2468, reen. R. C. § 2658, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 124; similar as amended: Kerr's C. ib.

ARTICLE 3.

ACTION FOR DIVORCE, CUSTODY OF CHILDREN AND DISPOSITION OF PROPERTY.

Cross ref. Exclusion of witnesses: § 6476. Procedure in divorce for insanity: § 7037.

§ 4639. Residence required by plaintiff when cause arises outside of state. A divorce must not be granted unless the plaintiff has been a resident of the state for 12 months next preceding the commencement of the action and of the county in which the action is instituted for six months where the cause of action arises outside this state. ['17, c. 125, § 1, p. 414.]

Hist. (See '75, p. 639, § 3) R. S. § 2469, reen. R. C. § 2659; am. '17, c. 125, § 1, p. 414, reen. C. L. § 2659. A temporary proviso is omitted. The amendatory act was effective Sept. 13, 1917.

Cited: Strode v. Strode (1898) 6 I. 67, 52 P. 161.

§ 4640. [2660] **Domicile of parties.** In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife, does not apply. After separation each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions. [R. S. § 2470.]

Hist. R. S. § 2470, reen. R. C. § 2660, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 129; Kerr's C. ib.

§ 4641. [2661] **Not granted by default or confession.** No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers. [R. S. § 2471.]

Hist. (See '75, p. 639, § 8) R. S. § 2471, reen. R. C. § 2661, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 130; Kerr's C. ib. Bell v. Bell (1908) 15 I. 7, 96 P. 196; DeCloedt v. DeCloedt (1913) 24 I. 277, 133 P. 664.

Cited: Strode v. Strode (1898) 6 I. 67, 52 P. 161, 96 A. S. R. 249; Hores v. Hores (1911) 20 I. 769, 119 P. 876.

Construed: The provisions of this section are mandatory. The statement, admission or testimony of either or both of the parties to the action is competent evidence. It is not of itself sufficient corroboration to establish the main issue in the action, but requires some extrinsic corroboration. Bell v. Bell (1908) 15 I. 7, 96 P. 196.

Degree of corroboration: No definite rule as the degree of corroboration required can be laid down, and each case must be decided according to its own facts and circumstances. Bell v. Bell (1908) 15 I. 9, 96 P. 196; DeCloedt v. DeCloedt (1913) 24 I. 277, 133 P. 664; Donaldson v. Donaldson (1917) 31 I. 180, 170 P. 84.

Judgment on the pleadings: A motion for judgment on the pleadings will not be entertained in a suit for divorce. Richards v. Richards (1913) 24 I. 87, 94, 132 P. 576.

Effect on default judgment: Every reasonable opportunity should be afforded each of the parties to a full hearing, and a liberal rule adopted in opening defaults. (Dis. op.) Darwin v. Darwin (1915) 27 I. 303, 149 P. 467.

§ 4642. [2662] **Allowance of support and suit money.** While an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. [R. S. § 2472.]

Hist. (See '75, p. 639, § 7) R. S. § 2472, reen. R. C. § 2662, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 137; as amended: Kerr's C. ib.

Allowance discretionary: The allowance of alimony to the wife and counsel fees pending an action of divorce rests in the sound discretion of the trial court. Wyatt v. Wyatt (1886) 2 I. 236, 10 P. 228.

Amount of allowance: In determining the amount of allowance, the court should take into consideration the wealth and social standing of the parties, their manner of living, the present available means of the wife, and the ability and income of the husband, her health and probable needs while the suit is pending, as well as all other circumstances which may aid the court in determining the amount necessary to maintain the wife during the suit, according to her former manner of living. Day v. Day (1908) 15 I. 107, 96 P. 431.

Where the marriage of the parties is admitted, in determining the amount of alimony the court should attempt to place each party in that position that neither should have the advantage of the other, in waging the suit or in presenting the evidence to prove or disprove the falsity of the allegations made. Ib.

Time of allowance: The court has no power after trial in the final judgment to award attorney's fees for past services. (Budge, C. J. dissents) Donaldson v. Donaldson (1917) 31 I. 180, 170 P. 94.

Allowance pending appeal: Where an appeal has been taken from a judgment in a divorce case, the district court still retains jurisdiction to make orders directing the payment of costs, expenses and attorneys' fees, necessary in the preparation and perfection of the appeal. Roby v. Roby (1903) 9 I. 371, 74 P. 957, 3 Ann. Cas. 50.

Allowance on appeal: On appeal, the supreme court will award a wife costs and attorneys' fees to prosecute or defend the appeal. Roby v. Roby (1904) 10 I. 139, 77 P. 213; Stoneburner v. Stoneburner (1906) 11 I. 603, 83 P. 938; Spofford v. Spofford (1910) 18 I. 115, 108 P. 1054.

Where, in a divorce suit, it appears that defendant is a wealthy man, and his wife is without means to properly prosecute her suit for divorce, the court will allow her attorneys' fees on an appeal from an order refusing to change the place of trial. Day v. Day (1906) 12 I. 556, 86 P. 531, 10 Ann. Cas. 260.

When the lower court allows an inadequate amount, its order will be revised on appeal. Ib.

Original jurisdiction in granting alimony and suit money is vested in the district court and judges thereof at chambers. The supreme court can only exercise jurisdiction in such matters where necessary to a complete exercise of its appellate jurisdiction. Callahan v. Dunn (1917) 30 I. 225, 164 P. 356.

§ 4643. [2663] **Custody of children.** In an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same. [R. S. § 2473.]

Hist. (See '75, p. 639, § 7) R. S. § 2473, reen. R. C. § 2663, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 138; similar as amended: Kerr's C. ib.

Cited: Re Miller (1896) 4 I. 711, 43 P. 870.

Discretionary power of court: The question as to the disposition of children is in the first instance in the discretion of the trial court and unless such discretion is abused the judgment will not be disturbed. Donaldson v. Donaldson (1917) 31 I. 180, 170 P. 94.

Order after judgment: Where, after judgment for divorce awarding the custody of the children to the mother, the father obtains an order permitting him to visit the children and restraining the mother or others from estranging the children from him, such order is appealable and a writ of review will not lie thereto. Porter v. Steele (1900) 7 I. 414, 63 P. 187.

§ 4644. [2664] **Alimony for fault of husband.** Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects. [R. S. § 2474.]

Hist. (See '75, p. 639, § 7) R. S. § 2474, reen. R. C. § 2664, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 139; Kerr's C. ib.

§ 4645. [2665] **Same: Security.** The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case. [R. S. § 2475.]

Hist. R. S. § 2475, reen. R. C. § 2665. reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 140; Kerr's C. ib.

§ 4646. [2666] **Same: What property liable.** In executing the four preceding sections the court must resort, first, to the community property, then to the separate property of the husband. [R. S. § 2476.]

Hist. R. S. § 2476, reen. R. C. § 2666, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 141; Kerr's C. ib.

§ 4647. [2667] **Allowance from separate property withheld.** When the wife has a sufficient separate estate, or there is community property sufficient to give her alimony or a proper support, the court must withhold any allowance to her out of the separate property of the husband. [R. S. § 2477.]

Hist. R. S. § 2477, reen. R. C. § 2667, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 142; Kerr's C. ib.

§ 4648. [2668] **Allowance for support of children.** The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just. [R. S. § 2478.]

Hist. R. S. § 2478, reen, R. C. § 2668, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 143; Kerr's C. ib.

§ 4649. [2669] **Legitimacy of issue.** When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court upon the evidence in the case. [R. S. § 2479.]

Hist. (See '75, p. 639, § 6) R. S. § 2479, reen. R. C. § 2669, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 145; Kerr's C. ib.

§ 4650. [2670] **Disposition of community property and homestead.** In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:

1. If the decree be rendered on the ground of adultery or extreme cruelty, the community property must be assigned to the respective parties in such proportions as the court, from all the facts of the case and the condition of the parties, deems just.

2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property must be equally divided between the parties.

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided.

4. If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party. [R. S. § 2480.]

Hist. (See '75, p. 635, § 12) R. S. § 2480, reen. R. C. § 2670, reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. C. 1872, § 146; same as amended except "shall be" for "must be" in subds. 1, 2 and 4; Kerr's C. ib.

Discretionary power of court: The disposition of community property is in the first instance in the discretion of the trial court and unless such discretion is abused the judgment will not be disturbed. Donaldson v. Donaldson (1917) 31 I. 180, 170 P. 94.

Division in subsequent suit: Division of property may be made in a later suit. Kuhnen v. Kuhnen (1916) 29 I. 712, 161 P. 1041.

Division after foreign divorce: A wife who abandons her husband and home in this state, takes up a separate residence in another state, procures a decree of divorce on substituted service in that state, and forms a new community by another marriage, cannot maintain an action thereafter in this state for a division of the community property. (Sullivan, C. J. dissents.) Bedal v. Sake (1904) 10 I. 270, 77 P. 638.

Disposition of property secondary: In action for divorce, the question of the

ownership of real estate will not be determined unless the divorce is granted. Bell v. Bell (1908) 15 I. 7, 96 P. 196.

Postnuptial settlement: In a divorce suit where property rights are involved and a postnuptial settlement is presented and relied upon as a settlement of all property rights, and such agreement is challenged on the ground that it is unfair and inequitable and fraudulent, the evidence must show clearly that the postnuptial settlement is in every way fair and unexceptionable on equitable grounds. DeCloedt v. DeCloedt (1913) 24 I. 277, 133 P. 664.

§ 4651. [2671] **Same: Order for disposition.** The court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds. [R. S. § 2481.]

Hist. (See '75, p. 635, § 12) R. S. § 2481, reen. R. C. § 2671, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 147; Kerr's C. ib.

§ 4652. [2672] **Same: Revision on appeal.** The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court. [R. S. § 2482.]

Hist. (See '75, p. 635, § 12) R. S. § 2482, reen. R. C. § 2672, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 148; Kerr's C. ib.

§ 4653. [2673] **Jurisdiction of actions.** Exclusive original jurisdiction of all actions and proceedings under this chapter is in the district court, and the judge thereof at chambers may make all necessary orders for temporary alimony and support, and the expenses of the action and the custody of children and property during the pendency of the action. [R. S. § 2483.]

Hist. (See '75, p. 169, § 1) R. S. § 2483, reen. R. C. § 2673, reen. C. L. ib.

Cited: Re Miller (1896) 4 I. 711, 43 P. 870.

Jurisdiction of appellate court: Motion for alimony must be heard in county or district in which action is pending. Supreme court does not have original jurisdiction in such matters and such orders are made by supreme court only when necessary to complete exercise of its appellate jurisdiction. Callahan v. Dunn (1917) 30 I. 225, 164 P. 353.

CHAPTER 184.

HUSBAND AND WIFE.

Purpose: The provisions of this chapter, concerning the rights of married women, are in the nature of a grant, or an enlargement of the powers of the wife to make contracts, as such rights existed at the common law. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

The statutes of this state with reference to contracts, powers and liabilities of married women must be construed as grants instead of restrictions of power and authority to contract. Bk. of Commerce v. Baldwin (1906) 12 I. 202, 85 P. 497.

The common-law disability of married women to enter into contracts still remains except when the same has been removed by legislative grants of power. Meier & Frank Co. v. Bruce (1917) 30 I. 732, 168 P. 5.

§ 4654. [2674] **Mutual obligations.** Husband and wife contract toward each other obligations of mutual respect, fidelity and support. [R. S. § 2493.]

Hist. R. S. § 2493, reen. R. C. § 2674, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 155; Kerr's C. ib.

Cited: Kohny v. Dunbar (1912) 21 I. 258, 262, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107.

Husband's liability: It is the duty of the husband to maintain and support his wife and family. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

The primary duty rests on the husband by reason of his marital contract and operation of law to furnish the wife with the necessaries of life, which includes board and lodging, and a creditor who furnished the wife with such necessaries may maintain his action against the husband, although the latter never contracted the debt, nor promised to pay the bill. Edminston v. Smith (1907) 13 I. 645, 92 P. 842, 121 A. S. R. 294, 14 L. R. A. (N. S.) 299, 871.

The fact that the debt was contracted by the wife and the credit was extended on the faith of her promise to pay, does not relieve the husband of the liability imposed on him by operation of law, independent of the wife's contractual liability to pay. Ib.

Wife's liability: A wife cannot bind her husband nor the community property for counsel fees in a divorce action. Wyatt v. Wyatt (1886) 2 I. 236, 10 P. 228.

No obligation rests on wife to support family out of separate property, unless there is no community property and husband is too infirm to support himself. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

Where necessaries are furnished to a married woman on the strength of her personal promise to pay therefor, the debt is incurred for her use and benefit and she is liable therefor as a feme sole. Edminston v. Smith (1907) 13 I. 645, 92 P. 842, 121 A. S. R. 294, 14 L. R. A. (N. S.) 871.

§ 4655. [2675] **Head of family.** The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto. [R. S. § 2494.]

Hist. R. S. § 2494, reen. R. C. § 2675, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 156; Kerr's C. ib.

Cited: Law v. Spence (1897) 5 I. 244, 48 P. 282; S. v. Beslin (1911) 19 I. 185, 112 P. 1053; S. v. Flower (1915) 27 I. 223, 147 P. 786; Wits-Keets Poo v. Rowton (1915) 28 I. 193, 152 P. 1064.

§ 4656. [2676] **Separate property of wife.** All property of the wife owned by her before marriage, and that acquired afterward by gift, bequest, devise or descent, or that which she shall acquire with the proceeds of her separate property, shall remain her sole and separate property, to the same extent and with the same effect, as the property of a husband similarly acquired. [C. L. § 2676.]

Hist. (See '67, p. 65, § 1) R. S. § 2495; am. '03, p. 345, § 1, reen. R. C. § 2676; compiled and reen. C. L. ib.

Cross ref. Wife's separate property exempt from execution for husband's debts: § 6919. Married woman may hold homestead corporation stock: § 4852.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 162; Kerr's C. ib.

Cited: Basset v. Beam (1894) 4 I. 106, 36 P. 501; Dernham & Kaufmann v. Rowley (1896) 4 I. 753, 44 P. 643; Bk. of Com. v. Baldwin (1906) 12 I. 202, 85 P. 497; Hall v. Johns (1909) 17 I. 224, 105 P. 71; Bliss v. Bliss (1911) 20 I. 467, 119 P. 451; Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107; Salisbury v. Spofford (1912) 22 I. 393, 126 P. 400; McFarland v. Johnson (1912) 22 I. 694, 127 P. 911; Smith v. Schultz (1912) 23 I. 144, 129 P. 640; (In brief of counsel) McDonnell v. Jones (1914) 25 I. 551; (In brief of counsel) Baldwin v. McFarland (1914) 26 I. 85; Wilkerson v. Aven (1914) 26 I. 559, 144 P. 1105; Ahlstrom v. Tage, 31 I. 459, 174 P. 605; Labonte v. Davidson, 31 I. 644, 175 P. 588.

Conveyances from husband: A husband when free from debts and liabilities may make a gift to his wife from their community property and the same will then become her separate property and will not be liable for debts subsequently contracted by him. Bk. of Orofino v. Wellman (1914) 26 I. 425, 143 P. 1169.

As against a preexisting creditor, a wife who takes a conveyance from her husband must show adequate consideration by clearer proof than is required in transactions between strangers. Chaney v. Gauld Co. (1915) 28 I. 76, 152 P. 468.

Borrowed money: Property purchased after marriage with money borrowed by wife is community property and does not come within the provisions of this section. Chaney v. Gauld Co. (1915) 28 I. 76, 152 P. 468.

Estoppel: A wife who permits her separate property to remain in her husband's name is estopped to assert her title against his creditors. Chaney v. Gauld (1915) 28 I. 76, 152 P. 468. But this rule does not apply where the wife did not know the title to the property was in the husband's name. McKeehan v. Vollmer-Clearwater Co. (1917) 30 I. 505, 166 P. 256.

Evidence: Oral testimony of wife ought not to be received on question of separate property if written evidence is available. Chaney v. Gauld (1915) 28 I. 76, 152 P. 468. Otherwise when written evidence is lost, McKeehan v. Vollmer-Clearwater Co. (1917) 30 I. 505, 166 P. 256.

Cases in which property was held to be wife's separate property:

Property purchased with separate funds, even though husband joined in signing mortgage notes for balance. Stewart v. Weiser L. Co. (1912) 21 I. 340, 121 P. 775; Baldwin v. McFarland (1914) 26 I. 85, 141 P. 76; Bk. of Orofino v. Wellman (1914) 26 I. 425, 143 P. 1169.

Property purchased with proceeds of separate homestead. Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66.

Question whether proceeds of timber cut from separate property are separate or community. Ib.

Property purchased in name of wife to the extent of payment with the funds of her separate estate. Northwestern etc. Bk. v. Rauch (1900) 7 I. 152, 61 P. 516.

Property purchased with wife's money, title taken in husband's name, without wife's knowledge and contrary to her instructions, she being illiterate. McKeehan v. Vollmer-Clearwater Co. (1917) 30 I. 505, 166 P. 256.

Property purchased with wife's money loaned to husband and repaid without fraud on creditors. Wilkerson v. Aven (1914) 26 I. 559, 144 P. 1105.

Property acquired by a married woman as separate property in another state and brought into this state. Gooding Milling etc. Co. v. Lincoln Co. S. Bk. (1912) 22 I. 468, 126 P. 772.

Interest in a contract which had been assigned by the husband to the wife. Salisbury v. Spofford (1912) 22 I. 393, 126 P. 400.

Gift from husband from community property. Bk. of Orofino v. Wellman (1914) 26 I. 425, 143 P. 1169.

Mining property by gift. Young v. First Nat. Bk. of Hailey (1895) 4 I. 323, 39 P. 557.

§ 4657. [2677] **Same: Management.** During the continuance of the marriage, the wife has the management, control and absolute power of disposition of her separate property, and may bargain, sell and convey her real and personal property, and may enter into any contract with reference to the same, in the same manner, and to the same extent, and with like effect, as a married man may in relation to his real and personal property: *Provided,* That the husband shall be bound by such contracts to no greater extent or effect than his wife under similar circumstances would be bound by his contracts. ['03, p. 345, § 2.]

Hist. '03, p. 345, § 2, reen. R. C. § 2677, reen. C. L. ib.

Cross ref. Liability for personal debts: § 4665. Married women may transfer stock held by them in corporations: § 4731. May hold stock in homestead corporation: § 4852. May hold and transfer stock in land and building corporations: § 4915. Capacity of married women to sue and be sued: § 6637.

Comp. leg.—Kan. Identical, but construction of that statute in Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480, disapproved. Bk. of Com. v. Baldwin (1908) 14 I. 75, 93 P. 504, 17 L. R. A. (N. S.) 676.

Cited: Grice v. Woodworth (1904) 10 I. 459, 80 P. 812, 109 A. S. R. 214, 69 L. R. A. 584; Bliss v. Bliss (1911) 20 I. 467, 119 P. 451; Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107; (In brief of counsel) McDonnell v. Jones (1914) 25 I. 551.

Application of section: This section and the act of which it is a part refers only to the separate property of the wife, and the management and control thereof, and does not empower a married woman to bind herself personally for the payment of a debt that was not contracted for her own use, or for the use and benefit of her separate estate, or in connection with the control and management thereof, or in conducting business connected therewith. Bk. of Com. v. Baldwin (1906) 12 I. 202, 85 P. 497; Ib. (1908) 14 I. 75, 93 P. 504, 17 L. R. A. (N. S.) 676.

A wife's power to contract with reference to her separate property is not an absolute and unlimited right of contract as to all matters. Her right is confined to those contracts that have reference to her separate estate. Ib.

The common-law disability of married women to enter into contracts still remains, except in contracts for her own use or in management of her separate property. Meier & Frank v. Bruce (1917) 30 I. 732, 168 P. 5.

Creation of liability in rem: In order for a married woman to create a charge against her separate estate for a debt not contracted for her use, nor for the benefit of such separate property, it must be made a charge in rem by mortgage or pledge of the property or in some manner known to the law as constituting a lien upon property. Such a charge can not be created by a mere representation of the woman that she owns a certain amount, class or character of property. Bk. of Com. v. Baldwin (1906) 12 I. 202, 85 P. 497; Ib. (1908) 14 I. 75, 93 P. 504, 17 L. R. A. (N. S.) 676; Smith v. Schultz (1912) 23 I. 144, 150, 129 P. 640.

Not bound as surety: A married woman has no authority to become surety or guarantor for the debts of others, such right and the concurrent obligations thereof not being necessary or essential to the complete enjoyment of her separate estate. Bk. of Com. v. Baldwin (1908) 14 I. 75, 93 P. 504, 17 L. R. A. (N. S.) 676.

Right to sue: A married woman is given the absolute control of her separate property which includes the right to bring an action for the protection of her separate property. Salisbury v. Spofford (1912) 22 I. 393, 126 P. 400.

But her attorneys cannot, by stipulation, bind a married woman in a case where she could not bind herself or make her liable on a contract that she has never executed. Strode v. Miller (1900) 7 I. 16, 59 P. 893.

Contract where wife receives property: A contract made by a married woman, by which she secures property for which the contract is executed, is for her own use and benefit, and such use and benefit is a fact resulting from the contract itself. Booth Merc. Co. v. Murphy (on rehearing 1908) 14 I. 212, 93 P. 777.

Separate contracts independent of husband: It is not necessary for the husband to join with the wife in the conveyance or incumbrance of her real estate. A wife may, independently of her husband, enter into contracts with reference to her separate property. Stewart v. Weiser L. Co. (1912) 21 I. 340, 121 P. 775.

Foreign contract: A contract entered into by a married woman in a state where her common-law disabilities have been re-

moved will be enforced here, even though not made for her own use or for the benefit of her separate estate. (Budge, C. J. dissents) Meier & Frank Co. v. Bruce (1917) 30 I. 732, 168 P. 5.

Transactions involving husband: It is error to render judgment jointly against husband and wife on a note signed by both in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate. Jaeckel v. Pease (1898) 6 I. 131, 53 P. 393.

A wife has no power to burden the community property with her contracts. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

Where a wife joins her husband in a warranty deed, conveying his separate property and for the conveyance of which the husband receives the consideration, the wife is not liable in an action for breach of the covenant of warranty, for the reason that such contract and covenant of warranty is not made with reference to the wife's separate property or for her own use or benefit. Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66.

A married woman who placed her husband in possession of her separate property and permitted him to manage it as his own was estopped from asserting ownership to the property when it would result in the loss of a debt contracted by her husband. Boise Butcher Co. v. Anixdale (1914) 26 I. 483, 144 P. 337.

A wife who loans proceeds of separate property to husband becomes one of his creditors, and rights as such are governed by same legal principles as other creditors. Wilkerson v. Aven (1914) 23 I. 559, 144 P. 1105; Bates v. Papesh (1917) 30 I. 529, 166 P. 270.

Decisions under prior statute: Repeal: The act of which this section is a part expressly repealed R. S. §§ 2498-9. Section 2499 provided for the appointment of a trustee in case of mismanagement by the husband. Decisions under the repealed § 2498, which gave the husband the management and control of the separate property of the wife during coverture, except in the sale or the creation of liens on the same, were as follows:

Bassett v. Beam (1894) 4 I. 106, 36 P. 501; Dernham & Kaufman v. Rowley (1896) 4 I. 753, 44 P. 643; Northwestern etc. Bk. v. Rauch (1900) 7 I. 152, 61 P. 516; Karlson v. Hanson & Karlson (1904) 10 I. 361, 78 P. 1080; Sencerbox v. First Nat. Bk. (1908) 14 I. 95, 93 P. 369; Larson v. Carter (1908) 14 I. 511, 94 P. 825; Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

§ 4658. [2678] **Same: Marriage settlements not affected.** Nothing in the two preceding sections contained shall invalidate, alter or change any marriage settlement now made or to be made hereafter. ['03, p. 345, § 4.]

Hist. '03, p. 345, § 4, reen. R. C. § 2678, reen. C. L. ib.

Cited: Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66.

§ 4659. [2679] **Separate property of husband.** All property owned by the husband before marriage, and that acquired by gift, bequest, devise or descent is his separate property. [R. S. § 2496.]

Hist. (See '67, p. 65, § 1) R. S. § 2496, reen. R. C. § 2679, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 163; Kerr's C. ib.

Cited: Kneen v. Halin (1899) 6 I. 621, 59 P. 14; Karlson v. Hanson & Karlson etc. Co. (1904) 10 I. 361, 78 P. 1080; Hall v. Johns (1909) 17 I. 224, 105 P. 71; Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107; Wilkerson v. Aven (1914) 26 I. 559, 144 P. 1105; Labonte v. Davidson, 31 I. 644, 175 P. 588.

Property acquired out of state: Personal property acquired during coverture is governed by the law of the matrimonial domicile. If the title thereto and property therein was vested in the husband under the law of the domicile it will be presumed everywhere to be his property. Douglas v. Douglas (1912) 22 I. 336, 125 P. 796.

Cases in which property was held to be husband's separate property:

Property purchased with proceeds of property owned and acquired in common-law state where property belongs to husband solely. Douglas v. Douglas (1912) 22 I. 336, 125 P. 796.

Homestead earned before marriage but where patent was not issued until after marriage. Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66.

§ 4660. [2680] **Community property.** All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property, unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband. [R. S. § 2497.]

Hist. (See '67, p. 65, § 2) R. S. § 2497, reen. R. C. § 2680, reen. C. L. ib. R. C. § 3060 duplicated this section and was omitted in C. L.

Comp. leg.—Cal. Similar in part: Civ. C. 1872, § 164; as amended: Kerr's C. ib.

Cited: Dernham & Kaufman v. Rowley (1896) 4 I. 753, 44 P. 643; Kneen v. Halin

(1899) 6 I. 621, 59 P. 14; Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107; Wilkerson v. Aven (1914) 26 I. 559, 144 P. 1105; (in brief of counsel) Aven v. Caldwell Com. Bk. (1914) 26 I. 566; Ewald v. Hufton, 31 I. 373, 173 P. 247.

Property classified: The property of a husband and wife is divided into two classes, namely, the separate property of each spouse, and community property. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

Nonresident wife: This section is not limited to a community created in this state or to one composed of persons who, having been married elsewhere, come within the state and become domiciled here, but protects a nonresident wife of a man who comes into this state and acquires property here. Jacobson v. Bunker Hill etc. Co. (1891) 3 I. 126, 28 P. 396.

Construction with § 6919: This section must be construed with § 6919 under which the rents, issues and profits of the separate property of the wife are exempt from execution against the husband. Thorn v. Anderson (1900) 7 I. 421, 63 P. 592; Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

Presumption that property belongs to community: All property acquired by either spouse during coverture is presumed to be community property. The presumption may be rebutted but the burden of proof rests upon the party who asserts it is separate property to show such fact by a preponderance of evidence. Jacobson v. Bunker Hill etc. Co. (1891) 3 I. 126, 28 P. 396; Vermont L. & T. Co. v. McGregor (1897) 5 I. 510, 51 P. 104; Stowell v. Tucker (1900) 7 I. 312, 62 P. 1033; Stewart v. Weiser L. Co. (1912) 21 I. 340, 121 P. 775; Douglas v. Douglas (1912) 22 I. 336, 125 P. 796; Gooding etc. Co. v. Lincoln Co. S. Bk. (1912) 22 I. 468, 126 P. 772; Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66; Chaney v. Gauld Co. (1915) 28 I. 76, 152 P. 468.

In an action to foreclose a mortgage, executed by husband and wife, failure to allege that the mortgaged property or any part thereof is the separate estate of the wife, or that the debts were created for the benefit of her separate estate, raises a presumption that said debts are debts of the husband, and that such property is community property. Strode v. Miller (1900) 7 I. 16, 59 P. 893.

Actions concerning community property: Under our statutes, making the time and earnings of both husband and wife community property, loss of ability to labor is an element of damage in an action by the husband and wife for a tortious injury to the wife and a separate action by the husband need not be brought to recover for such damage. Giffen v. Lewiston (1898) 6 I. 231, 55 P. 545.

In an action upon an account by a married woman, the fact that the account sued upon is community property is a proper defense. Holton v. Sandpoint L. Co. (1901) 7 I. 573, 64 P. 889. And a counterclaim against the husband of plaintiff may be interposed. Campbell v. Kerns (1907) 13 I. 287, 70 P. 108.

In an action against a wife to foreclose a mortgage on community property where the husband, being a necessary party to such action, is not served with process, the judgment, being void as to the husband, is also void as to the wife. Vermont Loan & Trust Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

Property acquired out of state: Property acquired out of state as separate property and brought here or transmuted into property here retains its separate character. Douglas v. Douglas (1912) 22 I. 336, 125 P. 796; Gooding etc. Co. v. Lincoln Co. S. Bk. (1912) 22 I. 468, 126 P. 772. But in the absence of proof to the contrary, the presumption arises in the courts of this state that the community property law prevails in a sister state, the same as it prevails in this state. Douglas v. Douglas, supra.

Property acquired with borrowed money: Property purchased with money borrowed by either spouse during the existence of the community is community property. Northwestern etc. Bk. v. Rauch (1900) 7 I. 152, 61 P. 516; Chaney v. Gauld Co. (1915) 28 I. 76, 152 P. 468.

Tax sale redemption: Where property assessed to the husband is sold for taxes to a third party, and by such third party to the wife, the circumstances amount to a redemption and the property retains its community character. Meserole v. Whitney (1912) 22 I. 543, 127 P. 553.

Gift by husband to wife: Husband may give to his wife his interest in any community property or in her earnings, so long as it is not done in fraud of creditors. Gooding M. & E. Co. v. Lincoln Co. S. Bk. (1912) 22 I. 468, 126 P. 772.

Liability for wife's debts: The wife cannot either directly or indirectly make the community property liable for her debts. But if a husband abandons his family or ceases to discharge his duties to them, the wife's passive rights in the community property then become active, and she may make contracts, particularly in regard to the support of herself and family, which are collectible out of the community property. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

Commingling of property: Property purchased in the name of the wife, partly with funds of her separate estate and partly with money borrowed during the existence of the community, is the separate estate of the wife to the extent to which funds of her separate estate is used and community property to the extent to which such borrowed money was used in its purchase. Northwestern etc. Bk. v. Rauch (1900) 7 I. 152, 61 P. 516.

Earnings of wife: A wife's earnings while living with her husband are community property, in the absence of any agreement to the contrary or gift by the husband. Ahlstrom v. Tage, 31 I. 459, 174 P. 605.

Cases in which property was held to be community property:

Mining property acquired under the laws of the United States during coverture. Jacobson v. Bunker Hill etc. Co. (1891) 3 I. 126, 28 P. 396.

Where property did not appear in rec-

ords to be separate property. Vermont Loan etc. Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

Recovery for injury to wife for loss of earnings to community. Giffen v. Lewiston (1898) 6 I. 231, 55 P. 545.

Preemption filing under laws of the U. S. when final proof and payment is made. Kneen v. Halin (1899) 6 I. 621, 59 P. 14.

Mortgaged property on which mortgages were executed by both husband and wife, there being no allegations that it was separate estate. Strode v. Miller (1900) 7 I. 16, 59 P. 893.

Property purchased with money borrowed by either spouse during existence of community. Northwestern etc. Bk. v. Rauch (1900) 7 I. 152, 61 P. 516.

Real estate conveyed to the wife during coverture. Stowell v. Tucker (1900) 7 I. 312, 62 P. 1033.

On question of evidence as to source of purchase money. Coleman v. Jaggers (1906) 12 I. 125, 85 P. 894, 118 A. S. R. 207.

Property acquired by the joint effort of the two members of the community or their individual and separate efforts. Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107.

Receipts from disposition of community property. Ib.

Property assessed to husband, sold to third party on tax deed, repurchased by wife. Meserole v. Whitney (1912) 22 I. 543, 127 P. 553.

As to whether timber cut from land which is the separate property of one of the spouses constitutes "rents or profits from the separate property," adverted to and doubted, but not decided. Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66.

Personal property alleged to have been purchased with wife's money but apparently claim was in fraud of creditors. McDonnell v. Jones (1914) 25 I. 551, 138 P. 1123.

Property purchased with borrowed money and taken in husband's name. Chaney v. Gauld Co. (1915) 28 I. 76, 152 P. 468.

The right to sue for damages for personal injuries to a married woman is a chose in action and is community property. Labonte v. Davidson, 31 I. 644, 175 P. 588.

§ 4661. [2681] **Inventory of wife's property.** A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside. [R. S. § 2500.]

Hist. (See '67, p. 65, §3) R. S. § 2500, reen. R. C. § 2681, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 165; Kerr's C. ib.

§ 4662. [2682] **Same: Effect.** The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife. [R. S. § 2501.]

Hist. (See '67, p. 65, § 5) R. S. § 2501, reen. R. C. § 2682, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 166; same as amended: Kerr's C. ib.

§ 4663. [2683] **Earnings of wife living separate from husband.** The earnings and accumulations of the wife and of her minor children living with her or in her custody, while she is living separate from her husband are the separate property of the wife. [R. S. § 2502.]

Hist. R. S. § 2502, reen. R. C. § 2683, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 169; Kerr's C. ib.

Cited: Bassett v. Beam (1895) 4 I. 106, 36 P. 501; Dernham & Kaufman v. Rowley (1896) 4 I. 753, 44 P. 643; Giffen v. Lewiston (1898) 6 I. 231, 55 P. 545.

§ 4664. [2684] **Liability for antenuptial debts.** The separate property of the husband is not liable for the debts of the wife contracted before the marriage. [R. S. § 2503.]

Hist. (See '67, p. 65, § 13) R. S. § 2503, reen. R. C. § 2684, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 170; Kerr's C. ib.

§ 4665. [2685] **Wife's liability for personal debts.** The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage. [R. S. § 2504.]

Hist. (See '67, p. 65, § 9) R. S. § 2504, reen. R. C. § 2685, reen. C. L. ib.

Cross ref. Liability for debts during coverture in management of separate estate: § 4657.

Comp. leg.—Cal. Same: Civ. C. 1872, § 171; similar with additional provisions as amended: Kerr's C. ib.

Cited: Bk. of Com. v. Baldwin (1908) 14 I. 75, 93 P. 504, 17 L. R. A. (N. S.) 676.

Liability for debts: A married woman may contract debts after her marriage and subject her separate property to liability therefor. Bassett v. Beam (1894) 4 I. 106, 36 P. 501.

Same: Debts of husband: In order to charge the separate property of the wife with liability for a debt it must be alleged and proven that the debt was incurred for the use or benefit of her separate property, or was contracted by her for her own use and benefit; debts contracted by the husband for his own benefit or for the use of his family cannot subject the separate property of the wife to liability therefor. Dernham & Kaufman v. Rowley (1896) 4 I. 753, 44 P. 643; Holt v. Gridley (1900) 7 I. 416, 63 P. 188.

The wife is not personally liable for the debts of her husband, and neither is her separate property. McFarland v. Johnson (1912) 22 I. 694, 698, 127 P. 911.

Liability for necessities: Where necessaries are furnished the wife upon her special contract and on her personal responsibility to pay therefor, she can be held to pay the debt, and to that end may be sued as a feme sole. In such case, the debt is incurred for her use and benefit. Edminston v. Smith (1907) 13 I. 645, 92 P. 842, 121 A. S. R. 294, 14 L. R. A. (N. S.) 299, 871.

No obligation on wife to support family out of her separate property unless there is no community property and husband is too infirm to support himself. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

Liability on joint contract: Where a husband and wife both contract to purchase a parcel of real estate, the purchase price is as much the debt of the wife as of the husband. Tipton v. Ellsworth (1910) 18 I. 207, 109 P. 134.

Liability on foreign contract: A contract entered into by a married woman in a state where her common-law disabilities have been removed will be enforced here. There is nothing wicked or immoral or contrary to public policy in permitting a wife's separate property to become liable for the payment of her husband's debts or community debts; nor is there anything in the statutes to indicate that the public policy of the state would be violated by enforcing a valid contract made by a married woman in a sister state. (Budge, C. J. dissents, on ground that settled policy of state is violated) Meier & Frank v. Bruce (1917) 30 I. 732, 168 P. 5.

§ 4666. Husband's control of community property. The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he can not sell, convey or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered. [C. L. § 2686.]

Hist. (See '67, p. 65, § 9, '85, p. 137, § 1) R. S. § 2505, reen. R. C. § 2686; am. '13, c. 105, p. 425; am. '15, c. 75, § 1, p. 187; compiled and reen. C. L. § 2686.

The act of '67 gave the husband the entire management and control and absolute power of disposition of the common property. The act of '85 required the joinder of the wife in the conveyance of any property of a married person occupied as a residence or homestead, or any common property of the husband and wife.

Cross ref. Testamentary power over community property; § 7803. Assignment of community property on dissolution of marriage: § 4650.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 172; as amended: Kerr's C. ib.

Cited: Hughes v. Latour Creek R. R. Co. (1917) 30 I. 475, 166 P. 219.

Prior law: Under this section, prior to the '13 and '15 amendments, it was not necessary for the wife to join with the husband in the conveyance of community property, unless the property had been impressed with a declaration of homestead, or was, at the time of the transfer, community property, occupied or used by the husband and wife as a residence. Ray v. Ray (1874) 1 I. 566; L. v. Spence (1897) 5 I. 244, 48 P. 282; Wilson v. Wilson (1899) 6 I. 597, 57 P. 708; N. W. etc. Bk. v. Rauch (1900) 7 I. 152, 61 P. 516; Wits-Keets-Poo v. Rowton (1915) 28 I. 193, 152 P. 1064; Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107.

Character of husband's control: The wife has an equal interest and ownership with the husband in community property and the only particular in which their rights differ is in the fact that the statute constitutes the husband the managing agent and trustee of the community partnership. Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107; but he cannot dispose of the community real estate unless the wife joins with him in the conveyance, whether or not the property is impressed with homestead declaration or used or occupied as a home. Wits-Keets-Poo v. Rowton (1915) 28 I. 193, 152 P. 1064.

Not liable for wife's separate debts: Community property cannot be bound by postnuptial contracts of the wife for the use and benefit of her own separate property. Hall v. Johns (1909) 17 I. 224, 105 P. 71. But as to part of community property now see § 4667.

Liable for husband's debts: Community property is liable to attachment and execution for the debts of the husband, whether incurred for his own use or for the benefit of the community. The 1913 amendment does not affect the general rule. Holt v. Empey, 32 I. —, 178, P. 703.

Husband's right to sue: The husband is the only necessary party in a suit to recover damages for personal injuries to the wife and for expenses incurred for medical attendance and hospital fees by reason thereof, and need not join the wife in such action. Labonte v. Davidson, 31 I. 644, 175 P. 588 (dis. op. by Budge, J.).

§ 4667. Wife's control of part of community property. The wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate. ['15, c. 75, § 2, p. 187.]

Hist. R. C. § 2686a, enacted by '15, c. 75, § 2, p. 187, reen. C. L. § 2686a.

Cross ref. Same property is exempt from execution against husband: § 6919.

§ 4668. [2687] **Curtesy and dower abolished.** No estate is allowed the husband as tenant by curtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband. [R. S. § 2506.]

Hist. ('67, p. 65, § 10) R. S. § 2506, reen. R. C. § 2687, reen. C. L. ib.

Cross ref. Inheritance of husband and wife from each other: § 7793. Devolution of community property: § 7803.

Comp. leg.—Cal. Same: Civ. C. 1872, § 173; Kerr's C. ib.

Cited: France v. Conner (1896) 161 U. S. 65, 40 L. ed. 619, 16 S. C. R. 497.

§ 4669. [2688] **Support of infirm husband.** The wife must support the husband out of her separate property when he has no separate property, and they no community property, and he from infirmity is not able or competent to support himself. [R. S. § 2507.]

Hist. R. S. § 2507, reen. R. C. § 2688, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 176; similar as amended: Kerr's C. ib.

Maintenance of family: The wife is under no obligation to maintain the family out of her separate estate, except as provided in this section. Hall v. Johns (1909) 17 I. 224, 105 P. 71.

§ 4670. [2689] **Property rights governed by chapter.** The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto. [R. S. § 2508.]

Hist. (See '67, p. 65, § 15) R. S. § 2508, reen. R. C. § 2689, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 177; Kerr's C. ib.

§ 4671. [2690] **Formalities required of marriage settlements.** All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved. [R. S. § 2509.]

Hist. (See '67, p. 65, § 16) R. S. § 2509, reen. R. C. § 2690, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 178; Kerr's C. ib.

§ 4672. [2691] **Same: Record.** When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract. [R. S. § 2510.]

Hist. (See '67, p. 65, § 17) R. S. § 2510, reen. R. C. § 2691, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 179; Kerr's C. ib.

§ 4673. [2692] **Same: Effect of record.** The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a conveyance of real property. [R. S. § 2511.]

Hist. (See '67, p. 65, § 18) R. S. § 2511, reen. R. C. § 2692, reen. C. L. ib.

Cross ref. Effect of record of conveyance: § 5423.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 180; Kerr's C. ib.

§ 4674. [2693] **Same: Minor may make settlement.** A minor capable of contracting marriage may make a valid marriage settlement. [R. S. § 2512.]

Hist. (See '67, p. 65, § 20) R. S. § 2512, reen. R. C. § 2693, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 181: Kerr's C. ib.

CHAPTER 185.

PARENT AND CHILD.

ARTICLE 1.

CHILDREN BY BIRTH.

§ 4675. [2694] **Allowance to parent for support.** The proper court may direct an allowance to be made to the parent of a child, out of its property for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit. [R. S. § 2530.]

Hist. R. S. § 2530, reen. R. C. § 2694, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 201: Kerr's C. ib.

§ 4676. [2695] **Reciprocal duties of support.** It is the duty of the father, the mother and the child or children of any poor person who is unable to maintain himself or herself by work, to maintain such poor person to the extent of his or her ability. Whenever any person shall apply for aid to any county within this state under its indigent laws, and it shall at any time appear to the county commissioners that said poor person has a father, mother, child or children who is able to maintain him or her, but fails so to do, it shall be the duty of the said commissioners to furnish all necessary aid and to bring a civil suit against such father, mother, child or children to recover the amount so expended, in the name of the county. The promise of an adult child to pay for necessaries previously furnished to such parents is binding. ['97, p. 52, § 1.]

Hist. R. S. § 2531; am. '97, p. 52, § 1, reen. '99, p. 301, § 1, reen. R. C. § 2695, reen. C. L. ib.

§ 4677. [2696] **Liability of parent for child's necessaries.** If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent. [R. S. § 2532.]

Hist. R. S. § 2532, reen. R. C. § 2696, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 207; Kerr's C. ib.

Parents equally liable: The mother as well as the father is liable for the support of their minor child, and if they neglect to provide articles necessary for its support, according to their circumstances, they or either of them may be compelled to do so. S. v. Beslin (1911) 19 I. 185, 112 P. 1053.

§ 4678. [2697] **Wages of minors.** The wages of a minor employed in service may be paid to him, unless, within 30 days after the commencement of the service the parent or guardian entitled thereto gives the employer notice that he claims such wages. [R. S. § 2533.]

Hist. R. S. § 2533, reen. R. C. § 2697, reen. C. L. ib.

Cross ref. Wages of minor children living with wife who is separated from her husband belong to wife: § 4663.

Comp. leg.—Cal. Same: Civ. C. 1872, § 212; similar as amended: Kerr's C. ib.

Disposition of son's wages: Where a debtor agrees with his creditor that the services and earnings of his infant son may be retained by the creditor in part payment of the indebtedness, he cannot, by emancipating his son or donating to him his earnings, avoid payment of such indebtedness and thereby give the son the right to recover for such services. Tuckey v. Lovell (1902) 8 I. 731, 71 P. 122.

§ 4679. [2698] **Custody of children after separation of parents.** When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regula-

tions as the case may require. The decision of the court must be guided by the welfare of the child. [R. S. § 2534.]

Hist. R. S. § 2534, reen. R. C. § 2698, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 214; Kerr's C. ib.

Cited: Re Miller (1896) 4 I. 711, 43 P. 870; S. v. Beslin (1911) 19 I. 185, 112 P. 1053.

§ 4680. [2699] Legitimization of issue by marriage. A child born before wedlock becomes legitimate by the subsequent marriage of its parents. [R. S. § 2535.]

Hist. '77, c. 24, § 21; R. S. § 2535, reen. R. C. § 2699, reen. C. L. ib.

Cross ref. Legitimacy of children where marriage is annulled: § 4622; in case of divorce for adultery of wife: § 4649.

Comp. leg.—Cal. No such provision in Civ. C. 1872; same: Kerr's C. § 215.

§ 4681. Rights of parents over children. The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or be unable or refuse to take the custody or has abandoned his or her family, the other is entitled to the child's custody, services and earnings.

Hist. R. C. § 2699a, enacted by '15, c. 120, § 1, p. 265; compiled and reen. C. L. § 2699a.

Cross ref. Either parent entitled to guardianship: § 7846.

Father's custody not exclusive: The father has no absolute right to deprive the mother of the care and custody of an infant child simply because he is the father. S. v. Beslin (1911) 19 I. 185, 191, 112 P. 1053.

Parent may lose right: The legal right to the custody of a minor may be abandoned or forfeited by the acts or conduct of the parent, and in such case the parent may be equitably estopped from asserting such legal right. Andrino v. Yates (1906) 12 I. 618, 87 P. 787.

Child's interest controlling: Where the legal right of the parent to the custody of a child is not clear, the best interest of the child will govern the court. Andrino v. Yates (1906) 12 I. 618, 87 P. 787.

Where the custody of a 12-year-old girl is in dispute the court may consult the wishes of the child to aid in determining what will be for the best interest of the child. Ib.

ARTICLE 2.

ADOPTION.

Cross ref. Adoption of orphan, homeless, abused or neglected children: c. 290.

§ 4682. [2700] Minors may be adopted. Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter. [R. S. § 2545.]

Hist. '79, c. 8, § 1; R. S. § 2545, reen. R. C. § 2700, reen. C. L. § 2700.

Cross ref. Adoption by homefinding society: c. 290.

Comp. leg.—Cal. Same: Civ. C. 1872, § 221; Kerr's C. ib.

Strict construction: Surrender of legal guardianship must be in accordance with law and the procedure prescribed therefor. Re Martin (1916) 29 I. 716, 161 P. 573.

§ 4683. [2701] Restrictions as to comparative age. The person adopting a child must be at least 15 years older than the person adopted. [R. S. § 2540.]

Hist. '79, p. 8, § 2; R. S. § 2540, reen. R. C. § 2701, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 222; as amended: Kerr's C. ib.

§ 4684. [2702] Consent of husband and wife necessary. A married man, not lawfully separated from his wife, can not adopt a child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent. [R. S. § 2547.]

Hist. '79, p. 8, § 3; R. S. § 2547, reen. R. C. § 2702, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 223; same as amended: Kerr's C. ib.

§ 4685. [2703] **Consent of parents of child: Exceptions.** A legitimate child can not be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty or neglect. If it can be shown satisfactorily to the judge that the parent or parents have abandoned it, or ceased to provide for its support, then it may be adopted by the written consent of its legal guardian; if no guardian, then of its nearest relative; if no relative, then by the consent of some person appointed by the judge to act in the proceedings as the next friend to such child. [R. S. § 2548.]

Hist. (See '79, p. 8, § 4) Act Feb. 5, '87, R. S. § 2548, reen. R. C. § 2703, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 224; as amended: Kerr's C. ib.

Nonconsent of parents: In order to make order of adoption valid without consent of parents it must appear in record that case comes within some of exceptions mentioned in this statute. A parent is not judicially deprived of his child's custody except by a final, absolute and unconditional judgment. Jain v. Priest (1917) 30 I. 273, 164 P. 364.

Notification to parents: As to whether parents of child must in all cases be notified of adoption proceedings, quaere. Jain v. Priest (1917) 30 I. 273, 164 P. 364.

§ 4686. [2704] **Consent of child.** The consent of a child, if over the age of 12 years, is necessary to its adoption. [R. S. § 2549.]

Hist. '79, p. 8, § 5; R. S. § 2549, reen. R. C. § 2704, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 225; Kerr's C. ib.

§ 4687. [2705] **Proceedings on adoption.** The person adopting a child, and the child adopted, and the other persons, if within or residents of the county, whose consent is necessary, must appear before the probate judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. But if the parent or guardian of the child, or either of them, is a nonresident of the county where the application is made, such nonresident parent or guardian may execute his consent in writing, and acknowledge the same before any officer authorized by the laws of this state to take acknowledgments of deeds, which consent being filed in the court where the application is made, is deemed a sufficient appearance on the part of such nonresident. [R. S. § 2550.]

Hist. '79, p. 8, § 6; '85, p. 25, § 1; R. S. § 2550, reen. R. C. § 2705, reen. C. L. ib.

Comp. leg.—Cal. Similar through first sentence, rest omitted: Civ. C. 1872, § 226; similar as amended: Kerr's C. ib.

§ 4688. [2706] **Order of adoption.** The judge must examine all persons appearing before him pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting. [R. S. § 2551.]

Hist. '79, p. 8, § 7; R. S. § 2551, reen. R. C. § 2706, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 227; similar with additional provision as amended: Kerr's C. ib.

§ 4689. [2707] **Effect of adoption.** A child, when adopted, may take the name of the person adopting, and the two thenceforth sustain toward each other the legal relation of parent and child, and have

all the rights and are subject to all the duties of that relation. [R. S. § 2552.]

Hist. '79, p. 8, § 8; R. S. § 2552, reen. R. C. § 2707, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 228; similar as amended: Kerr's C. ib.

§ 4690. [2708] **Release of child's parents from obligation.** The parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibilities for, the child so adopted, and have no right over it. [R. S. § 2553.]

Hist. '79, p. 8, § 9; R. S. § 2553, reen. R. C. § 2708, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 229; Kerr's C. ib.

§ 4691. [2709] **Adoption of illegitimate child.** The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption. [R. S. § 2554.]

Hist. '79, p. 8, §10; R. S. § 2554, reen. R. C. § 2709, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 230; Kerr's C. ib.

TITLE XXXVII. PRIVATE CORPORATIONS.

CHAPTER 186.

GENERAL BUSINESS CORPORATIONS.

Cross ref. Constitutional provisions governing corporations: Const. XI. Dissolution of corporations: §§ 7397-7403. Criminal frauds in management of corporations: §§ 8498-8512.

ARTICLE 1.

ARTICLES OF INCORPORATION.

§ 4692. [2710] **Corporations classified.** Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the state; all other corporations are private. [R. S. § 2575.]

Hist. R. S. § 2575, reen. R. C. § 2710, reen. C. L. ib.

Cross ref. The term "corporations" includes associations and joint stock companies having or exercising any of the powers or privileges of corporations: Const. XI, 16.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 284; same as amended: Kerr's C. ib.

Nonprofit corporations: A nonprofit company specifically stating that it is organized under this chapter, is not governed by c. 219 relating to religious, social and benevolent corporations. (Sullivan, J. dissents) Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 133 P. 899.

§ 4693. [2711] **Private corporations: How formed.** Private corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in this title: *Provided,* One such person must be a bona fide resident of this state. ['07, p. 540, § 1.]

Hist. R. S. § 2576; am. '99, p. 404, § 1; am. '07, p. 540, § 1, reen. R. C. § 2711, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 285; as amended: Kerr's C. ib.

§ 4694. [2712] **Purpose for which authorized.** Private corporations may be formed for any purpose for which individuals may lawfully associate themselves. [R. S. § 2577.]

Hist. R. S. § 2577, reen. R. C. § 2712, reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. C. 1872, § 286; same as amended: Kerr's C. ib.

§ 4695. [2713] **Articles of incorporation.** The instrument by which a private corporation is formed is called articles of incorporation. [R. S. § 2578.]

Hist. R. S. § 2578, reen. R. C. § 2713, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 289; Kerr's C. ib.

§ 4696. Same: Contents: Amendment. Articles of incorporation must be prepared setting forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place where its principal business is to be transacted.
4. The term for which it is to exist, not exceeding 50 years.
5. The number of its directors.
6. The amount of its capital stock and the number of shares into which it is divided.
7. If there is a capital stock, the amount actually subscribed and by whom.
8. Any corporation organized or existing, or hereafter organized or existing, under the laws of this state, instead of electing its entire board of directors annually, as now required by law, may provide in its articles of incorporation or by amendment to its articles of incorporation, for the election of one-third of the number of its directors for a term of one year, and one-third thereof for a term of two years, and one-third thereof for a term of three years, and thereafter at each succeeding annual meeting of the stockholders, one-third thereof for a term of three years. ['09, p. 157, S. B. 100, § 1.]

Hist. (See '64, p. 543, § 2) R. S. § 2579; am. '05, p. 161, § 1, reen. R. C. § 2714; am. '09, p. 157, S. B. 100, § 1, reen. C. L. § 2714.

Cross ref. With express reference to this section: Annual election of directors: § 4708.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 290; as amended: Kerr's C. ib.

Purpose: This section requires articles of incorporation to state the purpose for which the corporation is formed, not only to inform the sovereign which creates the corporation but also in order to formulate in a solemn and binding manner the contract of association between the incorporators, and express the actual considerations which induced them to thus associate themselves together. Riley v. Callahan Min. Co. (1916) 28 I. 525, 155 P. 665.

§ 4697. [2715] **Same: For railroad, wagon road, telephone or telegraph.** The articles of incorporation of any railroad, wagon road, telephone or telegraph organization must also state:

1. The kind of road, telephone or telegraph intended to be constructed.
2. The place from and to which it is intended to be run, and all the intermediate branches: *Provided*, That this subdivision shall not apply to railroad, telegraph or telephone corporations.
3. The estimated length of the road, telephone or telegraph line.
4. Every such corporation may provide in its articles of incorporation the number of directors which shall constitute a quorum for the transaction of business, and that every decision by a majority of such quorum of the board shall be valid as a corporate act.
5. That all the meetings of the board of directors may be held at the principal office of the corporation in this state, or at such other place or places within or without this state for the transaction of any business of the corporation as the directors may, by resolution or by the by-laws, provide.
6. That at least one member of the board of directors shall be a resident of this state, and that no other qualification as to residence of the directors shall be necessary.

7. The articles of incorporation of any such corporation now existing, or that may hereafter be organized under the laws of this state, may be amended in any respect conformable to the laws of this state by a vote representing at least a majority of the outstanding capital stock thereof, at a stockholders' meeting called for that purpose, as provided by section 4707 of this code: *Provided,* That the original purposes of the corporation shall not be altered nor shall the capital stock be diminished to an amount less than 50 per cent in excess of the indebtedness of the corporation: And, *Provided further,* That the personal or individual liability of the holder of fully paid capital stock for assessments, or for obligations of the corporation, shall not be changed without the consent of all the stockholders.

8. That stockholders shall not be individually liable for the debts of the corporation.

9. Railroad corporations organized and existing, or hereafter organized and existing, under the laws of this state, shall be subject to all the duties imposed by the terms of this section, and shall have and possess all the powers and privileges conferred by the laws under which said corporations were organized, or which are contained in their articles of incorporation. ['07, p. 472, S. B. 144, § 1.]

Hist. R. S. § 2580; am. '05, p. 161, § 2; am. '07, p. 472, S. B. 144, § 1, reen. R. C. § 2715, reen. C. L. ib.

Comp. leg.—Cal. Same through subd. 3 except "telephone" omitted throughout, other provisions different: Civ. C. 1872, § 291; Kerr's C. ib.

§ 4698. [2716] **Subscribers to articles.** The articles of incorporation must be subscribed by three or more persons, one of whom must be a bona fide resident of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property. ['05, p. 161, § 3.]

Hist. R. S. § 2581; am. '05, p. 161, § 3, reen. R. C. § 2716, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 292; as amended: Kerr's C. ib.

§ 4699. [2717] **Capital required of railroads, etc.** Each intended railroad, wagon road or telegraph corporation, before filing articles of incorporation, must have actually subscribed to its capital stock for each mile of the contemplated work, the following amount, to wit:

1. $1000 per mile of railroads.
2. $100 per mile of telegraph lines.
3. $300 per mile of wagon roads. [R. S. § 2582.]

Hist. R. S. § 2582, reen. R. C. § 2717, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 293; Kerr's C. ib.

§ 4700. [2718] **Same: Affidavit of subscription.** Before the secretary of state or the recorder of the county issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary or treasurer named in the articles, that the amount of the capital stock thereof required by law has been actually subscribed. [R. S. § 2583.]

Hist. R. S. § 2583, reen. R. C. § 2718, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 295; Kerr's C. ib.

§ 4701. [2719] **Certificate of incorporation.** Upon filing the articles of incorporation in the office of the county recorder of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county recorder, with the secretary of state, and filing the affidavit mentioned in the last section, when such affidavit is required, the secretary of state or such county recorder must issue to the corporation, over his official seal, a certificate that a copy of the articles, containing the required statement of facts, has been

filed in his office; and thereupon the persons executing the articles and their associates and successors shall be a body politic and corporate, by the name stated in the articles, and for the term of 50 years, unless it is in the articles of incorporation otherwise stated, or by the law otherwise specially provided. [R. S. § 2584.]

Hist. R. S. § 2584, reen. R. C. § 2719, reen. C. L. ib.

Cross ref. Term of existence of homestead corporations: § 4848.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 296; similar as amended: Kerr's C. ib.

Cited: Tarr v. Western L. & S. Co. (1909) 15 I. 741, 749, 99 P. 1049, 21 L. R. A. (N. S.) 707.

§ 4702. Limitation on selection of name. The secretary of state shall not issue any certificate permitting any corporation to take or use the name of any corporation heretofore organized in this state and which has not suffered the forfeiture of its charter, or to make or use a name so closely resembling the name of such corporation heretofore organized in this state as will tend to deceive. [C. L. § 2719a.]

Hist. '12, c. 6, proviso in § 8, p. 18; compiled and reen. C. L. § 2719a.

Cross ref. Forfeiture of charter: c. 188.

§ 4703. [2720] **Copy of articles as evidence.** A copy of any articles of incorporation filed in pursuance of this title and certified by the secretary of state, or the recorder of the proper county, must be received in all courts and other places as prima facie evidence of the facts therein stated. [R. S. § 2585.]

Hist. (See '64, p. 543, § 3) R. S. § 2585, reen. R. C. § 2720, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 297; as amended: Kerr's C. ib.

§ 4704. [2721] **Record of articles by secretary of state.** All articles of incorporation hereafter filed in the office of the secretary of state, and certificates of increase and decrease in the capital stock thereof, together with certificates of all other changes in said articles of incorporation provided by law, shall be recorded by the secretary of state in books provided therefor, which books shall be properly indexed: *Provided, however,* That this section shall not be construed to require the recording of foreign articles of incorporation. ['07, p. 555, § 1.]

Hist. '07, p. 555, § 1, reen. R. C. § 2721, reen. C. L. ib.

§ 4705. [2722] **Stockholders and members.** The owners of shares in a corporation which has a capital stock, are called stockholders. If a corporation has no capital stock, the corporators and their successors are called members. [R. S. § 2586.]

Hist. R. S. § 2586, reen. R. C. § 2722, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 298; Kerr's C. ib.

§ 4706. [2723] **Articles to be filed where property is located.** No corporation formed under the provisions of this title shall purchase, locate or hold property in any county of this state without filing a certified copy of its articles of incorporation in the office of the county recorder of the county in which such property is situated, within 60 days after such purchase or location is made. Any corporation failing to comply with the provisions of this section must not, while so in default, maintain or defend any action or proceeding in relation to such property. [R. C. § 2723.]

Hist. R. S. § 2587; am. R. C. § 2723, reen. C. L. ib.

Comp. leg.—Cal. No such provision in the Civ. C. 1872; similar as amended: Kerr's C.

ARTICLE 2.

BY-LAWS.

§ 4707. [2724] **By-laws to be adopted.** Every corporation formed under this title must, within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the laws of congress and of this state. The assent of stockholders representing a majority of all the subscribed capital stock, or a majority of the members, if there be no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and if such meeting be called, two weeks' notice of the same, by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or, if none be published therein, then in a paper published at the capital of the state, must be given by order of the acting president. The written assent of the holders of two-thirds of the stock subscribed, or of two-thirds of the members, if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose. [R. S. § 2588.]

Hist. R. S. § 2588, reen. R. C. § 2724, reen. C. L. ib.

Cross ref. Express references to this section: By-laws of Carey act operating companies: § 3050; amendment to articles of incorporations of railroad, wagon road, telephone or telegraph corporations: § 4697; change of place of business: § 4727.

Comp. leg.—Cal. See Civ. C. 1872, § 301; similar as amended: Kerr's C. ib.

§ 4708. [2725] **Provision for election of directors.** The directors of corporations must be elected annually by the stockholders or members, except that they may be classified and elected for the terms provided for in the articles of incorporation of said corporation as permitted by section 4696, and if no provision is made in the by-laws for the time of the election of directors, the election must be held on the first Tuesday in June. Notice of the meeting of stockholders for the election of directors must be given by an advertisement thereof for two weeks, in some newspaper published in the county in which the principal place of business of the corporation is located, or, if none be published therein, then in a newspaper published at the capital of the state. ['05, p. 161, § 4.]

Hist. (See '64, p. 543, § 5) R. S. § 2589; am. '05, p. 161, § 4, reen. R. C. § 2725, reen. C. L. ib.

Cross ref. Express reference to this section: Notice of meeting for removal of directors: § 4716.

Comp. leg.—Cal. See Civ. C. 1872, § 302; as amended: Kerr's C. ib.

§ 4709. Contents of by-laws. A corporation may, by its by-laws, where no other provision is specially made, provide, among other things:

1. The time, place and manner of calling and conducting its meetings.
2. The number of stockholders or members constituting a quorum.
3. The mode of voting by proxy.
4. The time of the annual election of directors, and the mode and manner of giving notice thereof, in addition to that prescribed by section 4708.
5. The duties and compensation of officers.
6. The manner of election, and the term of office, of all officers other than the directors.
7. The time and place of holding meetings of the board of directors, either within or without this state.
8. Suitable penalties for violation of by-laws, not exceeding in any case, $100 for any one offense. [C. L. § 2726.]

Hist. R. S. § 2590; am. '05, p. 161, § 5, reen. R. C. § 2726; compiled and reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 303; as amended: Kerr's C. ib.

Cross ref. By-laws of homestead corporation: § 4849.

§ 4710. Book of by-laws: Amendment of by-laws. All by-laws adopted must be certified by a majority of the directors and the secretary of the corporation, and copied in some book kept in the principal office of the corporation in the state, to be known as the book of by-laws, and no by-laws shall take effect until so copied, and the book shall be open to the inspection of the public during office hours of each day, except holidays.

The by-laws may be repealed or amended, or new by-laws may be adopted at the annual meeting, or at any meeting of the stockholders or members called for that purpose by the directors, by a vote representing two-thirds of the subscribed stock, or two-thirds of the members when there is no capital stock, or by the written consent, duly acknowledged in the same manner that conveyances of real estate are required by law to be acknowledged, of the holders of two-thirds of the subscribed capital stock, which written consent may be in one or more instruments, or the power to repeal and amend the by-laws and adopt new by-laws may, by a similar vote at any such meeting, or by a similar written consent, be delegated to the board of directors. This power, when so delegated, may be revoked by a similar vote at any regular meeting of the stockholders or members.

Whenever any amendment or new by-law is adopted, it shall be copied in the book of by-laws with the original by-laws, and immediately after them, and shall not take effect until so copied. If any by-laws be repealed, the fact of repeal, with the date of the meeting at which the repeal was enacted, or if such repeal occur by reason of the filing of written consent of the stockholders, the date when the consent of the necessary number was obtained, must be stated in the said book, and until so stated the repeal must not take effect. ['13, c. 81, p. 337.]

Hist. R. S. § 2591; am. '07, p. 571, § 1; am. '09, p. 157, S. B. 100, § 2; am. '13, c. 81, p. 337, reen. C. L. § 2727.

Comp. leg.—Cal. See Civ. C. 1872, § 304; similar as amended: Kerr's C. ib.

Cited: Mapleton Bk. v. Standrod (1902) 8 I. 740, 71 P. 119.

ARTICLE 3.

DIRECTORS.

§ 4711. Constitution and powers of board of directors. The corporate powers, business and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three nor more than 15 directors, to be elected from among the holders of the stock, or when there is no capital stock, then from among the members of such corporation. At least one of the directors must, in all cases, be a citizen and actual bona fide resident within this state. Directors of corporations for profit must be holders of the stock thereof in an amount to be fixed by the by-laws. Directors of all other corporations must be members thereof. Whenever a vacancy occurs in the board of directors, unless otherwise provided by the by-laws, such vacancy must be filled by the board or by a quorum thereof. Unless a majority is present and acting, no business performed, or act done, by the board of directors is valid as against the corporation: *Provided,* That the board of directors of any corporation may appoint an executive committee of its members, equal in number to at least one-third of the number of its directors, as set forth in its articles

of incorporation, and such committee shall have all the powers, rights and privileges of the board of directors, and may meet at such times and places as the board of directors may by resolution, or by the by-laws, prescribe, and the acts of such committee shall be in all matters valid as against the corporation. ['09, p. 157, S. B. 100, § 3.]

Hist. R. S. § 2592; am. '05, p. 161, § 6, reen. R. C. § 2728; am. '09, p. 157, S. B. 100, § 3, reen. C. L. § 2728.

Cross ref. Corporate powers: § 4752.

Comp. leg.—Cal. See Civ. C. 1872, § 305; as amended: Kerr's C. ib.

Cited: Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 133 P. 899.

Relation to stockholders: The relation of officers and directors to the stockholders is a fiduciary one. Riley v. Callahan Min. Co. (1916) 28 I. 525, 155 P. 665.

Ratification of board's action: Where a private corporation receives and retains the benefits of an unauthorized or illegal transaction on the part of its board of directors, such conduct amounts to a ratification. Coml. Trust Co. v. Ida. Brick Co. (1913) 25 I. 755, 139 P. 1004; Pettengil v. Blackman (1917) 30 I. 341, 164 P. 358.

Liability of directors: Directors are individually liable to the corporation for fraud, malfeasance or gross negligence, whereby its property is wasted and the stockholders are deprived of dividends, or their shares depreciated or rendered valueless. An action to enforce such liability must be brought by the corporation, unless it appears that it refuses, or that the directors who are in control are themselves answerable, when it may be maintained in equity by one or more stockholders in their own names. Just v. Ida. Canal etc. Co., 16 I. 639, 102 P. 381; Smith v. Rader, 31 I. 423, 173 P. 970.

§ 4712. Election of directors. At the first meeting of the stockholders held after the organization of the corporation, or at such subsequent meeting as may be called and held for such purpose, directors must be elected to hold their offices for one year and until their successors are elected and qualified; except that they may be classified and elected for the terms provided for in the articles of incorporation, or, if no such provision is made in the articles of incorporation of such corporations, then the board of directors shall be elected for one year. ['05, p. 161, § 7.]

Hist. R. S. § 2593; am. '05, p. 161, § 7, reen R. C. § 2729, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 306; repealed, 1889.

§ 4713. Same: How conducted: Water users' associations. All elections of directors must be by ballot, and the vote of the stockholders representing a majority of the subscribed capital stock, or a majority of the members, if there be no capital stock, is necessary to a choice. If there be capital stock in the corporation, each stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors shall not be elected in any other manner: *Provided, however,* That at regular meetings of the stockholders or members of a corporation or water users' association owning or controlling an irrigation system, of which corporation or water users' association the number of stockholders or members exceeds 100, those present either in person or by proxy shall constitute a quorum and may elect officers and transact all other business proper to be done by them: *Provided further,* That at no meeting of the stockholders or water users' association or members of such corporation, held after the 1st day of March in the year 1913, shall any officer, director or employee of such corporation or association have the right to cast, by proxy or otherwise, any votes except those representing stock actually owned by him. ['13, c. 2, p. 4.]

Hist. (See '64, p. 543, § 5) R. S. § 2594; am. '07, p. 540, § 2, reen. R. C. § 2730; am. '13, c. 2, p. 4, reen. C. L. § 2730.

Cross ref. Stockholders may vote in person or by proxy for the number of shares owned by them for as many persons as

there are directors or managers to be elected, or may cumulate the shares in favor of one or more candidates: Const. XI, 4.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 307; as amended: Kerr's C. ib.

§ 4714. [2731] Organization and officers of board. Immediately after their election, the directors must organize by the election of a president, who must be one of their number, a secretary, and a treasurer. They must perform the duties enjoined upon them by law and by the by-laws of the corporation. A majority of the directors, or in the case of any railroad, wagon road, telephone or telegraph organization, a quorum of the board of directors, as fixed by the articles of incorporation, is a sufficient number to form a board for the transaction of business, and every decision of such quorum or of a majority of the directors forming such board, made when duly assembled, is a valid corporate act, as though made by a majority of all the directors of the corporation. ['05, p. 161, § 8.]

Hist. R. S. § 2595; am. '05, p. 161, § 8, reen. R. C. § 2731, reen. C. L. ib.

Cross ref. Limitation on action against directors: § 6630.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 308; Kerr's C. ib.

Cited: Sparks v. Lower Payette Ditch Co. (1892) 3 I. 306, 29 P. 134.

§ 4715. Prohibition respecting dividends and capital. The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they reduce or increase the capital stock, except as in this title specially provided. For a violation of the provisions of this section the directors under whose administration the same may have occurred, except those who may have caused their dissent therefrom to be entered in the minutes of the meeting of the board of directors at the time, or those who were not present when the vote was taken, are, in their individual and private capacity, jointly and severally liable to the corporation and to the creditors thereof, in the event of dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence. ['09, p. 157, S. B. 100, § 4.]

Hist. (See '64, p. 543, § 13) R. S. § 2596, reen. R. C. § 2732; am. '09, p. 157, S. B. 100, § 4, reen. C. L. § 2732.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 309; similar with additional provisions as amended: Kerr's C. ib. Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

Application: Banking corporation: The provisions of this section have no application to banking corporations. (In syllabus) McTamany v. Day (1912) 23 I. 95, 128 P. 563.

The action of the directors and stockholders of a banking corporation in withdrawing and distributing among themselves the assets of the corporation is void as to existing creditors. Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

Beneficiaries: The statute makes the directors liable to all creditors—those who became creditors before such dividend is paid as well as those who became creditors afterward. Stoltz v. Scott (1912) 23 I. 104, 129 P. 340.

An action brought under this section is based on the illegal payment of dividends in fraud of creditors, and a receiver as the representative of creditors may maintain an action to recover the amount of dividends so illegally paid. Ib.

This statute was enacted for the benefit of creditors of and those who engage in business with corporations on the assumption that their capital is unimpaired and of stockholders who have right to insist that the corporation continue in business, but not for protection of directors who have violated its terms. Chadwick v. Holm (1918) 31 I. 252, 170 P. 87.

The liability for the violation of this section is in the first instance to the corporation itself. As between the creditors of the corporation and the stockholders thereof the liability of the latter is secondary. Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

Dissolution by insolvency: When a corporation ceases business because of its insolvency and is put in the hands of a receiver, it is dissolved within the meaning of this section. Stoltz v. Scott (1912) 23 I. 104, 129 P. 340.

When liability attaches: It is not necessary for a recovery against the directors that the assets of the corporation be first exhausted or its liability be first adjudi-

cated. Stoltz v. Scott (1912) 23 I. 104, 129 P. 340.

Improper dividends: Directors improperly vote themselves a dividend, when the corporation is in need of cash successfully and profitably to carry on its business. Claiborn v. Utah Assn. of Credit Men (1912) 22 I. 158, 165, 124 P. 788.

Reduction of capital stock: The purchase by the corporation of its own stock amounts to a reduction of the capital stock of the company in violation of this statute. Dietrich v. Copeland Lbr. Co. (1916) 28 I. 312, 154 P. 626.

Assets: The assets of a corporation constitute a trust fund for the payment of its debts which can not lawfully be divided until the creditors are paid. Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

Purchase of own stock by insolvent corporation: The purchase of its own stock by an insolvent corporation is void. Brown v. T. B. Reed & Co., 31 I. 529, 174 P. 136.

§ 4716. Removal of directors. No director can be removed from office unless by a vote of the stockholders holding two-thirds of the capital stock, or of two-thirds of the members, where there is no capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal. Meetings of stockholders or members for this purpose may be called by the president, or by a majority of the directors, or by members or stockholders holding at least one-half of the votes. Such call must be in writing and addressed to the secretary, who must thereupon give notice of the time, place and object of the meeting, and by whose order it is called. If the secretary refuses to give the notice, or if there is none, the call may be addressed directly to the members or stockholders, and be served as a notice, in which case it must specify the time and place of meeting. The notice must be given in the manner provided in section 4708 of this title, unless other express provision has been made therefor in the by-laws. In case of removal, the vacancy may be filled by election at the same meeting. ['09, p. 157, S. B. 100, § 5.]

Hist. R. S. § 2597, reen. R. C. § 2733; am. '09, p. 157, S. B. 100, § 5, reen. C. L. § 2733.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 310; as amended: Kerr's C. ib.

Cross ref. Express reference to this section: Adjourned elections: § 4720.

ARTICLE 4.

MEETINGS AND ELECTIONS.

§ 4717. Meetings: By whom called. Whenever, from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any justice of the peace of the county where such corporation is established, may, on written application of three or more of the stockholders, or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the justice may in the same warrant direct such person to preside at such meeting until a secretary is chosen and qualified, if there is no officer present legally authorized to preside thereat; *Provided,* That whenever the by-laws of any corporation authorized to do business in the state of Idaho fail to make provision for the calling of special stockholders' meetings of the corporation, that such meetings may be called by the president thereof or by the secretary in his absence or incapacity or by a majority of the board of directors; such call for a special meeting to be made on written notice to all stockholders and by two weeks' publication in a newspaper published at the principal place of business of the corporation, and the purpose of such meeting to be stated in the notice to the stockholders. ['13, c. 69, § 1, p. 306.]

Hist. (See '71, p. 51, § 1) R. S. § 2598, reen. R. C. § 2734; am. '13, c. 69, § 1, p. 306, reen. C. L. § 2734.

Comp. leg.—Cal. Analogous: Civ. C. 1872, § 311; additional provision as amended: Kerr's C. ib.

§ 4718. [2735] **Quorum, proxies and adjournment.** At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock, or of the members when there is no capital stock, represented either in person, or by proxy, in writing. Every person acting therein in person, or by proxy, or by representative, must be a member thereof, or a bona fide stockholder, having stock in his own name on the stock books of the corporation, at least 10 days prior to the election. Any vote or election had otherwise than in accordance with the provisions of this title, is voidable at the instance of absent stockholders or members, and may be set aside by petition to the district court of the county where the same was held or to the judge of said court at his chambers. Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if from any reason there is not present a majority of the subscribed stock or members, or no election or majority vote had. Such adjournment and the reasons thereof shall be recorded in the journal of proceedings of the board of directors. [R. S. § 2599.]

Hist. R. S. § 2599, reen. R. C. § 2735, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 312; as amended: Kerr's C. ib.

Stock book prima facie evidence of ownership: The stock book of the corporation is prima facie evidence of ownership, and sufficient to support a finding of the court that the person therein named was the owner of stock and entitled to vote it. Haynes v. Griffith (1909) 16 I. 280, 101 P. 728.

§ 4719. [2736] **Representation of stock of minors and estates.** The shares of stock of an estate of a minor or insane person may be represented by his guardian, and of a deceased person by his executor or administrator. [R. S. § 2600.]

Hist. (See '64, p. 543, § 11) R. S. § 2600, reen. R. C. § 2736, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 313; same as amended: Kerr's C. ib.

§ 4720. [2737] **Adjourned elections.** If from any cause an election does not take place on the day appointed in the by-laws, it may be held on any day thereafter, as may be provided for in such by-laws, or to which such election may be adjourned or ordered by the directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered, a meeting may be called by the stockholders as provided in section 4716 of this title. [R. S. § 2601.]

Hist. (See '64 p. 543, § 6) R. S. § 2601, reen. R. C. § 2737, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 314; as amended: Kerr's C. ib.

§ 4721. [2738] **Judicial review of elections.** Upon the application of any person, or body corporate, aggrieved by any election held by any corporate body, or any proceedings relating to any such election, the district judge of the district in which such election is held, must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. Before the proceedings are had under this section five days' notice thereof must be given to the adverse party, or to those to be affected thereby, if found within the state. [R. S. § 2602.]

Hist. R. S. § 2602, reen. R. C. § 2738, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 315; as amended: Kerr's C. ib.

§ 4722. [2739] **Liability for false certificates and reports.** Any officer of a corporation who wilfully gives a certificate, or wilfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, is liable for all the damages re-

sulting therefrom to any person injured thereby; and if two or more officers unite or participate in the commission of any of the acts herein designated, they are jointly and severally so liable. [R. S. § 2603.]

Hist. R. S. § 2603, reen. R. C. § 2739, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 316; as amended: Kerr's C. ib.

Cross ref. Making a false report a misdemeanor: § 8505.

§ 4723. [2740] **Meetings by consent.** When all stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meetings are as valid as if had at a meeting legally called and notified. [R. S. § 2604.]

Hist. R. S. § 2604, reen. R. C. § 2740, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 317; Kerr's C. ib.

§ 4724. [2741] **Same: Business which may be transacted.** The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation. [R. S. § 2605.]

Hist. R. S. § 2605, reen. R. C. § 2741, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 318; Kerr's C. ib.

§ 4725. [2742] **Place of holding meetings.** All meetings of the stockholders and members of the corporation shall be held at the office of the corporation at its principal place of business within this state. Meetings of the board of directors of the corporation, or of its executive committee, may be held at the principal place of business of the corporation in this state: *Provided,* That when so provided for in the articles of incorporation, or amended articles of incorporation, or by the by-laws, or by resolution of the board of directors, meetings of the board of directors and of the executive committee may be held for the transaction of any business of the corporation, at any place outside of this state, or elsewhere within this state, than at its principal place of business. ['05, p. 161, § 9.]

Hist. R. S. § 2606; am. '05, p. 161, § 9, reen. R. C. § 2742, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 319; Kerr's C. ib.

§ 4726. Manner of calling directors' meetings. When no provision is made in the by-laws for a regular or special meeting of the directors, and the mode of calling meetings, all meetings must be called by a 10 days' notice in writing, to be given by the secretary to each director, within or without the state, on the order of the president, or if there be none, on the order of two directors. ['13, c. 69, § 2, p. 307.]

Hist. R. S. § 2607, reen. R. C. § 2743; am. '13, c. 69, § 2, p. 307, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 320; Kerr's C. ib.

§ 4727. [2744] **Change of place of business.** Every corporation that has been or may be created under the general laws of this state may change its principal place of business from one place to another within this state. Before such change is made the consent, in writing, of the holders of two-thirds of the capital stock, or of two-thirds of the members, when there is no capital stock, must be obtained and filed, notice of such intended removal or change must be published at least once a week for three successive weeks, as provided in section 4707, giving the name of the county where it is situated and that to which it is intended to remove. [R. S. § 2608.]

Hist. R. S. § 2608, reen. R. C. § 2744, reen. C. L. ib.

Comp. leg.—Cal. No such provision in Civ. C. 1872; similar: as amended: Kerr's C. § 321a.

ARTICLE 5.

STOCK AND STOCKHOLDERS.

Cross ref. Capital stock of corporations exempted from taxation: § 3099, subd. 6. Increase or diminution of capital stock: § 4756.

§ 4728. Personal liability of stockholders. Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him.

Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount.

Nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof, except when so liable on the ground of fraud or misrepresentation, or concealment, or for neglect or misconduct as an officer, agent, stockholder or member of the corporation.

No corporation shall issue any stock as paid up, in whole or in part, or credit any amount, assessment or call as paid upon any of its stock, except for money, property, labor or services, actually received by the corporation, or actually paid upon the indebtedness of the corporation, as provided in this section, to the full value of the amount credited upon such stock.

If any stockholder of any insolvent corporation pays the full amount unpaid upon the stock held by him as above defined, upon the overdue debts of the corporation, incurred while he was such stockholder, he is relieved from any further personal liability upon his stock, but not from any liability for fraud, neglect or misconduct. The liability of such stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred by the corporation, and such liability is not released or discharged by any subsequent transfer of stock.

When such liability does not arise upon contract, it shall be deemed to be incurred when judgment thereof is obtained against the corporation.

The term "stockholders," as used in this section, applies not only to such person as appears by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and also to every person who has advanced the instalments or purchase money, or subscribed for stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee are not liable under the provisions of this section, by reason of any such investment, nor is the person for whose benefit such investment is made responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period, or while the investment continues. Stock held as collateral security, or by a trustee who is not the beneficial owner, or in any other representative capacity without a beneficial interest, does not make the holder thereof a stockholder

within the meaning of this section, except in the cases above mentioned, so as to charge him with the debts or liabilities of the corporation; but the pledger or person or estate represented is to be deemed the stockholder as respects such liability.

Members of corporations not organized for profit and having no capital stock are not individually or personally liable for its debts or liabilities, unless such liability is imposed by the by-laws of the corporation, and then only to the extent so imposed; any such liability may be enforced to the extent imposed by the by-laws by joint or several actions against members, as before provided.

The liability of each stockholder of a corporation not formed under the laws of this state, but doing business within the state, is the same as the liability of stockholders of corporations organized under the laws of this state. [C. L. § 2745.]

Hist. (See '64, p. 543, § 16) R. S. § 2609; am. '90-91, p. 172, §§ 1, 2, reen. '99, p. 115, §§ 1, 2, reen. R. C. § 2745; am. '09, p. 157, S. B. 100, § 6; compiled and reen. C. L. § 2745; in third paragraph after the phrase "to render any stockholder" has been inserted "individually or personally liable as such stockholder" to conform to section as originally enacted and as drafted in the original copy of the amendatory bill passed by the senate. The phrase appears to have been inadvertently omitted in engrossed copy transmitted to the house. In McTamany v. Day (1912) 23 I. 95, 101-2, 128 P. 563, the section is quoted with the word "liable" inserted by the court to supply the above omission.

Cross ref. Counties and municipal corporations not to become stockholders in corporations: Const. XII, 4. Stockholders not individually liable over amount of stock owned by them: Const. XI, 17. Liability of stockholders in banks: § 5247. Limitation on actions against stockholders: § 6630. Liability to assessments: § 4733 et seq.

Comp. leg.—Cal. Civ. C. 1872, § 322.

Application: This section does not apply to banking corporations, as the organization, internal management and supervision of banks are provided for by another chapter. McTamany v. Day (1912) 23 I. 95, 128 P. 563.

This section creates no new liability against a stockholder but recognizes an old liability, and makes it available to corporate creditors.

A purchaser of stock, originally issued as fully paid up in exchange for fraudulently overvalued property, is not liable to corporate creditors for the unpaid balance of its par value in excess of the true valuation of the property, where he acquired the stock in good faith and without notice. Feehan v. Kendrick, 32 I. —, 179 P. 507.

Application to existing corporations: Constitutionality: The liability of a shareholder in a corporation under this section and the following sections, which provide for an assessment against the stock of a corporation, is substantially the same as the liability imposed upon shareholders by the corporation act of '75 (R. L. '74-75, p. 618) except that by this section, and the sections providing for an assessment, an additional remedy to the remedy by action authorized by the former act, is given. Consequently these provisions of the R. S. are not, as applied to preexisting corporations, an unconstitutional impairment of the contract rights of the shareholders in such corporations. Sparks v. Lower Payette Ditch Co. (1892) 3 I. 306; 29 P. 134.

Same: Insolvent corporations: Stockholders in a corporation are not liable to creditors under this section as amended, where the corporation became insolvent and went out of business prior to the enactment of the amendment, but their liability is governed by the terms of the original section prior to the amendment. Aulbach v. Dahler (1896) 4 I. 654, 43 P. 322.

Liability to assessment: This section refers to the personal liability of stockholders, and not to the liability of stock to assessments made necessary, not only to carry out the purposes for which the corporation was created, but to preserve its property. Hall v. Eagle Rock & Willow Creek Water Co. (1897) 5 I. 551, 51 P. 110; Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

Liability can not be limited by agreement: A corporation has no authority to accept subscriptions to its capital stock upon special terms, where the terms are such as to constitute a fraud upon other subscribers, or upon persons who become creditors of the corporation. Meholin v. Carlson (1910) 17 I. 742, 107 P. 755, 134 A. S. R. 286.

Action on stockholder's liability: Possessors of certificates of stock are prima facie presumed to be bona fide holders, and it is incumbent on one suing on a stockholder's liability to allege that defendant was not a holder in good faith without notice of the fraud charged. Feehan v. Kendrick, 32 I. —, 179 P. 507.

§ 4729. Issuance of certificates. All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, or such other officers as may be authorized by the by-laws of the corporation, and all such corporations may pro-

vide in their by-laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide. ['09, p. 157, S. B. 100, § 7.]

Hist. R. S. § 2610, reen. R. C. § 2746; am. '09, p. 157, S. B. 100, § 7, reen. C. L. ib.

Cross ref. Corporations prohibited from issuing stocks or bonds except for labor done, services performed or money or property actually received: Const. XI, 9.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 323; similar as amended: Kerr's C. ib.

Purchase of stock under secret agreement: A secret agreement by which a purchaser of stock from a corporation is to get an advantage over other stockholders is void and constitutes no defense to an action brought to recover the purchase price by a receiver of an insolvent corporation. Meholin v. Carlson (1910) 17 I. 742, 754, 107 P. 755, 134 A. S. R. 286.

§ 4730. [2747] **Transfer of shares.** Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the name of the parties by and to whom transferred, the number and designation of the shares, and the date of the entry. Corporations may, by by-laws, provide that no transfer of their stock shall be made upon their books until all indebtedness to the corporation of the person in whose name the stock stands, whether for assessments, calls or otherwise, is paid. [R. S. § 2611.]

Hist. R. S. § 2611, reen. R. C. § 2747, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 324; as amended: Kerr's C. ib.

Transfer: Necessity of registration: The liability of stockholders of a corporation to creditors imposed by R. S. § 2609, is not affected by sale of the stock, unless the transfer is entered on the books of the corporation as prescribed by this section. Aulbach v. Dahler (1896) 4 I. 654, 43 P. 322.

Transfer on descent: Shares of stock in a corporation are personal property and descend according to the laws of the state which was the domicile of the owner at the time of his death, and the certificates of shares of corporate stock, which constitute evidence of ownership, are transferred according to the laws of the state wherein the corporation was organized. S. v. Dunlap (1916) 28 I. 784, 156 P. 1141.

Shares of stock in irrigation company: Shares of stock in an irrigation company are not appurtenant to lands of the owner although he irrigates such lands with the water represented by such shares. Wells v. Price (1899) 6 I. 490, 56 P. 266.

Certificates of shares of stock in an incorporated canal or ditch company are personal property. Watson v. Molden (1905) 10 I. 570, 79 P. 503.

Shares of stock in a Carey act operating company are but incidental to ownership of a water right, which is real estate. Ireton v. Idaho Irr. Co. (1917) 30 I. 310, 164 P. 687.

§ 4731. [2748] **Same: By married woman.** Shares of stock in corporations, held or owned by a married woman, may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a feme sole. All dividends payable upon any shares of stock of a corporation held by a married woman, may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman touching any shares of stock of any corporation, owned by her, is valid and binding without the signature of her husband, the same as if she were unmarried. [R. S. § 2612.]

Hist. R. S. § 2612, reen. R. C. § 2748, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 325; similar as amended: Kerr's C. ib.

Cited: Bassett v. Beam (1894) 4 I. 106, 36 P. 501.

§ 4732. [2749] **Same: By nonresident stockholders.** When shares of stock in a corporation are owned by a nonresident of the state, the president, secretary or directors of the corporation, before entering any

transfer of the shares on its books, or issuing certificate therefor to the transferee, may require satisfactory evidence that the nonresident owner was alive at the date of the transfer, and if such satisfactory evidence be not furnished, may require a bond of indemnity, with two sureties, satisfactory to the officers of the corporation, or approved by the judge of the district court of the district in which the principal office of the corporation is situate, conditioned to protect the corporation against any liability to the heirs or legal representatives of the owner of the shares, in case of his or her death before the transfer; and if such evidence or bond be not furnished when required, as herein provided, neither the corporation nor any officer thereof is liable for refusing to enter the transfer on the books of the corporation. [R. S. § 2613.]

Hist. R. S. § 2613, reen. R. C. § 2749, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 326; similar as amended: Kerr's C. ib.

ARTICLE 6.

ASSESSMENTS ON STOCK.

§ 4733. [2750] Directors may levy assessments. The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, herein provided. [R. S. § 2614.]

Hist. R. S. § 2614, reen. R. C. § 2750, reen. C. L. ib.

Cross ref. Corporate power to sell shares for delinquent assessments: § 4752.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 331; same as amended except "provided herein" for "herein provided," last words: Kerr's C. ib. Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

Cited: Sparks v. Lower Payette Ditch Co. (1892) 3 I. 306, 29 P. 134.

Unlawful assessment: Action: In an action against a corporation for the wrongful selling of stock of a shareholder, the burden is on the corporation to show a compliance with this section before attempting to assess and sell the plaintiff's stock, by showing that one-fourth of its stock had been subscribed, and the complaint in such an action is not demurrable for failure to allege that one-fourth of the stock had not been subscribed. Corcoran v. Sonora etc. Co. (1902) 8 I. 651, 71 P. 127.

Assessments and calls authorized: The statutes clearly empower a corporation not only to levy assessments or calls for instalments of unpaid portions of the subscribed capital stock, but also to levy assessments upon fully paid-up stock for the purposes enumerated in the statute. Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

Same: Defined: The word "assessment" and the words "call" or "instalments" are often used interchangeably in the statute; but strictly speaking, the word "assessment" means a demand upon stockholders for payments above the par value of their stock to meet the money demands of creditors of the corporation; while the word "call" or "instalments" means the action of the board of directors of the corporation demanding the payment of all or of a portion of unpaid subscriptions. Wall v. Basin M. Co., supra.

Assessment of paid-up stock: The levy of assessments against stock fully paid up is a proceeding in rem, by which the stock may be sold, but no personal liability attaches to the stockholder for any deficiency arising from the sale. Wall v. Basin M. Co., supra.

Nonassessment contract: A corporation is not prohibited from making a contract with its stockholders that their stock shall be nonassessable; and, if it does so, as by printing across the face of the certificate the words "fully paid and nonassessable," the corporation is bound by its contract and can not assess the stock. Wall v. Basin M. Co., supra.

Assessment in mutual company: A mortgage debt as well as current expenses of a mutual canal company may be paid by assessments levied against the stockholders as in this section provided. If directors fail to make levy stockholders can compel them to do so. Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 133 P. 899.

§ 4734. [2751] Limitation on assessments. No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation except in the cases in this section otherwise provided as follows:

1. If the whole capital of a corporation has not been paid up, and

the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

2. The directors of railroad corporations may assess the capital stock in instalments of not more than 10 per centum per month, unless in the articles of incorporation it is otherwise provided.

3. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper. [R. S. § 2615.]

Hist. R. S. § 2615, reen. R. C. § 2751, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 332; Kerr's C. ib. Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

Cited: Sparks v. Lower Payette Ditch Co. (1892) 3 I. 306, 29 P. 134; Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

§ 4735. [2752] **Same: Previous uncollected assessment.** No assessment must be levied while any portion of a previous one remains unpaid, unless:

1. The power of the corporation has been exercised in accordance with the provisions of this title for the purpose of collecting such previous assessment.

2. The collection of the previous assessment has been enjoined, or

3. The assessment falls within the provisions of one of the subdivisions of the last preceding section. [R. S. § 2616.]

Hist. R. S. § 2616, reen. R. C. § 2752, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 333; Kerr's C. ib. Same as § 275.

Cited: Sparks v. Lower Payette Ditch Co. (1892) 3 I. 306, 29 P. 134; Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

§ 4736. [2753] **Order levying assessment.** The order levying an assessment must specify the amount thereof, when, to whom and where payable; fix the day subsequent to the full term of publication of the assessment notice, on which the unpaid assessments will be delinquent, not less than 30 or more than 60 days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than 15 nor more than 60 days from the day the stock is declared delinquent. [R. S. § 2617.]

Hist. R. S. § 2617, reen. R. C. § 2753, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 334; Kerr's C. ib.

Cited: Corcoran v. Sonora etc. Co. (1902) 8 I. 651, 71 P. 127.

§ 4737. Notice of assessment. Upon making of the order the secretary must cause to be published and mailed to each stockholder at his last known place of residence, a notice thereof, in the following form:

(Name of corporation in full. Location of principal place of business.) Notice is hereby given that at a meeting of the directors held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom and where). Any stock upon which this assessment remains unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the(day appointed) to pay the delinquent assessment, together with costs of advertising and expenses of sale. (Signature of secretary with location of office.) ['09, p. 157, S. B. 100, § 8.]

Hist. R. S. § 2618, reen. R. C. § 2754; am. '09, p. 157, S. B. 100, § 8, reen. C. L. § 2754.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 335; Kerr's C. ib.

§ 4738. [2755] **Same: Publication.** The notice must be published once a week, for four successive weeks, in some newspaper of general

circulation published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if situated in a different county and a paper be published therein. If there be no newspaper published in the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and if there be none, then in a newspaper published at the capital of the state. [R. S. § 2619.]

Hist. R. S. § 2619, reen. R. C. § 2755, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 336; different as amended: Kerr's C. ib.

§ **4739.** [2756] **Delinquent notice.** If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice heretofore provided for was published, a notice substantially in the following form:

(Name in full. Location of principal place of business.) Notice—There is delinquent upon the following described stock on account of assessment levied on the (date), (and assessments previous thereto, if any), the several amounts set opposite the names of the respective shareholders as follows: (Names, number of certificate, number of shares, amount). And in accordance with law, so many shares of each parcel of such stock as may be necessary, will be sold at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with the cost of advertising and expenses of the sale. (Name of secretary, with location of office.) [R. S. § 2620.]

Hist. R. S. § 2620, reen. R. C. § 2756, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 337; Kerr's C. ib.

§ **4740.** [2757] **Same: Additional requirements.** The notice must specify every certificate of stock, the number of shares it represents and the amount due thereon, except when certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon must be stated. [R. S. § 2621.]

Hist. R. S. § 2621, reen. R. C. § 2757, reen. C. L. ib.

Comp. leg.—Cal. Same except "together with the fact that certificates for such shares have not been issued" inserted after "thereon": Civ. C. 1872, § 338; Kerr's C. ib.

§ **4741.** [2758] **Same: Publication.** The notice, when published in a daily paper must be published for 10 days, excluding Sundays and legal holidays, previous to the day of sale. When published in a weekly paper it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least 15 days prior to the day of sale. [R. S. § 2622.]

Hist. R. S. § 2622, reen. R. C. § 2758, reen. C. L. ib.

Comp. leg.—Cal. Same except "legal" omitted: Civ. C. 1872, § 339; Kerr's C. ib.

Cited: Mantle v. Jack Waite M. Co. (1913) 24 I. 613, 135 P. 854.

§ **4742.** [2759] **Delinquent stock may be sold.** By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale, upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessment due and costs of advertising and sale. [R. S. § 2623.]

Hist. R. S. § 2623, reen. R. C. § 2759, reen. C. L. ib.

Cross ref. Sale of stock of homestead corporation for delinquency: § 4850.

Comp. leg.—Cal. Same except "advertising and" omitted: Civ. C. 1872, § 340; Kerr's C. ib.

§ 4743. [2760] **Conduct of sale.** On the day, at the place, and at the time, appointed in the notice of sale, the secretary must, unless otherwise ordered by the board of directors, sell, or cause to be sold, at public auction to the highest bidder, for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising in addition to the assessment. [R. S. § 2624.]

Hist. R. S. § 2624, reen. R. C. § 2760, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 341; Kerr's C. ib.

§ 4744. [2761] **Purchaser.** The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share, is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation on payment of the assessment and costs. [R. S. § 2625.]

Hist. R. S. § 2625, reen. R. C. § 2761, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 342; Kerr's C. ib.

§ 4745. [2762] **Corporation may purchase.** If at the sale of stock no bidder offers the amount of the assessment and costs and charges due, the same may be bid in and purchased by the corporation, through the secretary, president or any director thereof, at the amount of the assessment, charges and costs due; and said amount must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation made. While the stock remains the property of the corporation it is not assessable, nor must any dividend be declared thereon, but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation. [R. S. § 2626.]

Hist. R. S. § 2626, reen. R. C. § 2762, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 343; Kerr's C. ib.

§ 4746. Same: Effect of purchase. All purchases of its own stock made by any corporation, vest the legal title to the same in the corporation, and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, on vote of a majority of all the remaining shares: *Provided,* That when the by-laws so provide, the board of directors may allow a redemption of the stock so sold upon payment of the sum for which the same was sold, together with all subsequent assessments which may be due thereon, and interest on such sums from the time they were due. Whenever any portion of the capital stock of a corporation is held by the corporation, it shall not be voted, but a majority of the remaining shares is a majority of the stock for all purposes of election or voting. ['09, p. 157, S. B. 100, § 9.]

Hist. R. S. § 2627, reen. R. C. § 2763; am. '09, p. 157, S. B. 100, § 9, reen. C. L. ib.

Comp. leg.—Cal. Analogous: Civ. C. 1872, § 344; Kerr's C. ib.

§ 4747. [2764] **Postponement of sale.** The dates fixed in any notice of assessment or notice of delinquent sale, published as aforesaid, may be extended from time to time for not more than 30 days, by order of the directors, entered on the records of the corporation; but no such order is effectual unless notice of such extension or postponement is

appended to, and published with, the notice to which the order relates. [R. S. § 2628.]

Hist. R. S. § 2628, reen. R. C. § 2764, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 345; Kerr's C. ib.

Mandatory: This section is mandatory, and by failure to comply with same the sale is void. Mantle v. Jack Waite M. Co. (1913) 24 I. 613, 135 P. 854.

§ 4748. [2765] **Defective proceedings.** No assessment is invalidated by a failure to make publication of the notices, nor by the nonperformance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings except the levying of assessment, are void, and publication must begin anew. [R. S. § 2629.]

Hist. R. S. § 2629, reen. R. C. § 2765, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 346; Kerr's C. ib.

Cited: Mantle v. Jack Waite M. Co. (1913) 24 I. 613, 135 P. 854.

§ 4749. [2766] **Actions to recover stock sold.** No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect in the notice of sale or in its publication, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid or may be due thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced within six months after such sale was made. [R. S. § 2630.]

Hist. R. S. § 2630, reen. R. C. § 2766, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 347; Kerr's C. ib.

Cited: Corcoran v. Sonora etc. Co. (1902) 8 I. 651, 71 P. 127.

Application: This section refers to a case brought by a stockholder to recover back stock that has been sold, where the sale is irregular, not where the corporation has by its contract or act divested itself of the power and authority to levy an assessment. Mantle v. Jack Waite M. Co. (1913) 24 I. 613, 135 P. 854.

§ 4750. [2767] **Proof of publication.** The publication of notice required by this title may be proved by the affidavit of the printer, publisher, foreman or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is prima facie evidence of the time and place of sale, of the quality and particular description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. Such affidavit must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are prima facie evidence of the facts therein stated. Certificates of files and records of the corporation in his office, signed by the secretary, and under the seal of the corporation, are prima facie evidence of their contents. [R. S. § 2631.]

Hist. R. S. § 2631, reen. R. C. § 2767, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 348; as amended: Kerr's C. ib.

§ 4751. [2768] **Collection of call by action.** On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof. [R. S. § 2632.]

Hist. R. S. § 2632, reen. R. C. § 2768, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 349; Kerr's C. ib.

Construed: This section must be construed with the limitations imposed by Const. XI, 17, which prohibit an action against a stockholder to recover an assess-

ment upon stock fully paid. If an assessment levied by a corporation is in the nature of a call for the unpaid portion of the par value of stock, the corporation may elect to waive the sale and proceed by action to recover the amount of the assessment. Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

ARTICLE 7.

POWERS OF CORPORATIONS.

§ 4752. Enumeration of powers. Every corporation, as such, has power:

1. Of succession, by its corporate name, for the period limited, and when no period is limited, perpetually.
2. To sue and be sued in any court, as a natural person may.
3. To make and use a common seal, and alter the same at pleasure.
4. To purchase and hold such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited by this title; and to sell, lease, assign, transfer, mortgage or convey, any rights, privileges, franchises, real or personal property of the corporation, other than its franchises of being a corporation; and to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations.
5. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation.
6. To make by-laws not inconsistent with any existing law, for the management of its business and property, the regulation of its affairs, and for the transfer of its stock.
7. To admit stockholders or members, and to sell their stock or shares for the payment of assessments or instalments.
8. To enter into any contracts or obligations essential, necessary or proper to the transactions of its ordinary affairs, or for the purposes of the corporation.
9. To create two or more kinds of stock of such classes, with such designations, preference and voting powers, or restrictions or qualifications thereof, as shall be stated or expressed in the articles of incorporation or in any certificate of amendment thereof, or as shall be fixed in the by-laws; and the power to increase or decrease the stock as in this code elsewhere provided shall apply to all or any of the classes of stock; but no preferred stock shall be issued except for cash or its equivalent nor for less than par value of its shares, and at no time shall the total amount of the preferred stock, issued and outstanding, exceed two-thirds of the capital stock paid in cash or property; and such preferred stock may, if desired, be made subject to redemption any time after three years from the issuance thereof at a price not less than par, and the holders thereof shall be entitled to receive and the corporation shall be bound to pay thereon a fixed yearly dividend, if actually earned, to be expressed in the certificate, not exceeding 8 per centum, payable quarterly, semiannually or annually before any dividend shall be set apart or paid on the common stock, and such dividend may be made cumulative. In no event shall a holder of preferred stock be personally liable for the debts of the corporation; but in case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. On a dissolution of the corporation, voluntary or otherwise, the holders of preferred stock shall be entitled to have their shares redeemed at par before any distribution of any part of the assets of the corporation shall be made to the holders of the common stock.

Any corporation now in existence may amend its articles of incorporation so as to provide for the issuance of preferred stock, or an in-

crease thereof, in the same manner as is now provided by law for amendments increasing the capital stock of corporations and the number and amount of shares therein.

When any corporation shall issue stock or bonds for labor done, services performed or property actually received, the judgment of the directors of such corporation as to the value of such labor, services or property shall, in the absence of fraud in the transaction, be conclusive.

10. To amend its articles of incorporation as follows: Changing the name of the corporation; the purposes for which the corporation was formed; the place where its principal place of business is to be transacted; the number of its directors; increasing or diminishing the capital stock or in any other respect not in violation of law desired by the stockholders: *Provided,* That the capital stock must in no case be diminished to an amount less than the indebtedness of the corporation or the estimated cost of the work it may be the object or purpose of the corporation to construct. Any amendments shall be made and certified in the manner prescribed in section 4756 for increasing or diminishing the capital stock and filed in the office of the county recorder and secretary of state. ['09, p. 157, S. B. 100, § 10.]

Hist. (See '64, p. 543, § 4) R. S. § 2633, reen. R. C. § 2769; am. '09, p. 157, S. B. 100, § 10, reen. C. L. § 2769.

Cross ref. Inhibition against issuance of stock or bonds except for value: Const. XI, 9. Limitation on transfer of franchise: Const. XI, 15.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 354; Kerr's C. ib.

Alienation: The power of alienation given by subd. 4 of this section is limited by Const. XI, 15, prohibiting the alienation of corporate franchise and property so as to release or relieve the same from liabilities incurred in operation. Towle v. Great Shoshone etc. Co. (1916) 232 F. 733, 738; aff. Am. Waterworks etc. Co. v. Towle (1917) 245 F. 706.

Assessments: Subd. 7 shows the legislative intent to provide for assessments upon full-paid stock as well as for calls for instalments for unpaid portions of subscriptions. Wall v. Basin M. Co. (1909) 16 I. 313, 101 P. 733, 22 L. R. A. (N. S.) 1013.

Borrowing money: Power of directors: Under this section construed with § 4711, the directors of a corporation are authorized to borrow money for the corporation and to issue mortgages on the corporate property to secure it, without submitting the question to the stockholders. Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 133 P. 899.

Powers limited by articles: While every corporation as such is granted the power to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations, this is not an unqualified grant of power, but must always be construed in the case of any particular corporation with reference to the purposes for which the corporation was organized as expressed in its articles of incorporation. Riley v. Callahan M. Co. (1916) 28 I. 525, 155 P. 665.

Ultra vires: The doctrine of ultra vires when invoked for or against a corporation should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. In such a case the party is estopped from setting up the defense of ultra vires. Meholin v. Carlson (1910) 17 I. 742, 107 P. 755, 134 A. S. R. 286; First Nat. Bk. v. Callahan M. Co. (1916) 28 I. 627, 155 P. 673.

Venue of actions: A domestic corporation has the same right as a resident defendant to have a trial in the county where its principal place of business is located. Easley v. New Zealand Ins. Co. (1894) 4 I. 205, 38 P. 405.

Liability for damages: A judgment for personal injuries inflicted by a corporation becomes a lien against the franchise and property of such corporation in the hands of a purchaser or grantee, and is superior to any subsequent bonds, mortgages or encumbrances placed thereon by such purchaser or grantee. Seymour v. Boise R. R. Co. (1913) 24 I. 7, 132 P. 427; Towle v. Great Shoshone etc. Co., supra.

§ 4753. [2770] **Limitation on powers.** No corporation shall emit paper money or create or issue bills, notes or other evidences of debt, upon loans or otherwise, for circulation as money. [R. S. § 2634.]

Hist. (See '64, p. 543, § 15) R. S. § 2634, reen. R. C. § 2770, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 356; Kerr's C. ib.

§ 4754. [2771] **Misnomer in written instruments.** The misnomer of a corporation in any written instrument does not invalidate the instru-

ment if it can be reasonably ascertained from it what corporation is intended. [R. S. § 2635.]

Hist. R. S. § 2635, reen. R. C. § 2771, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 357; Kerr's C. ib.

§ 4755. [2772] When to commence business: Attack on organization. If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this title, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the people of the state, on the information of the prosecuting attorney of the county of the principal place of business of the corporation. [R. S. § 2636.]

Hist. R. S. § 2636, reen. R. C. § 2772, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 358; as amended: Kerr's C. ib.

Cited: Postal Tel. Cable Co. v. Oregon Short Line Ry. Co. (1900) 104 F. 623.

Collateral attack: Individuals can not in collateral suits avail themselves of any defects in the organization of a corporation. This may be done only by the power creating them in a direct proceeding instituted for that purpose. Henry Gold M. Co. v. Henry (1913) 25 I. 333, 137 P. 523.

Estoppel: A person who has been instrumental in the formation of a corporation and who has contracted with the corporation with full knowledge of its transactions is not in a position to contest the legality of its formation. Henry Gold M. Co. v. Henry (1913) 25 I. 333, 137 P. 523.

§ 4756. [2773] Increasing and diminishing capital stock. Every corporation may increase or diminish its capital stock as in this section provided:

1. By a majority vote of the directors there may be called a meeting of the stockholders, to be convened for the purpose of increasing or diminishing the capital stock.

2. Personal notice of the time and place of such meeting, and of the object thereof, must be served on each stockholder at least 30 days prior to the date of such proposed meeting, or, in lieu thereof, the notice must be published at least once a week in a newspaper published in the county where the principal business is located, for at least 30 days.

3. The notice must also contain the amount to which it is proposed to increase or diminish the capital stock.

4. The capital stock must in no case be diminished to an amount less than the indebtedness of the corporation or the estimated cost of the works it may be the object or purpose of the corporation to construct.

5. At least two-thirds of the entire capital stock must vote in favor of such increase or diminution before the same is effected.

6. A certificate signed and verified by the chairman and secretary of the meeting, must be made, showing a strict compliance with all the requirements of this section, the amount to which the capital stock has been increased or diminished, the amount of stock represented at the meeting, and the vote by which the object was accomplished.

7. Said certificate must be subscribed by a majority of the directors, and duplicates made, one to be filed in the office of the county recorder and one in the office of the secretary of state, as provided for original articles of incorporation, and thereupon the capital stock is so increased or diminished. ['07, p. 540, § 3.]

Hist. (See '64, p. 543, §§ 20, 21, 22) R. S. § 2637; am. '07, p. 540, § 3, reen. R. C. § 2773, reen. C. L. ib.

Cross ref. Express reference to this section: Amendment of articles of incorporation by increasing or decreasing capital stock: § 4752, subd. 10.

Fictitious increase of stock prohibited and no increase shall be made without consent of persons holding majority of stock obtained at a meeting held after 30 days' notice given in pursuance of law: Const. XI, 9.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 359; as amended: Kerr's C. ib.

Mandatory: Where corporation seeks to amend articles of incorporation by increasing or diminishing stock, strict compliance with statutory requirements is necessary. Failure of directors to pass resolution calling a meeting of stockholders and failure to give notice of such meeting renders attempted increase void. Farmers' & Traders' Bk. v. Nat. Laundry etc. Co. (1917) 30 I. 788, 168 P. 670.

Injunction to restrain increase: Equity will restrain corporation attempting unauthorized increase of capital stock at suit of injured stockholder. Farmers' & Traders' Bk. v. Nat. Laundry etc. Co., supra.

§ 4757. [2774] **Limitation on acquisition of real property.** No corporation must acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except such right of way or other property as it may acquire under the laws of congress, or as may be otherwise specially provided. A corporation may acquire real property, as provided in the Code of Civil Procedure, when needed for any of the uses and purposes there mentioned. [R. S. § 2638.]

Hist. R. S. § 2638, reen. R. C. § 2774, reen. C. L. ib.

Cross ref. Condemnation of property: §§ 7404-7423.

Comp. leg.—Cal. See Civ. C. 1872, § 360; similar as amended: Kerr's C. ib.

ARTICLE 8.

CORPORATE RECORDS.

§ 4758. [2775] **Records required to be kept.** All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their directors, members or stockholders, with the time and place of holding the same, whether regular or special, and if special, their object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done; who were present, and who absent, and, if requested by any director, member or stockholder, the time must be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, the protest of any director, member or stockholder, to any action or proposed action, must be entered in full—all such records to be open to the inspection of any director, member, stockholder or creditor of the corporation. [R. S. § 2639.]

Hist. R. S. § 2639, reen. R. C. § 2775, reen. C. L. ib.

Cross ref. Refusal to permit inspection a misdemeanor: § 8506.

Comp. leg.—Cal. Same: Civ. C. 1872, § 377; Kerr's C. ib.

Cited: Mapleton Bank v. Standrod (1902) 8 I. 740, 71 P. 119.

Conclusiveness of record: Corporation estopped to deny: A corporation can not prove by parol evidence facts which are required by this section to be shown in its journal. Corcoran v. Sonora etc. Co. (1902) 8 I. 651, 71 P. 127.

Same: When parol evidence admissible: Where the verity of the records of a corporation is attacked by minority stockholders, who deny that the transactions therein purporting to be recorded ever occurred, and they contend that the true minutes of a given meeting show the very contrary of that shown by the official record, parol evidence is admissible to show what actually occurred at such meeting. Just v. Idaho Canal etc. Co. (1909) 16 I. 639, 102 P. 381, 133 A. S. R. 140.

Right of inspection by stockholders: This section and §§ 4759 and 8506 have adopted and extended the common law rule and make the right of inspection of books of corporation by stockholders absolute. The right to make copies of the records follows as an incident to the right to examine. Pfirman v. Success M. Co. (1917) 30 I. 468, 166 P. 216.

§ 4759. [2776] **Same: Stock and transfer book.** In addition to the records required to be kept by the preceding section, corporations for

profit must keep a book, to be known as the stock and transfer book, in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; instalments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such stock and transfer book must be kept open to the inspection of any stockholder, member or creditor. [R. S. § 2640.]

Hist. R. S. § 2640, reen. R. C. § 2776, reen. C. L. ib.

Cross ref. Refusal to permit inspection a misdemeanor: § 8506.

Comp. leg.—Cal. Same: Civ. C. 1872, § 378; Kerr's C. ib.

Cited: Pfirman v. Success M. Co. (1917) 30 I. 468, 166 P. 216.

Right to inspection: The stock and transfer book is not subject to the inspection of private creditors of stockholders or the public generally, but by any stockholder member or creditor (of the corporation). Mapleton Bank v. Standrod (1902) 8 I. 740, 71 P. 119.

ARTICLE 9.

RIGHT OF REPEAL.

§ 4760. [2777] **Legislature may amend or repeal title.** The legislature may at any time amend or repeal this title or any chapter, article or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred. [R. S. § 2641.]

Hist. R. S. § 2641, reen. R. C. § 2777, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 384; Kerr's C. ib.

ARTICLE 10.

SALE OF FRANCHISE ON EXECUTION.

§ 4761. [2778] **Franchise may be levied upon.** For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property. [R. S. § 2642.]

Hist. R. S. § 2642, reen. R. C. § 2778, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 388; similar as further amended: Kerr's C. ib.

§ 4762. [2779] **Purchaser to conduct business.** The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided. [R. S. § 2643.]

Hist. R. S. § 2643, reen. R. C. § 2779, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 389; Kerr's C. ib.

§ 4763. [2780] **Actions by purchaser.** The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same and may use the name of the corporation for the purpose of any action necessary to recover the same. A recovery for damages

or any penalties thus had, is a bar to any subsequent action by or on behalf of the corporation for the same. [R. S. § 2644.]

Hist. R. S. § 2644, reen. R. C. § 2780, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 390; Kerr's C. ib.

§ 4764. [2781] **Effect of sale on corporation.** The corporation whose franchise is sold, as in this title provided, in all other respects retains the same powers, is bound to discharge the same duties, and is liable to the same penalties and forfeitures as before such sale. [R. S. § 2645.]

Hist. R. S. § 2645, reen. R. C. § 2781, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 391; similar as amended: Kerr's C. ib.

§ 4765. [2782] **Redemption from sale.** The corporation may, at any time within one year after such sale, redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with 10 per cent interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof revert and belong to the corporation, as if no such sale had been made. [R. S. § 2616.]

Hist. R. S. § 2616, reen. R. C. § 2782, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 392; different as amended: Kerr's C. ib.

§ 4766. [2783] **Place of sale.** The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business. [R. S. § 2647.]

Hist. R. S. § 2647, reen. R. C. § 2783, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 393; as amended: Kerr's C. ib.

ARTICLE 11.

MISCELLANEOUS PROVISIONS.

§ 4767. [2787] **Directors are trustees on dissolution.** Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution, are trustees of the creditors and stockholders, or members, of the corporation dissolved, and have full power to settle the affairs of the corporation. [R. S. § 2648.]

Hist. (See '64, p. 543, § 23) R. S. § 2648, reen. R. C. § 2787, reen. C. L. ib.

Cross ref. Similar provision as to foreign corporations which have forfeited their right to do business in this state: '12, c. 6, p. 13 (§§ 4780-92). (In dis. op.) Rowe v. Stevens (1913) 25 I. 237, 267, 137 P. 159.

Not repealed: This section was not amended or repealed by '12, c. 6, p. 13, (§§ 4780-92). Rowe v. Stevens, supra.

Jurisdiction of court: This section recognizes the court's jurisdiction, which is broad enough to permit a court to appoint a trustee or receiver for an insolvent foreign corporation doing business in this state. Rowe v. Stevens, supra.

§ 4768. [2788] **Extending term of existence.** Every corporation formed for a period less than 50 years may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding 50 years from its formation. Such extension may be made at any meeting of the stockholders or members called by the directors expressly for considering the subject, if voted by stockholders representing two-thirds of the capital stock, or by two-thirds of the members; or may be made upon the written assent of that number of stockholders or members. A certificate of the proceedings of the meeting upon such vote, or upon such assent, must be signed by the chairman and secretary of the meeting of a majority of the directors and be filed in the office of the county recorder, where the original articles of incorporation were filed, and a certified copy thereof in the office of the secretary of state, and thereupon the term

of the corporation shall be extended for the specified period. [R. S. § 2649.]

Hist. R. S. § 2649, reen. R. C. § 2788, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 401; similar as amended: Kerr's C. ib.

§ 4769. [2789] **Continuation of existing corporations.** Any existing corporation formed under any law of this state may continue under this chapter, or under the provisions of any subsequent chapter particularly applicable thereto, by the unanimous vote of all its directors, or its election so to continue may be made at any annual meeting of the stockholders, or members or at any meeting called by the directors expressly for considering the subject, if voted by stockholders representing a majority of the capital stock, or by a majority of the members, or may be made by the directors upon the written consent of that number of such stockholders or members. A certificate of the action of the directors, signed by them and their secretary, when the election is made by their unanimous vote or upon the written consent of the stockholders or members, or a certificate of the proceedings of the meeting of the stockholders or members, when such election is made at any such meeting, signed by the chairman and secretary of the meeting and a majority of the directors, must be filed in the office of the recorder of the county where the original articles of incorporation are filed, and a certified copy thereof must be filed in the office of the secretary of state, and thereafter the corporation must continue its existence under the provisions of this title, which are applicable thereto; and must possess all the rights and powers, and be subject to all the obligations, restrictions and limitations prescribed thereby. [R. S. § 2650.]

Hist. R. S. § 2650, reen. R. C. § 2789, reen. C. L. § 2789. This provision of the Revised Statutes has been left unchanged, although it applies only to corporations organized prior to the taking effect of the Revised Statutes. This chapter having been in force continuously since that date, all corporations formed since then come within its provisions.

Comp. leg.—Cal. Different: Civ. C. 1872, § 402; repealed 1874.

Cited: (In brief of counsel) Com. Trust Co. v. Idaho Brick Co. (1913) 25 I. 755.

Estoppel to assert noncompliance: Where a corporation organized prior to the passage of the Revised Statutes commenced levying assessments immediately after such passage, and continued so to do for a period of eight years, with the acquiesence of its stockholders, a stockholder could not defeat an assessment levied by the corporation after the lapse of such a time, on the ground that it had not complied with this section. Hall v. Eagle Rock etc. Co. (1897) 5 I. 551, 51 P. 110.

§ 4770. [2790] **Same.** No corporation formed or existing before 12 o'clock, noon, of June 1, 1887, is affected by the provisions of this title unless such corporation elects to continue its existence under it as provided in the last section, but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section. [R. C. § 2790.]

Hist. R. S. § 2651; am. R. C. § 2790, reen. C. L. ib.

§ 4771. [2791] **Application of chapter.** The provisions of this chapter are applicable to every corporation, unless such corporation is exempted from its operation, or unless a special provision is made in relation thereto inconsistent with some provision in this chapter, in which case the special provision prevails. [R. S. § 2652.]

Hist. R. S. § 2652, reen. R. C. § 2791, reen. C. L. ib.

Comp. leg.—Cal. Civ. C. 1872, § 403; Kerr's C. ib.

CHAPTER 187.

FOREIGN CORPORATIONS.

Cross ref. Express reference to this article: Foreign insurance companies exempt from these provisions: §§ 4936, 4949.

Foreign corporation not to do business within the state without having one or more known places of business and an authorized agent on whom process may be served: Const. XI, 10.

Legislation valid: This statute is an amplification of Const. XI, 10, and carries out the declared policy of the state toward foreign corporations. Katz v. Herrick (1906) 12 I. 1, 86 P. 873.

Even in the absence of any constitutional declaration of the subject, the legislature has the power to impose conditions and restrictions on foreign corporations as a prerequisite to their doing business. Ib.

A corporation is a creature of the laws of the state or sovereignty where created, and has no legal existence beyond the limits of such state or sovereignty, except as is granted to foreign corporations by the laws of the state in which such corporation applies for permission to carry on its business, and the assent of the state may be upon such terms and conditions as the legislature may prescribe. Continental Oil Co. v. Hattabaugh (1912) 21 I. 285, 121 P. 81.

§ 4772. Filing of evidence of incorporation: Prerequisite to doing business. Every corporation not created under the laws of this state must, before doing business in this state, file with the county recorder of the county in this state in which is designated its principal place of business in this state, a copy of the articles of incorporation of said corporation, duly certified to by the secretary of state of the state in which said corporation was organized, and a copy of such articles of incorporation duly certified by such county recorder, with the secretary of state, paying to the latter the same fees as are provided by law to be paid for filing original articles of incorporation. [Part of R. C. § 2792.]

Hist. '03, p. 49, H. B. 45, § 1, amending R. S. § 2653; am. R. C. § 2792, reen. '15, c. 124, p. 270, reen. C. L. § 2792a.

Cited: Bettilyon Homebuilders Co. v. Philbrick, 31 I. 724, 175 P. 958.

Noncompliance: Where a foreign corporation has filed a copy of its articles of incorporation with the secretary of state, duly certified to by the secretary of the state or the territory where the corporation was organized, but such copy was not certified to by the county recorder of any county of this state, and no certified copy of its articles of incorporation had been filed with the recorder of any county of this state; held, that the corporation had failed substantially to comply with the requirements of the statute. Tarr v. Western etc. Co. (1909) 15 I. 741, 99 P. 1049, 21 L. R. A. (N. S.) 707.

Doing business in this state: What is not: Cases in which it was held that the foreign corporation was not doing business within the meaning of this article:

The sale of an article by a foreign corporation in another state through orders taken by agents is interstate commerce and does not constitute doing business in this state. Belle City Mfg. Co. v. Frizzell (1905) 11 I. 1, 81 P. 58; Toledo etc. Co. v. Young (1909) 16 I. 187, 101 P. 257; Foore v. Simon Piano Co. (1910) 18 I. 167, 108 P. 1038.

The prosecution of an action in this state for the collection of a debt contracted in another state, and payable in that state, does not constitute doing business in this state. Bonham Nat. Bk. v. Grimes Pass M. Co. (1910) 18 I. 629, 111 P. 1078.

The mere purchase at execution sale of real property, in satisfaction of a judgment procured by a foreign corporation on an interstate transaction, is not in itself doing business in this state. Foore v. Simon Piano Co. supra.

The foreclosure of a real estate mortgage assigned to the plaintiff in another state before maturity, and for which plaintiff comes into the courts of the state for the sole and only purpose of maintaining said action, does not constitute doing business within this state. Diamond Bk. v. Van Meter (1911) 19 I. 225, 113 P. 97.

§ 4773. Designation of statutory agent. Such corporation must also within three months from the time of commencement to do business in this state, designate some person in the county in which the principal place of business of such corporation in the state is situated, upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid must file such designation in the office of the secretary of state, and in the office of the clerk of the district court for such county, and a copy of such designation certified by either of said officers, must be evidence of such appointment.

It is lawful to serve on such person so designated any process issued as aforesaid, and such service must be deemed a valid service thereof.

Such notice and designation of agent on whom process may be served, shall run from the time of filing the same as herein provided, until his successor is appointed by such filing, or said office becomes vacant by resignation filed by such agent in the office in which his appointment is filed, or by his death, or removal from such county, and in case of such vacancy said corporation shall, within 60 days thereafter, refill said office as herein provided. ['15, c. 124, p. 170.]

Hist. (See '79, p. 3, § 5) R. S. § 2653; am. '03, p. 49, H. B. 45, § 1; am. R. C. § 2792; am. '15, c. 124, p. 170, reen. C. L. 2792b.

Cross ref. Express reference to this section: Service of summons: § 4144. As to effect of designation of principal place of business on venue of actions, see annotations to § 4779.

Cited: (In brief of counsel) Zimmerman v. Bradford-Kennedy Co. (1908) 14 I. 681.

Proof of service: Proof of service of summons on a foreign corporation by delivery of a copy to the president, without showing any designation by the corporation of the president as its agent for the service of process, is fatally defective. Applington v. G. V. B. Mining Co. (1898) 6 I. 216, 55 P. 241.

Service where corporation ceases business: A foreign corporation having assented to the provisions of this article and designated an agent must respond to process served upon him in a controversy arising out of business transacted within the state, even though it has ceased to do business within the state. Hill v. Empire State etc. Co. (1907) 156 F. 797.

§ 4774. Change of principal place of business in state. Any corporation which has complied with the requirements of this article may change its principal place of business in this state, to another county by filing in the office of the secretary of state and in the office of the clerk of the district court of the county in which its principal place of business has heretofore been situated, and of the clerk of the district court of the county to which such principal place of business is changed, a statement of such change, designating some person in the county to which said place of business is changed on whom process may be served, and by filing a copy of its articles of incorporation duly certified by the secretary of state of the state in which such corporation was organized or by the secretary of state in this state, in the county last mentioned. ['15, c. 124, p. 270.]

Hist. '15, c. 124, p. 270, amending R. C. § 2792, reen. C. L. § 2792c.

§ 4775. Effect of noncompliance: On contracts. No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as provided in sections 4772 and 4773 can be sued upon or enforced in any court of this state by such corporation. ['03, p. 49, H. B. 45, § 1.]

Hist. '03, p. 49, H. B. 45, § 1, amending R. S. § 2653, reen. R. C. § 2792, reen. '15, c. 124, p. 270, reen. C. L. § 2792d.

Construed: A foreign corporation which fails to comply with the requirements of this article cannot maintain a suit in any of the courts of the state for breach or violation of a contract entered into during the time the corporation has failed to comply therewith. Katz v. Herrick (1906) 12 I. 1, 86 P. 873.

This section is mandatory and must be substantially complied with in order to enable foreign corporations to maintain an action in the courts for the enforcement of contracts. Tarr v. Western etc. Co. (1909) 15 I. 741, 99 P. 1049, 21 L. R. A. (N. S.) 707; Morris-Roberts Co. v. Mariner (1913) 24 I. 788, 135 P. 1166.

The contract referred to in this section is one growing out of the "doing of business" in this state, or one so connected therewith as to be an element of such transaction. Bettilyon Homebuilders Co. v. Philbrick, 31 I. 724, 175 P. 958.

Applied to note: Where the indorsee of a nonnegotiable promissory note sues the maker thereof and the defendant sets up as one of his defenses that the payee was a foreign corporation doing business in this state, and that it failed to comply with the constitution and statutes of the state in designating an agent upon whom service of process could be made, and in filing copies of its articles of incorporation, it is error for the court to strike such defense from defendant's answer. Union Stock Yards Nat. Bk. v. Bolan (1908) 14 I. 87, 93 P. 508, 125 A. S. R. 146.

Not applicable to contracts in interstate commerce: This section is not applicable to contracts made in interstate commerce.

Belle City Mfg. Co. v. Frizzell (1905) 11 I. 1, 81 P. 58; Toledo etc. Co. v. Young (1909) 16 I. 187, 101 P. 257; Foore v. Simon Piano Co. (1910) 18 I. 167, 108 P. 1038; Bonham Nat. Bk. v. Grimes Pass M. Co. (1910) 18 I. 629, 111 P. 1087; Diamond Bk. v. Van Meter (1911) 19 I. 225, 113 P. 97.

Contracts not void: The fact that this statute points out certain penalties against noncomplying foreign corporations but does not specifically declare contracts entered into in violation of the statute to be void, does not indicate that the contracts of noncomplying foreign corporations are to be deemed valid. Katz v. Herrick (1906) 12 I. 1, 86 P. 873.

The contracts entered into by such corporation are not void but the corporation is deprived of its remedy in the courts on an action to enforce contracts made by them while in default of compliance with the requirements of law. Ib.

Same: Enforceable in federal court: This statute is remedial relating to pleadings and practice in the state courts only and does not render void the executory contracts of a foreign corporation failing to comply with it. The latter may sue thereon in the federal court. Colby v. Cleaver (1908) 169 F. 206; Continental etc. Bk. v. Corey Bros. Const. Co. (1913) 208 F. 976, 125 C. C. A. 64.

Other actions not prohibited: This section is applicable only to actions brought for the enforcement of contracts, and has no applicability to action by a foreign corporation to protect its property lawfully acquired. Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14; War Eagle Con. M. Co. v. Dickie (1908) 14 I. 534, 94 P. 1034; Ida. Fruit etc. Co. v. Great Western etc. Co. (1909) 17 I. 273, 105 P. 562; Junction Placer M. Co. v. Reed (1915) 28 I. 219, 153 P. 564.

Estoppel as applied to other party: The fact that a party to a contract with a noncomplying foreign corporation has made numerous payments of interest instalments before being sued, and without objection on the ground of the noncompliance of the corporation, does not constitute a waiver of the right to plead the corporation's failure to comply with the statute and constitution of this state in order to entitle it to do business within the state. Tarr v. Western etc. Co. (1909) 15 I. 741, 99 P. 1049, 21 L. R. A. (N. S.) 707.

In a case where a person has secured a loan from a noncomplying foreign corporation and has failed to pay the same as provided by his contract, even though the corporation has failed to qualify as provided by law in order to entitle it to do business in this state, the borrower will not be heard in a court of equity to admit the contract and the indebtedness and at the same time prosecute his action to cancel the mortgage given to secure the indebtedness, simply because the corporation failed to comply with the statute in qualifying to do business. Ib.

Pleading: Where a foreign corporation commences an action in this state and discloses upon the face of its pleading that it is a foreign corporation, it must then either show a compliance with the state laws entitling it to do business within the state or else show by the facts constituting its cause of action that the contract sued upon does not arise out of a domestic transaction or by reason of doing any business within this state. Bonham Nat. Bk. v. Grimes Pass M. Co. (1910) 18 I. 629, 111 P. 1087.

§ 4776. Same: On real estate holdings. Such corporation can not take or hold title to any realty within this state prior to making such filings, and any pretended deed or conveyance of real estate to such corporation prior to such filings shall be absolutely null and void. ['03, p. 49, H. B. 45, § 1.]

Hist. '03, p. 49, H. B. 45, § 1, amending R. S. § 2653, reen. R. C. § 2792, reen. '15, c. 124, p. 270, reen. C. L. § 2792e.

Cited: Kiesel v. Bybee (1908) 14 I. 670, 95 P. 20; Pa. etc. Co. v. Gallagher (1910) 19 I. 101, 112 P. 1044.

Construed: This section is mandatory and any conveyance made to a foreign corporation that has failed to comply with it is null and void. Dickens-West M. Co. v. Crescent etc. Co. (1914) 26 I. 153, 141 P. 566.

Where a foreign corporation at the time of acquiring property rights had previously complied by filing its articles and designating an agent, it would not be precluded from suing to protect such rights by reason of the fact that it had no designated agent at time of action. Junction Placer M. Co. v. Reed (1915) 28 I. 219, 153 P. 564.

This section does not apply to a foreign corporation which bids in real estate at execution sale for the collection of a judgment due to the corporation which judgment arises out of an interstate transaction. Foore v. Simon Piano Co. (1910) 18 I. 167, 108 P. 1038.

Prior titles not affected: A noncomplying corporation may maintain a suit to protect its title to property in this state validly acquired. Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14; War Eagle etc. Co. v. Dickie (1908) 14 I. 534, 94 P. 1034; Ida. Fruit etc. Co. v. Great Western etc. Co. (1909) 17 I. 273, 105 P. 562; Junction Placer M. Co. v. Reed (1915) 28 I. 219, 153 P. 564.

Deed to trustee for noncomplying corporation: Foreign corporation cannot take or hold title to realty prior to complying with this section and Const. XI, 10, but conveyance to a trustee for its benefit prior to doing business is not void. (Op. by Budge, J. concurred in by Sullivan, C. J.; Morgan, J. dissenting) Donaldson v. Thousand Springs P. Co. (1916) 29 I. 735, 162 P. 334.

A trustee or agent of corporation can no more take title under the statute than the corporation, and a conveyance to such a trustee is void. (Op. by Rice, J., on re-

hearing, concurred in by Morgan, J., Budge, C. J. dissenting) Donaldson v. Thousand Springs P. Co. supra.

Estoppel: The right to take and hold title to real property is one that can neither legally nor equitably be questioned by the vendor thereof after he has parted with his title and received the purchase price therefor. Keating v. Keating M. Co. (1910) 18 I. 660, 112 P. 206.

The judgment creditor of a grantor who has parted with title after receiving full consideration therefor cannot set aside the conveyance as void under this section. Donaldson v. Thousand Springs P. Co. (1916) 29 I. 735, 162 P. 334. Ib. (on rehearing, 1917) 29 I. 754, 162 P. 334.

Equitable relief: While this section is mandatory, in an equitable case where the ends of justice require, it will not be strictly enforced. Morris Roberts Co. v. Mariner (1913) 24 I. 788, 135 P. 1166.

§ 4777. Same: Liability of officers. Any and all officers, agents and representatives of said corporation, or persons claiming to be officers or agents of the same, who shall make or attempt to make any contract or agreement, or contract any indebtedness, in the name of such corporation, or for its use and benefit, before such original filings are made, or while such corporation is in default upon filing a reappointment as hereby provided, shall be, jointly and severally, personally liable upon and for all such contracts and agreements as principal contractors. ['03, p. 49, H. B. 45, § 1.]

Hist. '03, p. 49, H. B. 45, § 1, amending R. S. § 2653, reen. R. C. § 2792, reen. '15, c. 124, p. 270, reen. C. L. § 2792f.

Statute of limitations: Where it is sought to hold the officers of a noncomplying corporation personally liable under this section, action must be brought within the time prescribed by the statute of limitations. Copeland v. Dietrich Lbr. Co. (1916) 28 I. 312, 154 P. 626.

§ 4778. Same: Statute of limitations. Every such corporation which fails to comply with the provisions of this section shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporation during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state. [Part of R. C. § 2792.]

Hist. R. S. § 2653, reen. '03, p. 49, H. B. 45, § 1, amending R. S. § 2653; am. R. C. § 2792, reen. '15, c. 124, p. 270, reen. C. L. § 2792g.

Not applicable to officers: Where it is sought to hold the officers of a noncomplying foreign corporation personally liable, action must be brought within the time prescribed by the statute of limitations. Dietrich v. Copeland Lbr. Co. (1916) 28 I. 312, 154 P. 626.

Instructions: Instructions embodying this section approved. Austin v. Brown Bros. (1917) 30 I. 167, 164 P. 95; Graham v. Brown Bros. (1917) 30 I. 651, 168 P. 9.

§ 4779. Effect of compliance. Foreign corporations complying with the provisions of this article shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the state applicable to like domestic corporations. [C. L. § 2792h.]

Hist. R. S. § 2653, reen. '03, p. 49, H. B. 45, § 1, reen. R. C. § 2792, reen. '15, c. 124, p. 270; compiled and reen. C. L. § 2792h.

Cited: Tarr v. Western etc. Co. (1909) 15 I. 741, 99 P. 1049, 21 L. R. A. (N. S.) 707.

Subject to attachment: Under this section a foreign corporation is not a citizen or resident of this state within the meaning of the foreign attachment laws, and is not exempt from attachment as a nonresident. Jennings v. Ida. Ry. etc. Co. (1915) 26 I. 703, 146 P. 101, Ann. Cas. 1916E 359, L. R. A. (N. S.) 1915D 115.

Complaint: Essential allegations: Where a foreign corporation commences an action in this state and discloses upon the face of its pleading that it is a foreign corporation, it must then either show a compliance with the state laws entitling it to do business within the state or else show by the facts constituting its cause of action that the contract sued upon does not arise out of a domestic transaction, or by reason of doing any business within this state. Bonham Nat. Bk. v. Grimes Pass etc. M. Co. (1910) 18 I. 629, 111 P. 1078.

Complaint: When demurrable: A failure to set forth the performance of all the things required by the constitution and statute leaves the complaint open to demurrer on the ground of failure to show capacity to sue. Valley Lbr. etc. Co. v. Driessel (1907) 13 I. 662, 93 P. 765, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63; Valley Lbr. etc. Co. v. Nickerson (1907) 13 I. 682, 93 P. 24; Con. Wagon etc. Co. v. Kent (1913) 23 I. 690, 132 P. 305.

General demurrer not sufficient: In an action by a foreign corporation, a general demurrer does not raise the question of

plaintiff's legal capacity to sue. Valley Lbr. etc. Co. v. Driessel (1907) 13 I. 662, 93 P. 765, 13 Ann. Cas. 63, 15 L. R. A. (N. S.) 299; Valley Lbr. Co. v. Nickerson (1907) 13 I. 682, 93 P. 24.

Waiver: Unless the fact of the compliance of a foreign corporation with our state law is put in issue by demurrer or answer, it is waived. Valley Lbr. etc. Co. v. Driessel, supra; Valley Lbr. etc. Co. v. Nickerson, supra.

Answer: Insufficient denial: Where a foreign corporation alleges in its complaint its compliance with the laws of the state relative to doing business herein, a denial thereof on information and belief raises no issue. Nelson Bennett Co. v. Twin Falls etc. Co. (on rehearing) (1905) 14 I. 5, 93 P. 789; Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14; Toledo etc. Co. v. Young (1909) 16 I. 187, 101 P. 257.

Answer: Burden of proof: Where the complaint of a foreign corporation fails to allege compliance with the constitution and statutes of this state relating to foreign corporations, and defendant fails to demur, but raises the objection by pleading such noncompliance as an affirmative defense to plaintiff's right of recovery, the burden of proving such allegation is on defendant. Kiesel v. Bybee (1908) 14 I. 670, 95 P. 20.

Venue of actions: Foreign corporations doing business in this state do not acquire, by complying with this law and designating an agent for service of process, a fixed residence in this state so as to be entitled to be sued in the county in which such agent resides, but such corporations are, for the purpose of jurisdiction, nonresidents of the state and may be sued in the district court in any county designated in the complaint. Boyer v. N. P. Ry. (1901) 8 I. 74, 66 P. 826, 70 L. R. A. 691 (overruling Easley v. New Zealand Ins. Co. 4 I. 205, 38 P. 405); Boyer v. N. P. Ry. (1901) 8 I. 81, 66 P. 1082; Smith v. Intermountain Auto Co. (1913) 25 I. 212, 136 P. 1125.

By complying with this section and designating an agent for the service of process, a foreign corporation obtains the same rights as a citizen so far as the venue of an action against it is concerned, but no superior rights, and it may therefore be sued in a justice's court of the precinct in which an injury to property committed by it occurs, although the residence of the agent whom it designates is in another county. Webster v. O. S. L. Ry. (1898) 6 I. 312, 55 P. 661.

CHAPTER 188.

ANNUAL STATEMENT AND LICENSE FEE.

§ 4780. Annual statement of corporations. Every corporation organized or formed under, by or pursuant to the laws of this state, whether now existing or hereafter created, and every foreign corporation, joint stock company or association now doing business in this state, or that may hereafter do business in this state, shall, during the month of July of each year and on or before the 1st day of September next thereafter, furnish to the secretary of state and the county recorder of each county in this state, wherein the articles of such corporation are filed, an annual statement hereinafter provided for, upon blanks to be supplied by the secretary of state for filing in the office of the secretary of state, and by the county recorder for filing in the office of the county recorder of such county or counties.

The said statement shall be sworn to by one of the officers of the corporation, or managing agent, or authorized attorney in fact in this state of any foreign corporation, joint stock company or association, before an officer duly authorized to administer oaths, setting forth the name of the corporation, joint stock company or association, the location of its principal office, the names of the president, secretary and treasurer, with the post-office address of each, date of annual election of directors and officers of such corporation, joint stock company or association, the amount of authorized capital stock, the number of shares, the par value of each share, the amount of the capital stock subscribed, the amount of capital stock issued and the amount of capital stock paid up.

Every foreign corporation, joint stock company or association shall include in such statement the name and post-office address of its managing agent or attorney in fact in this state.

Nothing in this section shall be so construed as to require fire, marine, fire and marine, life, accident, life and accident, surety companies,

educational, religious, scientific and charitable corporations, and all corporations which are not organized for pecuniary profit, to file the annual statement referred to in this section. ['12, c. 6, § 1, p. 14.]

Hist. '07, p. 235, § 1, reen. R. C. § 2784; am. '09, p. 8, H. B. 15; am. '12, c. 6, § 1, p. 14, reen. C. L. 207:1.

Cited: Rowe v. Stevens (1913) 25 I. 237, 137 P. 159.

§ 4781. Annual license: Exemptions. No corporation heretofore or hereafter incorporated under the laws of this state, or of any other state, shall do or attempt to do business by virtue of its charter or certificate of incorporation, in this state, without a state license therefor: *Provided,* That nothing in this chapter shall be so construed as to require the payment of the annual license tax herein provided for, by fire, marine, fire and marine, life, accident, life and accident, surety companies, educational, religious, scientific and charitable corporations or associations, and all corporations which are not organized for pecuniary profit, all mining corporations which do not own productive mines, telephone and irrigation corporations, incorporated canals, lateral and drainage ditches, operated on the cooperative plan solely and not conducted and operated wholly or in part, for revenue purposes: *Provided further,* That all nonproductive mining corporations, all cooperative telephone and irrigation corporations, incorporated canals, lateral and drainage ditches, which are operated on the cooperative plan solely, and not conducted wholly or in part, for revenue purposes, must file the annual statement provided for in section 4780, within the time specified therein, in order to secure exemption from the payment of the annual license tax provided for in section 4782. ['12, c. 6, § 2, p. 15.]

Hist. Based upon '07, p. 235, § 2, reen. R. C. § 2785; enacted '12, c. 6, § 2, p. 15, reen. C. L. 207:2.

Cross ref. Water users' associations exempt from annual franchise tax: § 4845. License fees of insurance companies: § 5001. et seq.

Cited: N. P. Ry. Co. v. Gifford (1913) 25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436; Rowe v. Stevens (1913) 25 I. 237, 137 P. 159.

§ 4782. Annual license fee schedule. It shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, except such as are exempt by the provisions of section 4781 to procure annually from the secretary of state a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows:

When the authorized capital stock does not exceed $5000, an annual license fee of $10; when the authorized capital stock exceeds $5000 and does not exceed $10,000, $12.50; when the authorized capital stock exceeds $10,000 and does not exceed $25,000, $15; when the authorized capital stock exceeds $25,000 and does not exceed $50,000, $22.50; when the authorized capital stock exceeds $50,000 and does not exceed $100,000, $37.50; when the authorized capital stock exceeds $100,000 and does not exceed $250,000, $52.50; when the authorized capital stock exceeds $250,000 and does not exceed $500,000, $75; when the authorized capital stock exceeds $500,000 and does not exceed $1,000,000, $90; when the authorized capital stock exceeds $1,000,000 and does not exceed $2,000,000, $130; when the authorized capital stock exceeds $2,000,000, $150.

Said license tax or fee shall be due and payable on the 1st day of July of each and every year, to the secretary of state, who shall pay the same into the state treasury. If not paid on or before the hour of 4 o'clock p. m. of the 1st day of September, next thereafter, the same shall

become delinquent, and there shall be added thereto, as a penalty for such delinquency, the sum of $10.

The license tax or fee hereby provided authorizes the corporation to transact its business during the year, or for any fractional part of such year, in which such license tax or fee is paid. "Year," within the meaning of this chapter, means from and including the 1st day of July, to and including the 30th day of June next thereafter. ['12, c. 6, § 3, p. 15.]

Hist. '07, p. 235, § 2, reen. R. C. § 2785; am. '12, c. 6, § 3, p. 15, reen. C. L. 207:3.

Constitutionality: The fee required by this section is an excise and not a property or ad valorem tax. The statute is not violative either of the commerce clause of the federal constitution or of any provision of the state constitution. N. P. Ry. Co. v. Gifford (1913) 25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436; id. 27 I. 667, 151 P. 909, appeal dismissed 242 U. S. 659.

Application to intrastate commerce: The excise required by this section is not a property tax which is laid or intended to be laid upon corporations engaged exclusively in interstate commerce and cannot apply thereto, but it does apply to the local and intrastate business in which a corporation may be engaged, whether it is also engaged in interstate commerce or not. Ib.

Graduation of license tax: The authorized capital stock of a corporation is only used as a basis of measuring the license or excise tax which is imposed upon the corporation and is not used for the purpose of a basis for taxing the property of the corporation, the purpose being to graduate the license tax proportionately to the size, magnitude and probable activities of the corporation seeking to engage in domestic business. Ib.

§ 4783. Fees for fraction of year. At the time of filing a certified copy of articles of incorporation of any corporation, when filed on or between the 1st day of July and the 30th day of September, in any year, there shall be paid, in addition to all other fees required by law to be paid to the secretary of state, the full amount of the license tax provided to be paid in section 4782; when filed on or between the 1st day of October and the 31st day of December, in any year, a sum equal to three-fourths of the license tax provided for in section 4782 shall be paid; when filed on or between the 1st day of January and the 31st day of March, in any year, a sum equal to one-half of such license tax provided for in section 4782 shall be paid; and when filed on or between the 1st day of April and the 30th day of June, in any year, a sum equal to one-fourth of the license tax provided for in section 4782 shall be paid. Upon receipt of such full or fractional license tax the secretary of state shall issue a license receipt for the full or for the fractional part of the then current fiscal year. ['12, c. 6, § 4, p. 16.]

Hist. '12, c. 6, § 4, p. 16, reen. C. L. 207:4.

Cited: N. P. Ry. Co. v. Gifford (1913) 25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436.

§ 4784. Delinquent corporations: Proclamation of forfeiture. The secretary of state shall, on or before the 1st day of October in each year, report to the governor of the state, a list of all corporations which have become delinquent in the payment of the license tax provided in section 4782 of this chapter, and the governor shall forthwith issue his proclamation, declaring under this chapter that the charters of such delinquent domestic corporations will be forfeited, and the right of such foreign corporation to do business in this state will be forfeited, unless payment of the said license tax, together with the penalty for such delinquency, as hereinbefore provided, be made to the secretary of state on or before the hour of 4 o'clock p. m. of the 30th day of November next following. ['12, c. 6, § 5, p. 16.]

Hist. '12, c. 6, § 5, p. 16, reen. C. L. 207:5.

Cited: N. P. Ry. Co. v. Gifford (1913) 25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436.

§ 4785. Same: Publication of proclamation. Said proclamation shall be filed immediately in the office of the secretary of state, and said secretary of state shall immediately cause a copy of said proclamation to be published in one issue of each of two newspapers of general circulation, to be selected by the secretary of state. ['12, c. 6, § 6, p. 17.]

Hist. '12, c. 6, § 6, p. 17, reen. C. L. 207:6.

25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436.

Cited: N. P. Ry. Co. v. Gifford (1913)

§ 4786. Forfeiture of charters of delinquent corporations. At the hour of 4 o'clock p. m. of the 30th day of November of each year, the charters of all delinquent domestic corporations which have failed to pay the said license tax, together with said penalty for such delinquency, shall be forfeited to the state of Idaho; and the right of all delinquent foreign corporations to do business in this state, which have failed to pay said license tax, together with the penalty for such delinquency, shall be likewise forfeited. ['12, c. 6, § 7, p. 17.]

Hist. '12, c. 6, § 7, p. 17, reen. C. L. 207:7.

25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436.

Cited: N. P. Ry. Co. v. Gifford (1913)

§ 4787. Reinstatement of corporations. Any corporation which failed to pay the license tax and penalty required by this chapter may pay all the said license taxes and penalties prescribed by section 4782, and the license taxes and penalties that would have accrued, if such corporation had not forfeited its charter or right to do business, and any such corporation making such payment shall be relieved from the forfeiture prescribed by this chapter, and all persons exercising the powers of any such corporation, making such payment, shall be relieved from the provisions of section 4789. The secretary of state shall issue to every corporation so reinstated a certificate showing such reinstatement, and the date thereof, and any such corporation shall file a copy of such certificate of reinstatement with the county recorder of each county in this state in which it shall purchase, locate or hold property in the manner required by law by filing a copy of the articles of incorporation of such corporation: *Provided,* The rehabilitation of a corporation under the provisions of this chapter shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture: *Provided,* That in case the name of any corporation which has suffered the forfeiture prescribed by this chapter has been adopted by any other corporation since the date of said forfeiture, or a name which so closely resembles the name of such corporation as will tend to deceive, then said corporation, having suffered said forfeiture, shall be relieved therefrom, pursuant to the terms of this section of this chapter, only upon the adoption by said corporation seeking reinstatement of a new name, and in such case, nothing in this chapter contained shall be construed as permitting such corporation to be revived, or carry on any business, under its former name, and such corporation shall have the right to use its former name or take such new name only upon filing an application therefor with the secretary of state, and upon the issuing of a certificate to such corporation by the secretary of state, setting forth the right of such corporation to take such new name, or use its former name, as the case may be. ['12, c. 6, part of § 8, p. 17.]

Hist. '12, c. 6, § 8, p. 17; compiled and reen. C. L. 207:8.

25 I. 196, 136 P. 1131, appeal dismissed 235 U. S. 711, 35 S. C. R. 198, 59 L. ed. 436.

Cited: N. P. Ry. Co. v. Gifford (1913)

§ 4788. Duties of secretary of state. On or before the 31st day of December of each year the secretary of state shall make a list of all domestic corporations whose charters have been so forfeited, and of all foreign corporations whose right to do business in this state has been so forfeited, and shall transmit a certified copy thereof to each county recorder in this state, who shall file the same in his office. ['12, c. 6, § 9, p. 18.]

Hist. '12, c. 6, § 9, p. 18, reen. C. L. 207:9.

Abatement of mortgage foreclosure: In a suit in equity and in rem to foreclose a mortgage, an abatement of the action does not necessarily work a dismissal of the action or destroy the cause of action, but merely operates to suspend the further prosecution thereof until the cause which resulted in the abatement is removed, when a revival may be had and the action may be prosecuted to final judgment. Rowe v. Stevens (1913) 25 I. 237, 137 P. 159.

Presumption of good standing: Where a foreign corporation is shown to have complied with the laws of this state and to have lawfully entered upon business in this state, one dealing with such corporation or desiring to prosecute an action against it may presume that it has paid the corporation tax and is still entitled to do business in this state, and he is not chargeable with the duty of making inquiry and examination to ascertain if it has kept in good standing so long as it has continued to do business. Rowe v. Stevens, supra.

§ 4789. Penalties for violation of chapter. It shall be unlawful for any corporation delinquent under this chapter, either domestic or foreign, which has not paid the license tax or fee, together with the penalty for such delinquency, as in this chapter prescribed, to exercise the powers of such corporation, or to transact any business in this state, after the 30th day of November next following the delinquency.

Each and every person who exercises any of the powers of a corporation so delinquent, either domestic or foreign, which has not paid the license tax, together with the penalty for such delinquency, or who transacts any business for or in behalf of any such corporation, after the 30th day of November next following the delinquency, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 and not exceeding $1000, or by imprisonment in the county jail not less than 50 days and not more than 500 days, or by both such fine and imprisonment. ['12, c. 6, § 10, p. 18.]

Hist. '07, p. 235, § 3, reen. R. C. § 2786; superseded '12, c. 6, § 10, p. 18, reen. C. L. 207:10.

Cited: Rowe v. Stevens (1913) 25 I. 237, 137 P. 159.

§ 4790. Trustees for defaulting corporation and stockholders. In all cases of forfeiture under the provisions of this chapter, the directors or managers in office of the affairs of any domestic corporation whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, or any other person or persons who may be appointed by any court of competent jurisdiction to perform that duty, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited, and have full power to settle the affairs of the corporation, and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state after such forfeiture by any person having a claim against any of said corporations. ['12, c. 6, § 11, p. 18.]

Hist. '12, c. 6, part of § 11, p. 18, reen. C. L. 207:11.

Cross ref. Similar provision: § 4767. (In dis. op.) Rowe v. Stevens (1913) 25 I. 237, 267, 137 P. 159.

Jurisdiction of court to appoint receivers: This section does not limit the jurisdiction of the court in appointing trustees and receivers of a defaulting foreign corporation. Rowe v. Stevens, supra.

Right of directors to intervene: Directors of a defaulting foreign corporation who cannot defend an action in the name of the corporation may intervene and defend as trustees. Otherwise, the court may appoint a trustee to represent the corporation. (Con. op.) Rowe v. Stevens, supra.

§ 4791. Actions against corporation not abated. No action pending against any corporation, at the time of such forfeiture, shall abate thereby, but may be prosecuted to final judgment, and the same may be enforced by execution with the same force and effect, and in like manner as though no forfeiture had occurred. ['12, c. 6, proviso in § 11, p. 19.]

Hist. '12, c. 6, proviso in § 11, p. 19, reen. C. L. 207:12.

§ 4792. Same: Enforcement of judgments. Where judgment has been entered against any corporation prior to forfeiture under this chapter an execution may be issued thereon and the property of said corporation, or which may come into the hands of any trustee for it, may be levied upon, seized and sold to satisfy the same with like force and effect as though such forfeiture has not occurred. ['12, c. 6, proviso in § 11, p. 19.]

Hist. '12, c. 6, proviso in § 11, p. 19, reen. C. L. 207:13.

CHAPTER 189.

RAILROAD CORPORATIONS.

ARTICLE 1.

GENERAL PROVISIONS AND POWERS OF RAILROADS.

Cross ref. Railroad transportation and express companies are common carriers, and all railroads are public highways, and subject to legislative control: Const. XI, 5. Equal rights guaranteed and discrimination prohibited: Const. XI, 6. Regulation by public utilities commission: c. 119.

§ 4793. [2793] **Election of directors.** Directors of railroad corporations may be elected at a meeting of the stockholders other than the annual meeting, as a majority of the fixed capital stock may determine, or as the by-laws may provide; notice thereof to be given as provided for notices of meetings to adopt by-laws in chapter 186. [R. S. § 2663.]

Hist. R. S. § 2663, reen. R. C. § 2793, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 454; Kerr's C. ib.

§ 4794. Issuance of bonds. Railroad corporations may borrow on the credit of the corporation, and under such regulations and restrictions as the directors thereof may impose, such sums of money as may be necessary for constructing, completing, equipping, extending and improving their railroad, and all else relative thereto, and for leasing, purchasing or operating the whole or any part of the railroad of any other railroad corporation, together with the franchises, powers, immunities, and all other property or appurtenances appertaining thereto, and may issue and dispose of bonds and promissory notes therefor bearing interest at a rate not exceeding 10 per cent per annum, and may also issue bonds and promissory notes bearing interest not in excess of the rate aforesaid, in payment of any debts or contracts for constructing, completing, equipping, extending and improving their road, and all else relative thereto, and for leasing, purchasing or operating the whole or any part of the railroad of any other railroad corporation, together with the franchises, powers, immunities and all other property or appurtenances appertaining thereto and to secure

the payment of any or all of such bonds and notes, they may mortgage their corporate property and franchises. ['15, c. 13, § 1, p. 49.]

Hist. R. S. § 2664, reen. R. C. § 2791; am. '11, c. 11, § 1, p. 28; am. '15, c. 13, § 1, p. 49, reen. C. L. § 2794.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 456; amended: Kerr's C. ib.

§ 4795. [2795] **Same: Sinking fund: Conversion into stock.** The directors must provide a sinking fund, to be specially applied to the redemption of such bonds on or before their maturity, and may also confer on any holder of any bond or note issued, for money borrowed or in payment of any debt or contract for the construction and equipment of such road, the right to convert the principal due or owing thereon into stock of such corporation, at any time within eight years from the date of such bonds, under such regulations as the directors may adopt. [R. S. § 2665.]

Hist. R. S. § 2665, reen. R. C. § 2795, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 457; Kerr's C. ib.

§ 4796. [2796] **Enumeration of powers.** Every railroad corporation has power:

1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents and employees may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto.

2. To receive, hold, take and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it to aid and encourage the construction, maintenance and accommodation of such railroad.

3. To purchase, or by voluntary grants or donations to receive, take possession of, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of such railroad, and for all stations, depots and other purposes necessary to successfully work and conduct the business of the road.

4. To lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same: *Provided,* That any such railroad corporation may take and hold any right of way or other property, of whatever width or extent that it may acquire under the laws of congress.

5. To construct its road across, along or upon any stream of water, water course, navigable stream, street, avenue or highway, or across any railway, canal, ditch or flume which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation must restore the stream or water course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise.

6. To cross, intersect, join or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, must unite with the owners of such new railroad in forming such new intersections and connections, and grant facilities therefor. And if the two corporations can not agree upon the amount of compensation to be

made therefor, or the points or the manner of such crossings, intersections and connections, the same must be ascertained and determined as is provided in the Code of Civil Procedure.

7. To purchase lands, timber, stone, gravel or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in the Code of Civil Procedure for the condemnation of lands; and to change the line of its road in whole or in part whenever a majority of the directors so determine, as is provided hereinafter, but no such change must vary the general route of such road as contemplated in its articles of incorporation.

8. To carry persons and property on their railroad and receive tolls or compensation therefor.

9. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures and machinery for the accommodation and use of their passengers, freight and business.

10. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor within the limits prescribed by law, and subject to alteration, change or amendment by the legislature at any time.

11. To regulate the force and speed of their locomotives, cars, trains or other machinery used and employed on their road, and to establish, execute and enforce all needful and proper rules and regulations for the management of its business transactions usual and proper for railroad corporations. [R. S. § 2666.]

Hist. R. S. § 2666, reen. R. C. § 2796, reen. C. L. ib.

Cross ref. Condemnation proceedings: §§ 7404-7423.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 465; additional provision as amended: Kerr's C. ib.

Cited: (Subd. 5) Idaho etc. R. R. Co. v. Post Falls L. Co. (1911) 20 I. 695, 119 P. 1098, 2 N. C. C. A. 464, 38 L. R. A. (N. S.) 114; (on rehearing) N. P. Ry. Co. v. Hirzel (1916) 29 I. 438, 461, 161 P. 854.

Right of way location: The power to locate a railroad right of way by a corporation being vested in its board of directors, some official corporate action is necessary before such corporation can make a valid location. Blackwell L. Co. v. Empire Mill Co. (1916) 29 I. 421, 160 P. 265.

§ 4797. [2797] **Purchase, sale and guaranty of securities.** Any railroad corporation, whether chartered by, or organized under, the laws of this state or of the territory of Idaho, or of the United States, or of any other state or territory, may take, purchase, hold, sell and dispose of, or guarantee the payment of, the bonds and securities of any other railroad corporation whose line of railroad is continuous of, or by lease, traffic contract, or otherwise connected with, its own line. ['90-91, p. 16, § 1.]

Hist. '90-91, p. 16, § 1, reen. '99, p. 10, § 1, reen. R. C. § 2797, reen. C. L. ib.

§ 4798. [2798] **Bridging navigable streams.** Any railroad corporation heretofore duly organized and incorporated under the laws of this state, or of the United States, or of any other state or territory, or which may hereafter be duly incorporated and organized under the laws of this state, or of the United States, or of any other state or territory, and authorized to do business in this state and to construct and operate railroads therein, shall have, and hereby is given, the right to build and construct, possess and own, bridges across the navigable streams and waters within this state, over or across which the projected line or lines of railway of such railroad corporation, or either of them, will run: *Provided,* That said bridges are to be constructed in good faith for the purpose of being made a part of the constructed line

of said railroad, or a part of any of the line thereof to be constructed and in course of construction, and to be used by such railroad corporation as a part of its line of railroad so constructed, or to be constructed, for the more convenient, expeditious and safe operation thereof: *Provided further,* That such bridges shall be so constructed as to not interfere with, impede or obstruct the navigation of such stream or navigable waters, and shall comply with, and be subject to, the acts of congress relating to navigable streams, and the rules and regulations of the executive departments. ['90-91, p. 32, § 1.]

Hist. '90-91, p. 32, § 1, reen. '99, p. 20, § 1, reen. R. C. § 2798, reen. C. L. ib.

Question of fact: whether a railroad company, in bridging a stream, has unreasonably and unnecessarily impaired or obstructed navigation is a question of fact. Idaho etc. R. R. Co. v. Post Falls L. Co. (1911) 20 I. 695, 119 P. 1098, 2 N. C. C. A. 464, 38 L. R. A. (N. S.) 114.

§ 4799. [2799] **Construction of extensions and branches.** Any railroad corporation chartered by or organized under the laws of this state, or of any state or territory, or under the laws of the United States, and authorized to do business in this state, may extend its railroad from any point named in its charter or articles of incorporation, or may build branch roads, either from any point on its line of road or from any point on the line of any other railroad connecting, or to be connected, with its road, the use of which other road between such points and the connection with its own road, such corporation shall have secured by lease or agreement for a term of not less than ten years from its date. Before making any such extension, or building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the record of its proceedings, designate the route of such proposed extension or branch by indicating the place from and to which said railroad is to be constructed, and the estimated length of such railroad, and the name of each county in this state through or into which it is constructed or intended to be constructed, and file a copy of such record, certified by the president and secretary, in the office of the secretary of state, who shall indorse thereon the date of filing thereof and record the same. Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch, and receive aid thereto, which it would have had if it had been authorized in its charter or articles of incorporation. ['90-91, p. 124, § 1.]

Hist. '90-91, p. 124, § 1, reen. '99, p. 81, § 1, reen. R. C. § 2799, reen. C. L. ib.

§ 4800. [2800] **Consolidation, sales and leases.** Any such railroad corporation may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when such other railroad corporation does not own any competing line of railroad, upon such terms as may be agreed upon, and become one corporation, by any name selected, which, within this state, shall possess all of the powers, franchises, and immunities, including the right of further consolidation with other corporations under this section, and be subject to all the liabilities and restrictions such as such corporations peculiarly possess, or were subject to at the time of consolidation by the laws then in force applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock, in person or by proxy, at the regular annual meeting thereof, or a special meeting called for that purpose in the manner provided by the by-laws of the respective consolidating corporations, or by the consent, in writ-

ing, of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval or such consent, and accompanied by lists of their stockholders and the numbers of shares held by each, duly certified by the respective presidents and secretaries, with the respective corporate seals of such corporations affixed, shall be filed for record in the office of the secretary of state before any such consolidation shall have any validity or effect.

Any railroad corporation whose line is wholly or in part within this state, whether chartered by or organized under the laws of this state, or of any other state or territory, or of the United States, may lease or purchase and operate the whole or any part of the railroad of any other railroad corporation, together with the franchises, powers, immunities and all other property or appurtenances appertaining thereto; (or any railroad company may sell or lease the whole or any part of its railroads or branches within or without this state, constructed, or to be constructed, together with all property and rights, privileges and franchises pertaining hereto, to any railroad company organized or existing pursuant to the laws of the United States or of this state, or of any other state or territory of the United States); and all such purchases or leases heretofore made or entered into are for all intents and purposes hereby ratified and confirmed: *Provided,* That in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated, at the par value thereof, nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation. ['01, p. 214, § 1.]

Hist. '90-91, p. 124, § 2, reen. '99, p. 81, § 2; am. '01, p. 214, § 1, reen. R. C. § 2800, reen. C. L. ib.

Cross ref. Domestic railroad or other corporations consolidating with foreign corporations do not thereby become foreign corporations: Const. XI, 14.

§ 4801. [2801] **Extensions into the state.** Any railroad corporation chartered by or organized under the laws of the United States, or of any state or territory, whose constructed railroad shall reach or intersect the boundary line of this state at any point, may extend its railroad into the state from any such point or points to any place or places within this state, and may build branches from any point on such extension. Before making such extension, or building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the record of its proceedings, designate the route of such proposed extension or branch by indicating the place from and to which such extension or branch is to be constructed, and the estimated length of such extension or branch, and the name of each county in this state through or into which it is constructed or intended to be constructed, and file a copy of such record, certified by the president and secretary, in the office of the secretary of state, who shall indorse thereon the date of filing thereof and record the same. Thereupon such corporation shall have all the rights and privileges to make such extension, or build such branch, and receive such aid thereto as it would have had had it been authorized so to do by articles of incorporation duly filed in accordance with the laws of this state. It shall be the duty of railroad companies, when intersecting or crossing any other railroad in this state, to so arrange their sidetracks or switches that cars or freight may be readily transferred from one track to the other at the option of the shipper. ['90-91, p. 124, § 3.]

Hist. '90-91, p. 124, § 3, reen. '99, p. 81, § 3, reen. R. C. § 2801, reen. C. L. ib.

§ 4802. [2802] **Application and construction of preceding sections.** The three preceding sections shall not apply to any corporations before such corporations shall have filed an acceptance of the provisions of the state constitution, as provided in section 7, of article XI, of the constitution, nor shall anything in said sections contained ever be so construed as to exempt any railroad property from taxation. [R. C. § 2802.]

Hist. '90-91, p. 124, §§ 4, 5, reen. '99, p. 81, §§ 4, 5; am. R. C. § 2802, reen. C. L. ib.

ARTICLE 2.

CONSTRUCTION OF ROAD.

§ 4803. [2803] **Map and profile.** Every railroad corporation in this state must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land acquired for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the secretary of state; and also like maps of the parts thereof located in different counties, and file the same in the office of the recorder of the county in which such parts of the road are, there to remain of record forever. The maps and profiles must be certified by the chief engineer, the acting president and secretary of such company, and copies of the same, so certified and filed, be kept in the office of the secretary of the corporation, subject to examination by all parties interested. [R. S. § 2667.]

Hist. R. S. § 2667, reen. R. C. § 2803, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 466; Kerr's C. ib.

§ 4804. [2804] **Altering location.** If, at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may, as provided in subdivision 7, of section 4796, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are on file, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location, within five years after such change. No new location as herein provided, must be run so as to avoid any points named in their articles of incorporation. [R. S. § 2668.]

Hist. R. S. § 2668, reen. R. C. § 2804, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 467; Kerr's C. ib.

§ 4805. [2805] **Time for commencing and completing construction.** Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited. [R. S. § 2669.]

Hist. R. S. § 2669, reen. R. C. § 2805, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 468; additional provisions as amended: Kerr's C. ib.

§ 4806. [2806] **Crossings and intersections.** Whenever the track of one railroad intersects or crosses the track of another railroad, whether the same be a street railroad, wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and

adjusted as to permit the passage of the cars on each road with as little obstruction as possible; and in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under the Code of Civil Procedure, and the damages assessed and the right of way granted as in other cases. [R. S. § 2670.]

Hist. R. S. § 2670, reen. R. C. § 2806, reen. C. L. ib.

Cross ref. Condemnation proceedings: §§ 7404-7423.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 469; Kerr's C. ib.

§ 4807. [2807] **Use of streets: Consent of authorities.** No railroad corporation must use any street, alley or highway, or any of the land or water within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate. [R. S. § 2671.]

Hist. R. S. § 2671, reen. R. C. § 2807, reen. C. L. ib.

Cross ref. Railroads not to be constructed within municipal corporations without the consent of the local authorities: Const. XI, 11.

Comp. leg.—Cal. Same: Civ. C. 1872, § 470; Kerr's C. ib.

Cited: Trueman v. St. Maries (1912) 21 I. 632, 123 P. 508.

§ 4808. [2808] **Crossing other railroads and highways.** Whenever the track of such railroad crosses a railroad or highway, such railroad or highway may be carried under, over, or on a level with the track as may be most expedient; and in cases where an embankment or cutting necessitates a change in the line of such railroad or highway, the corporation may take such additional lands and materials as are necessary for the construction of such road or highway on such new line. If such other necessary lands cannot be had otherwise, they may be condemned as provided in the Code of Civil Procedure; and when compensation is made therefor, the same becomes the property of the corporation. [R. S. § 2672.]

Hist. R. S. § 2672, reen. R. C. § 2808, reen. C. L. ib.

Cross ref. Condemnation proceedings: §§ 7404-7423. Intersections at railroad crossings: § 4801.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 472; Kerr's C. ib.

Maintenance of private crossing: Where a railroad in obtaining a grant of a right of way agrees to maintain a crossing over its road, it cannot thereafter complain that the maintenance of the crossing was more burdensome than they anticipated. Fox v. Spokane I. Ry. (1914) 26 I. 60, 140 P. 1103.

ARTICLE 3.

OPERATION OF ROAD.

§ 4809. [2809] **Checking baggage.** A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employee of a railroad corporation, and a duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of $20 to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employee of the railroad corporation he may recover the value thereof from the corporation. [R. S. § 2674.]

Hist. R. S. § 2674, reen. R. C. § 2809, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 479; Kerr's C. ib.

Constitutionality: The requirement of this section that a railroad company shall not collect toll or fare from a passenger when it fails, neglects or refuses to deliver to him a check for his baggage is valid and binding upon such company as a part of the penalty for its failure to comply with the statute, and is not taking of prop-

erty without due process of law. Tarr v. O. S. L. R. R. Co. (1908) 14 I. 192, 93 P. 957, 125 A. S. R. 151.

Liability of company: Where a railroad company has no night agent at a station to receive and check baggage, but stops its train at such station and takes on a passenger and his baggage, and after the passenger boards the train and demands a check for his baggage and declines to pay his fare or deliver up his ticket until he receives such check, and the employees of the company in charge of the train refuse to deliver a baggage check, and, on the contrary, eject the passenger from the train, the railroad company will be held liable in damages for the tort so committed. Tarr v. O. S. L. R. R. Co. supra.

§ 4810. [2810] **Accommodations for passengers and freight.** Every such corporation must start and run their cars for the transportation of persons and property, at such regular times as they shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or is offered for transportation at the place of starting, at the junction of other railroads and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport and discharge such passengers and property at, from and to such places, on the due payment of toll, freight or fare therefor. [R. S. § 2675.]

Hist. R. S. § 2675, reen. R. C. § 2810, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 481; similar as amended: Kerr's C. ib.

Cross ref. Equal transportation rights guaranteed and discriminations prohibited: Const. XI, 5.

Cited: (In brief of counsel) McLean v. Dist. Ct. (1913) 24 I. 441.

§ 4811. [2811] **Refusal to accept passengers or freight.** In case of refusal by such corporation or its agents so to take and transport any passengers or property, or to deliver the same at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit. [R. S. § 2676.]

Hist. R. S. § 2676, reen. R. C. § 2811, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 482; Kerr's C. ib.

§ 4812. [2812] **Accommodations to be sufficient.** Every railroad corporation must furnish on the inside of its passenger cars, sufficient room and accommodations for all passengers to whom tickets are sold for any one trip, and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars. [R. S. § 2677.]

Hist. R. S. § 2677, reen. R. C. § 2812, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 483; Kerr's C. ib.

§ 4813. [2813] **Printed rules and regulations.** Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section. [R. S. § 2678.]

Hist. R. S. § 2678, reen. R. C. § 2813, reen C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 484; Kerr's C. ib.

§ 4814. Erection and maintenance of fences: Liability for damages. Every railroad company or corporation operating any steam or electric railroad in this state shall erect and maintain lawful fences, not less than four feet high, on each side of its road, where the same

passes through or along enclosed or adjoining cultivated fields or enclosed lands, with proper and necessary openings and gates therein and farm crossings; and also construct and maintain cattle guards suitable and sufficient to prevent horses, cattle, mules or other animals from getting on such railroads, at all highway crossings where such railroad is fenced up to such highway crossing.

Until such fences, openings, gates, farm crossings and cattle guards shall be duly and properly made, installed and maintained, such railroad company or corporation shall be liable in a civil action to any and all person or persons who may sustain any loss, injury or damage by the wounding, maiming or killing of any horse, mare, gelding, filly, jack, jenny or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, which shall be done by such railroad company or corporation, or its agents or servants, in the operation and management of engines, cars, or other rolling stock, upon or over such railroad, whether such person or persons operating or in charge of such engine, cars or other rolling stock were guilty of negligence or not; and such railroad company or corporation shall also be liable in a civil action to any and all persons who may sustain any loss, injury or damage by the wounding, maiming or killing of any horse, mare, gelding, filly, jack, jenny or mule, or any cow, heifer, bull, ox, steer or calf, or any other domestic animal which shall be done by such railroad company or corporation, or its agents or servants in the operation or management of engines, cars, or other rolling stock upon or over such railroad, if any such animal or animals escape from adjoining lands and come upon the right of way or railroad tracks of such railroad company or corporation, occasioned by the failure of such railroad company or corporation to construct and maintain such fences, gates, farm crossings or cattle guards, whether the person or persons operating or in charge of such engine, cars or other rolling stock were guilty of negligence or not; but after such fences, gates, farm crossings and cattle guards shall have been duly made, installed and maintained, such railroad company or corporation shall not be liable for any such damage, unless negligently or wilfully done, and in all actions for the recovery of damages under this section, proof of the wounding, maiming or killing of such animal or animals by such railroad company or corporation, shall be prima facie evidence of negligence or wilfulness on the part of such railroad company or corporation.

If any railroad company or corporation, aforesaid, fail, neglect or refuse for and during a period of three months after the completion of its road through or along the fields or enclosures hereinbefore mentioned, to erect, install and maintain any fences, openings, gates, farm crossings, or cattle guards as herein required, after having received not less than 30 days' notice requiring them to erect, install and maintain such fences, openings, gates, farm crossings or cattle guards, then the owner of such field or enclosure may erect and maintain such fences, openings, gates, farm crossings and cattle guards, and shall thereupon have a right to recover from such railroad or corporation, the full value of the work so done, by a civil action in any court of competent jurisdiction. ['11, c. 223, § 1, p. 706.]

Hist. (See R. S. § 2679, reen. R. C. § 2814) '07, p. 324, § 1, reen. R. C. § 2815; am. '11, c. 223, § 1, p. 706, reen. C. L. ib.

Cross ref. Express reference to this section: Claims for damages: § 4816.

Comp. leg.—Mont. Similar: R. C. §§ 4308, 4309. Saccamonno v. Great Nor. Ry. Co. (1917) 30 I. 513, 166 P. 267.

Cited: (Former related statute) Patrie v. O. S. L. Ry. (1899) 6 I. 448, 56 P. 82; Pilmer v. Boise Traction Co. (1908) 14 I. 327, 94 P. 432, 125 A. S. R. 161, 15 L. R. A. (N. S.) 254; Monical v. N. P. Ry. Co. (1910) 19 I. 150, 112 P. 764; Brown v. O. S. L. Ry. Co. (1911) 20 I. 364, 118 P. 768.

Constitutionality: The statute which this section repealed (R. S. § 2680) was held unconstitutional because it made the railroad liable for killing an animal without any proof of negligence or of violation of statutory duty. Catril v. Union Pac. Ry. Co. (1889) 2 I. 576, 21 P. 416; Jones v. O. S. L. Ry. Co. (1899) 6 I. 441, 56 P. 76.

A section which this supersedes was held to be a general police regulation, designed not merely for the benefit of the adjoining owners, but for the protection of property in domestic animals generally and for the safety of passengers who would be exposed to peril by collision with cattle coming upon the track. The company is under a general obligation to the public and not a limited obligation to adjoining landowners. Johnson v. O. S. L. Ry. Co. (1900) 7 I. 355, 63 P. 112.

In order to enforce the duty to fence the legislature may prescribe appropriate penalties. The mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are mere matters of legislative discretion. Hindman v. O. S. L. Ry. Co., 32 I. —, 178P. 837.

Construed: Liability of railroad: Until the railroad has complied with this section, it is liable, regardless of any negligence on the part of its servants, for all damages incurred by the destruction of live stock. Bernhardi v. N. P. Ry. Co. (1910) 18 I. 76, 108 P. 542, 27 L. R. A. (N. S.) 796.

Application: Rural districts: "Inclosed or cultivated fields or inclosed lands" as used in this section refers to rural or country districts. The section does not apply to a municipality or town, whether incorporated or not, unless its limits are so extended as to include fields. Bernhardi v. N. P. Ry. Co. supra.

Application: Crossings: This section applies only to stock killed on the company's line where it is required to fence it, and not at highway crossings. Yates v. Camas Prairie R. R. Co. (1912) 22 I. 802, 128 P. 545.

Maintenance of gates: This section requires every railroad company to erect and maintain fences, with gates at private crossings, at places where it is required to fence, which gates so maintained shall be kept closed by the railroad company, as far as third parties and the public are concerned. Saccamonno v. Great Nor. Ry. Co. (1917) 30 I. 513, 166 P. 267.

Maintenance of cattle guards: It is the duty of a railroad company to maintain a cattle guard at a highway crossing where it has fenced its right of way up to the highway, whether it has done so voluntarily or because required to fence by the statute. Strong v. O. S. L. Ry. Co. (1917) 31 I. 48, 169 P. 179.

§ 4815. [2816] **Crossings and cattle guards.** It shall be the duty of every railroad company whose line runs through or across any desert or other unoccupied territory, to keep and maintain suitable crossings and cattle guards, wherever any public highway or publicly traveled road crosses the same, and to place gates at convenient intervals not exceeding four miles apart, for the crossing of the same wherever there are no roads within such distances. ['07, p. 324, § 2.]

Hist. '07, p. 324, § 2, reen. R. C. § 2816, reen. C. L. ib.

Construed: It was intended that this section should apply to great stretches of country traversed by railroads, but not cultivated or inclosed. It was not intended to apply to such lands as are included in § 4814. Brown v. O. S. L. Ry. Co. (1911) 20 I. 364, 118 P. 768.

It was not intended by this section to require a railroad company to erect gates in places where its track is not fenced nor required to be fenced. Ib.

§ 4816. Claim for damages. Any person claiming damages under section 4814 must serve notice of his claim in writing signed by such person, or some one in his behalf, upon any station agent, ticket agent, or other agent of such railroad company or corporation, within six months after the alleged damage is done, and all suits for such damage must be commenced within one year after the service of such notice. ['11, c. 223, § 2, p. 707.]

Hist. '07, p. 324, § 3, reen. R. C. § 2817; am. '11, c. 223, § 2, p. 707, reen. C. L. § 2817.

Cited: Wallace v. O. S. L. Ry. Co. (1909) 16 I. 103, 100 P. 904; Strong v. O. S. L. Ry. Co. (1917) 31 I. 48, 169 P. 179.

Purpose of notice: The purpose of the notice required by this section is to prevent stale claims being filed against the company, and to afford the latter an opportunity to make an investigation, the liability of the company being limited to the value of the animal or animals killed or wounded, if the company's right of way fence has been erected and maintained as required by law. Hindman v. O. S. L. R. Co. 32 I. —, 178 P. 837.

§ 4817. Recovery of attorneys' fees. In all suits under section 4814 if the plaintiff recover any damages he shall also be entitled to recover reasonable attorneys' fees, together with his costs of suit. ['11, c. 223, § 3, p. 708.]

Hist. '07, p. 324, § 4, reen. R. C. § 2818; am. '11, c. 223, § 3, p. 708, reen. C. L. § 2818.

Cited: (On rehearing) Yates v. Camas P. R. R. Co. (1912) 22 I. 802, 806, 128 P. 545.

Constitutional: This section is a proper police regulation, designed to compel railroad companies to comply with the law requiring them to maintain fences along their rights of way for the public safety, and to provide a penalty for violation thereof. It does not deprive them of their property without due process of law nor deny to them the equal protection of the laws, and is not repugnant to the 14th amendment to the federal constitution. Hindman v. O. S. L. R. Co. 32 I. —, 178 P. 837.

§ 4818. [2819] **Book of descriptions of stock killed.** Every railroad company must keep a book at a principal station in each county into or through which its road runs, to be designated by the company, and a notice of the station so designated must be filed with the recorder of the county in which the station is located; and every such company must cause to be entered in said book, within 15 days after the killing or maiming of any animal, a description as nearly as may be of such animal, its color, age, marks and brands, and keep said book subject to public inspection. Should any company fail to keep such book, or to file such notice in the manner herein provided, or to enter therein such description of any animal maimed or killed, for a period of 15 days thereafter, such company is liable to the owner of such animal for twice the value thereof. [R. S. § 2681.]

Hist. R. S. § 2681, reen. R. C. § 2819, reen. C. L. ib.

Cited: Jones v. O. S. L. Ry. Co. (1899) 6 I. 441, 56 P. 76.

Constitutionality: Constitutionality of this section mentioned but not determined. Wilson v. O. S. L. Ry. Co. (1915) 28 I. 54, 152 P. 1062.

Purpose: The duty imposed upon the railroad company under this section is the keeping of a book, the evident purpose of which is to give notice, but this is not necessary where the owner has actual notice. Wilson v. O. S. L. Ry. Co. supra.

Negligence must be shown: The killing of the animals and the failure to keep the book herein required do not alone render the company liable. The plaintiff must in addition allege and prove negligence on the company's part. Wilson v. O. S. L. Ry. Co. supra.

§ 4819. [2820] **Disposal of carcass.** In case of maiming or killing any cattle, sheep or hog, the body of the animal belongs to the company, unless the owner elects, within 12 hours, to take the same in satisfaction or reduction of damages. The company may proceed to take care of and preserve the body of such animal, and must, unless taken by the owner, take off enough of the hide to show distinctly any brands on such animal, also both ears, including the hide between the ears, and in such way as to keep the ears together, and the pieces of hide so taken off, and the ears of each animal, must be attached together and preserved for at least three months for inspection at the station house nearest to the place where such killing or maiming occurred. For every failure so to keep any such pieces of hide and ears for inspection, the company, in addition to the damages to the owner, forfeits $100, to be recovered in an action in the name of the state, in any court of competent jurisdiction, one-half to be paid into the school fund of the county, and the residue to the informer. [R. S. § 2682.]

Hist. R. S. § 2682 (see '88-89, p. 45), reen. R. C. § 2820, reen. C. L. ib.

§ 4820. [2821] **Bell or whistle to be sounded.** A bell of at least 20 pounds weight must be placed on each locomotive engine, and be rung at a distance of at least 80 rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of $100 for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the prose-

cuting attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains or cars, when the provisions of this section are not complied with. [R. S. § 2683.]

Hist. R. S. § 2683, reen. R. C. § 2821, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 486; Kerr's C. ib.

Construed: This section does not rest the liability for damages upon the contingency that the injury sustained was the result of the failure to ring the bell or blow the whistle, but declares absolutely that where the bell is not rung or the whistle blown and damages are sustained, the company is liable. Wheeler v. O. R. & N. Co. (1909) 16 I. 375, 102 P. 347.

Failure of railway company to ring bell or sound whistle constitutes negligence per se, negligence in law. Wheeler v. O. R. & N. Co. supra; Graves v. N. P. Ry. Co. (1917) 30 I. 542, 166 P. 571.

Contributory negligence: Railroad company is liable for damages where provisions of this section are not complied with unless person injured is guilty of contributory negligence. Wheeler v. O. R. & N. Co. supra; Graves v. N. P. Ry. Co. supra.

If the duty imposed upon the company by this section is observed the company has a right to assume that persons on the highway will look and listen. Burrow v. Idaho etc. R. R. Co. (1913) 24 I. 652, 135 P. 838.

There is no arbitrary rule as to when or where the traveler must stop, look and listen. Graves v. N. P. Ry. Co. supra.

§ 4821. Ejection of passengers: Penalty for employee's misconduct. If any passenger on any railroad train refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, or uses abusive, vulgar, obscene or profane language in a car occupied by other passengers, or makes his presence offensive or unsafe to the said passengers, or if any trespasser be found on any car or train, the conductor and employees of the railway company may put him and his baggage out of the cars or off the train, using no unnecessary force, at any station of the railway company operating such train, which is open at the time of such ejection, on stopping the train, but not otherwise.

Any conductor or employee of any railway company violating the provisions of this section shall be guilty of a misdemeanor, and the railway company shall be liable for all damages caused thereby. ['11, c. 188, p. 620.]

Hist. R. S. § 2684, reen. R. C. § 2822; am. '11, c. 188, p. 620, reen. C. L. § 2822.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 487; Kerr's C. ib.

Cited: Palcher v. O. S. L. Ry. Co. (1917) 31 I. 93, 169 P. 298.

§ 4822. [2823] **Report of delayed trains.** All railway corporations operating in the state of Idaho shall, upon the arrival of delayed passenger trains at the first division terminal within the confines of this state, notify by telegraph every station on the line of the road within this state, how much the said passenger train is delayed. Upon the arrival of the said delayed passenger train at each succeeding division terminal, or station where train dispatchers are located, it shall be the duty of the dispatcher or telegraph operator at each terminal or office to notify every telegraph station on the line of the road, not yet reached by such train, how much the said train is delayed. ['07, p. 347, § 1.]

Hist. '07, p. 347, § 1, reen. R. C. § 2823, reen. C. L. ib.

§ 4823. [2824] **Same: Notice at stations.** Every operator, agent or person in charge of the telegraph station shall post a notice in a conspicuous place in the station or waiting room, and when such telegraph station is connected by telephone with the central telephone exchange in any town or city, he shall promptly notify such central exchange how late the delayed train is running. ['07, p. 347, § 2.]

Hist. '07, p. 347, § 2, reen. R. C. § 2824, reen. C. L. ib.

§ 4824. [2825] **Same: Failure to give notice a misdemeanor.** Every operator, dispatcher, agent or person in charge of a telegraph station who shall fail, neglect or refuse to post such notice correctly, or to advise such telephone exchange promptly, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed $25 for each offense. ['07, p. 347, § 3.]

Hist. '07, p. 347, § 3, reen. R. C. § 2825, reen. C. L. ib.

§ 4825. [2826] **Same: Punishment of corporation.** Any railway corporation that shall violate the provisions of the three preceding sections shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed $100 for each offense. ['07, p. 347, § 4.]

Hist. '07, p. 347, § 4, reen. R. C. § 2826, reen. C. L. ib.

ARTICLE 4.

CONDITIONAL SALES AND LEASES OF EQUIPMENT.

§ 4826. [2827] **Lien of vendor or lessor.** In any contract for the sale of railroad or street railway equipment or rolling stock it shall be lawful to agree that the title to the property sold or contracted to be sold, although possession thereof may be delivered immediately, or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. And in any contract for the leasing or hiring of such property, it shall be lawful to stipulate for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract, may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee: *Provided*, That no such contract shall be valid as against any subsequent judgment creditor, or any subsequent bona fide purchaser for value and without notice, unless:

1. The same shall be evidenced by an instrument executed by the parties and duly acknowledged by the vendee or lessee or bailee, as the case may be, or duly proved before some person authorized by law to take acknowledgment of deeds, and in the same manner as deeds are acknowledged or proved.
2. Such instrument shall be filed for record in the office of the secretary of state.
3. Each locomotive, engine or car so sold, leased or hired, or contracted to be sold, leased or hired as aforesaid, shall have the name of the vendor, lessor or bailor plainly marked on each side thereof, followed by the word "owner" or "lessor" or "bailor," as the case may be. ['05, p. 154, § 1.]

Hist. '05, p. 154, § 1, reen. R. C. § 2827, reen. C. L. ib.

§ 4827. [2828] **Same: Record of contract.** The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose. And on payment in full of the purchase money, and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract,

duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor or bailor, or his or its assignee, and recorded as aforesaid. And for such services the secretary of state shall be entitled to a fee of $2 for recording each of said contracts and each of said declarations, and a fee of $1 for noting such declaration on the margin of the record. ['05, p. 154, § 2.]

Hist. '05, p. 154, § 2, reen. R. C. § 2828, reen. C. L. ib.

§ 4828. [2829] Prior contracts not affected. This article shall not be held to invalidate or affect, in any way any contract of the kind referred to in the first section hereof, made prior to the 3d day of May, 1905, and any such contract theretofore made may, upon compliance with the provisions of this article, be recorded as herein provided. [R. C. § 2829.]

Hist. '05, p. 154, § 3; am. R. C. § 2829, reen. C. L. ib.

CHAPTER 190.

BRIDGE, FERRY, FLUME AND BOOM CORPORATIONS.

§ 4829. License to take tolls. When a corporation is formed for the construction and maintenance of a bridge, ferry, flume or boom, or for two or more of said purposes, it must not take tolls on or for the same until authority is granted therefor by the boards of county commissioners of the county or counties where its flume or abutments, landings or anchorages are situate. But after such authority is granted it may demand and receive such tolls as it is so authorized to take, and may, when necessary, secure the right of way for its flume, and the necessary chutes, raceways, landings, abutments and anchorages under the provisions of the Code of Civil Procedure. [C. L. § 2830.]

Hist. R. S. § 2694, reen. R. C. § 2830; compiled and reen. C. L. ib.

Comp. leg.—Cal. Similar in part; Civ. C. 1872, § 528; similar as amended: Kerr's C. ib.

Cross ref. Grant of authority to take toll: § 1444. Condemnation proceedings: § 7404 et seq.

§ 4830. [2831] When franchise ceases. Every such corporation ceases to be a body corporate:

1. If, within one year from filing its articles of incorporation it has not commenced the construction of its bridge, flume or boom, as the case may be, and if within two years from such filing its bridge or boom is not completed.

2. If, when the bridge or boom of such corporation is destroyed, it is not reconstructed and ready for use within two years thereafter.

3. If the ferry of any such corporation is not in running order within four months after authority to take tolls thereon is obtained, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law. [R. S. § 2695.]

Hist. R. S. § 2695, reen. R. C. § 2831, reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. C. 1872, § 529; as amended. Kerr's C. ib.

§ 4831. [2832] Application to individuals. When a bridge, ferry, flume or boom is operated or owned by a natural person, this chapter is applicable to such person in like manner as it is applicable to corporations. [R. S. § 2696.]

Hist. R. S. § 2696, reen. R. C. § 2832, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 531; Kerr's C. ib.

CHAPTER 191.

TELEGRAPH, TELEPHONE AND ELECTRIC POWER CORPORATIONS.

ARTICLE 1.

GENERAL PROVISIONS.

Cross ref. Regulation by public utilities commission: c. 119.

§ 4832. [2833] **Right to use highways.** Telegraph and telephone corporations may construct lines of telegraph or telephone along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters. [R. S. § 2700.]

Hist. R. S. § 2700, reen. R. C. § 2833, reen. C. L. ib.

Cross ref. Corporations have the right to construct and maintain lines of telegraph and telephone and connect the same with other lines: Const. XI, 13.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 536; similar as amended: Kerr's C. ib.

Cited: O. S. L. Ry. Co. v. Postal Tel. Cable Co. (1901) 111 F. 842.

§ 4833. [2834] **Injury to company's property.** Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph or telephone corporation, is liable to the corporation for all damages sustained thereby. [R. S. § 2701.]

Hist. R. S. § 2701, reen. R. C. § 2834, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 537; similar as amended: Kerr's C. ib.

§ 4834. [2835] **Penalty for malicious injury.** Any person who wilfully or maliciously does any injury in any telegraph or telephone property mentioned in the preceding section, is liable to the corporation for 100 times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction. [R. S. § 2702.]

Hist. R. S. § 2702, reen. R. C. § 2835, reen. C. L. ib.

Cross ref. Criminal liability for injuring telegraph or telephone property: § 8521.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 538; same as amended: Kerr's C. ib.

§ 4835. [2836] **Transfer of rights and franchises.** Any telegraph or telephone corporation may, at any time, with the consent of the persons holding two-thirds of the issued stock of the corporation, sell, lease, assign, transfer or convey any rights, privileges, franchises or property of the corporation, except its corporate franchise. [R. S. § 2703.]

Hist. R. S. § 2703, reen. R. C. § 2836, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 540; same as amended: Kerr's C. ib.

§ 4836. [2837] **Rights of way for electric power companies.** Any person, company or corporation incorporated or that may hereafter be incorporated under the laws of this state or of any state or territory of the United States, and doing business in this state, for the purpose of supplying, transmitting, delivering or furnishing electric power or electric energy by wires, cables or any other method or means, shall have and is hereby given the right to erect, construct, maintain and operate all necessary lines upon, along and over any and all public roads, streets and highways, except within the limits of incorporated cities and towns and across the right of way of any railroad or railroad corporation, together with poles, piers, arms, cross-arms, wires, supports, structures and fixtures for the purposes aforesaid, or either of them, in such man-

ner and at such places as not to incommode the public use of the road, highway, street or railroad, or to interrupt the navigation of water, together with the right to erect, construct, maintain and operate upon said electric power line a telephone line to be used only in connection with the said electric energy and power line: *Provided,* That the corporation, company or person exercising the right of way herein and hereby granted shall first apply to the board of county commissioners for permission to construct in the manner provided by law, and to acquire a right of way, and shall give to the county into or through which the right of way herein and hereby granted is exercised, a bond, with surety to be approved by the board of county commissioners, in the sum of $5000, conditioned to hold the said county harmless from any and all liability on account of the erection, construction, maintenance or operation of the said electric line or lines: *Provided further,* That nothing in this section shall be construed to mean the right to occupy public roads for any railroad or car line of any kind. ['03, p. 343, § 1.]

Hist. '03, p. 343, § 1, reen. R. C. § 2837, reen. C. L. ib.

Cross ref. Obtaining authority for stringing electric wires over highways: § 3459.

ARTICLE 2.

REGULATIONS CONCERNING MESSAGES.

§ 4837. Refusal to accept messages unlawful. It shall be unlawful for any telegraph or telephone company or any person in charge of such telegraph or telephone service, or operating or controlling any public telegraph or telephone system or office within this state, in whole or in part, or any employee thereof, to fail or refuse to accept and transmit to its final destination, promptly and by the most expeditious means of communication available between the place of receipt and destination thereof, any message or communication when the same shall be presented for transmission to any regular telegraph or telephone station upon any of its lines, and the regular and usual fees and charges paid, tendered or offered thereon: *Provided,* That when any message or communication is offered which is couched, in whole or in part, in obscene or profane language, nothing in this article contained shall be so construed as to compel any telegraph or telephone company, or any person in charge of the same, to transmit such message or communication, and for the purpose of carrying out the provisions of this article. ['11, c. 222, part of § 1, p. 704.]

Hist. '11, c. 222, part of § 1, p. 704, reen. C. L. § 2837a.

§ 4838. Telegraph offices must connect with telephone. All telegraph offices or stations from which messages are transmitted, or at which messages are received for transmission shall be equipped with proper telephone connections in order that messages and communications may be expeditiously transferred from telegraph to telephone lines or from telephone to telegraph lines when such transfer will accelerate the transmission of any such messages or communications: *Provided,* That nothing herein is intended to require said telegraph companies or any one operating or controlling any telegraph system or office within this state to build a telephone line, it being intended to require such company to install a telephone in each of its offices where such telephone can be obtained by it, as it may be obtained by other business offices in the same vicinity. [C. L. § 2837b.]

Hist. '11, c. 222, part of § 1, p. 704; compiled and reen. C. L. § 2837b.

§ 4839. Messages must be wired when possible. It is the purpose of this article, among other things, to require cooperation on the part of telegraph and telephone companies in the transmission of messages and communications to or from any place where the use of both means of communication is necessary or desirable and where such use will expedite the transmission of any such message or communication; and it shall be unlawful for any telegraph or telephone company or any person having charge of any public telegraph or telephone service or system, controlling or operating any such system within this state, in whole or in part, or any employee thereof, to transmit any message or communication upon which the fees and charges have been paid, tendered or offered, as herein provided, by mail, over any portion of the distance over which such message or communication is to be transmitted, unless neither telegraph nor telephone service is available, and then such means of transmission shall only be used for such distance as necessary in conveying such message to the nearest telegraph or telephone station. ['11, c. 222, § 2, p. 705.]

Hist. '11, c. 222, § 2, p. 705, reen. C. L. § 2837c.

§ 4840. Law cumulative. This article shall be cumulative only, and is intended as affording additional remedy not now provided by law. [C. L. § 2837d.]

Hist. '11, c. 222, § 2, p. 705; compiled and reen. C, L. § 2837d.

Company's liability: A telegraph company is a public service corporation engaged in a public utility, and in receiving, transmitting and delivering messages should be treated as an independent principal or contracting party, and be held liable in contract and tort, the same as other principals. Strong v. Western Union Tel. Co. (1910) 18 I. 389, 109 P. 910, Ann. Cas. 1912A 55.

The reasonableness or unreasonableness of rules and regulations made by a telegraph company must be determined with reference to public policy, precisely as in the case of common carriers, and a stipulation which exempts such company from damages for its own negligence is void. Ib.

Where a telegraph company fails to transmit a message correctly, the proof of the fact is prima facie evidence of the company's negligence. Ib.

§ 4841. Penalty for violation. Any telegraph or telephone company or person owning, controlling or operating any telegraph or telephone line or system within this state, in whole or in part, or any employee thereof, violating any of the provisions of this article, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not exceeding $300. ['11, c. 222, § 4, p. 705.]

Hist. '11, c. 222, § 4, p. 705, reen. C. L. § 2837e.

CHAPTER 192.

WATER AND CANAL CORPORATIONS.

§ 4842. Contracts for municipal water supply. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but an exclusive right must not be granted. No contract or grant must be made for a term exceeding 50 years. [C. L. § 2838.]

Hist. R. S. § 2710, reen. R. C. § 2838; modified by '13, c. 61, p. 247, especially §§ 29, 30a, p. 268 (§§ 2450-1); compiled and reen. C. L. § 2838.

Cross ref. Certificate of convenience and necessity required from public utilities commission before exercising right or obtaining franchise: § 2475.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 548: Kerr's C. ib.

Cited: Boise City Artesian Hot & Cold Water Co. v. Boise City (1903) 123 F. 232, 59 C. C. A. 236.

Application: This law applies only to corporations furnishing water to cities, etc., and has no application to contracts between an individual and a city for furnishing such water. Jack v. Grangeville (1903) 9 I. 291, 74 P. 969.

This law applicable to water corporations, furnishing water to cities and towns, was not intended to apply to corporations furnishing water for irrigation purposes. MacCammelly v. Pioneer Irr. Dist. (1909) 17 I. 415, 105, P. 1076.

Actions: Pleading: In an action to compel a water company to furnish a city with free water in case of fire, the complaint must set forth the ordinance and contract by which the company is authorized to supply water to the city. (Sullivan, J. dissents.) Boise City v. Artes. H. & C. W. Co. (1895) 4 I. 351, 39 P. 562.

Grant for indefinite term: A municipal grant to individuals for an indefinite term, of the right to lay pipes in the city streets and to repair the pipes of a water distributing system, if affected at all by this section, is not rendered thereby ineffective, but at most is limited to a term of fifty years. Boise Artesian etc. Water Co. v. Boise City (1913) 230 U. S. 84, 57 L. ed. 1400, 33 S. C. R. 997, overruling (1911) 186 F. 705, 108 C. C. A. 523.

Repealed section: R. C. § 2839, which followed this section, was repealed by the public utilities law. Citations to it were as follows:

Bellevue W. Co. v. Bellevue (1893) 3 I. 739, 35 P. 693; Boise City v. Artes. H. & C. Water Co. (1895) 4 I. 351, 39 P. 562; Boise City W. Co. v. Boise City (1903) 123 F. 232, 59 C. C. A. 236; Boise Artes. etc. Co. v. Boise City (1913) 230 U. S. 84, 57 L. ed. 1400, 33 S. C. R. 997; Jack v. Grangeville (1903) 9 I. 291, 74 P. 969; Spotswood v. Morris (1906) 12 I. 360, 85 P. 1094; Bothwell v. Consumers' Co. (1907) 13 I. 568, 92 P. 533, 24 L. R. A. (N. S.) 485; Hatch v. Consumers' Co. (1909) 17 I. 204, 104 P. 670, 40 L. R. A. (N. S.) 263, 224 U. S. 148, 32, S. C. R. 465; Pocatello v. Murray (1912) 21 I. 180, 120 P. 812, aff. 226 U. S. 318, 57 L. ed. 239, 33 S. C. R. 107; Pocatello v. Murray (1913) 23 I. 447, 130 P. 383, Ann. Cas. 1914C 1050.

§ 4843. [2840] **Right of way granted.** Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right of way within the city or town, and subject to the reasonable rules and directions of the board of county commissioners as to the mode and manner of using any right of way outside the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city or town, or the public roads and highways within the county, as may be necessary for the laying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and acqueducts in conducting water from outside points to the corporate limits of said city or town. ['05, p. 192, § 2.]

Hist. R. S. § 2712; am. '05, p. 192, § 2, reen. R. C. § 2840, reen. C. L. ib.

Comp. leg.—Cal. Similar in part: Civ. C. 1872, § 550.

Cited: Boise City v. Artesian H. & C. W. Co. (1895) 4 I. 351, 39 P. 562; Jack v. Grangeville (1903) 9 I. 291, 74 P. 969; MacCammelly v. Pioneer Irr. Dist. (1909) 17 I. 415, 105 P. 1076.

Nature of grant: A municipal grant of the right to occupy the city streets with the pipes of a water distributing system is, when accepted by the grantee, not a mere revocable license, but a substantial property right. Boise Artesian etc. Water Co. v. Boise City (1913) 230 U. S. 84, 57 L. ed. 1400, 33 S. C. R. 997, overruling (1911) 186 F. 705, 108 C. C. A. 223.

The obligation of a municipal ordinance granting an irrevocable easement to lay pipes in the city streets and repair the pipes of a water distributing system is unconstitutionally impaired by a subsequent ordinance requiring the payment to the city of a monthly rental for such use and occupation of the streets. Ib.

Rights of way under this section are granted without requiring any compensation whatever. Pocatello v. Murray (1912) 21 I. 180, 199, 120 P. 812, 226 U. S. 318, 33 S. C. R. 107, 57 L. ed. 239.

Pipes in street: All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of the company to construct the same at its own expense and connect with the pipes of the property owner at the line of his property and the limit of its franchise. Bothwell v. Consumers' Co. (1907) 13 I. 568, 92 P. 533, 24 L. R. A. (N. S.) 485.

It is the duty of a water company to supply and lay the laterals from its main pipe line to the line of a consumer's property abutting on the street, and such laterals are the property of the company. Hatch v. Consumers Co. (1909) 17 I. 204, 104 P. 670, 40 L. R. A. (N. S.) 263, 224 U. S. 148, 32 S. C. R. 465.

§ 4844. [2841] **Works not to obstruct highways.** All water works must be so laid and constructed as not to obstruct public highways. [R. C. § 2841.]

Hist. R. S. § 2713, modified by '99, p. 380, § 25 (see R. C. § 3310); am. R. C. § 2841, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 551; Kerr's C. ib.

Cited: Jack v. Grangeville (1903) 9 I. 291, 74 P. 969; MacCammelly v. Pioneer Irr. Dist. (1909) 17 I. 415, 105 P. 1076; (In brief of counsel) Nampa v. N. & M. Irr. Dist. (1913) 23 I. 422.

§ 4845. [2842] **Water users' associations: Exemptions from taxes.** Any water users' association which is organized in conformity with the requirements of the United States under the reclamation act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders, shall be exempt from the payment of any incorporation tax, and from the payment of any annual franchise tax; but shall be required to pay, as preliminary to its incorporation, only a fee of $20 for the filing and recording of its articles of incorporation and the issuance of certificate of incorporation. ['05, p. 373, § 3.]

Hist. '05, p. 373, § 3, reen. R. C. § 2842, reen. C. L. ib.

Reclamation act: Original act, June 17, 1902, c. 1093, 32 St. L. 388; Warren act, Feb. 21, 1911, c. 141, 36 St. L. 237; reclamation extension act, Aug. 13, 1914, c. 247, 38 St. L. 686.

Cross ref. Cooperative irrigation companies must file annual statements: § 4781.

§ 4846. [2843] **Same: Record of articles and subscriptions.** It shall be the duty of the county recorders of counties in which water users' associations are organized, to provide record books containing printed forms of the articles of incorporation and stock subscriptions to the stock of water users' associations organized in conformity with the requirements of the United States under the reclamation act, and to use such books for recording stock subscriptions of such associations; and the charges for the recording thereof shall be made on the basis of the number of words actually written therein and not for the printed form. ['05, p. 373, § 4.]

Hist. '05, p. 373, § 4, reen. R. C. § 2843, reen. C. L. ib.

§ 4847. Annual report of irrigation companies. It shall be the duty of any corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof in this state, to file, before the first Monday in January in each year, in the office of the county recorder of every county in which said company distributes water under such sale or rental, upon a blank form to be prepared and furnished by him upon application, and a duplicate copy thereof with the department of reclamation, a statement showing the condition of the business of said corporation on December 31 of the preceding year, which statement shall include the following:

1. A general description of the property of the company.
2. A statement of its cost and estimated present value.
3. The total amount and the character of all indebtedness of the company, including a list of all perpetual water rights sold and outstanding and their respective dates of execution, and the amount received from such sales.
4. The amount due to said company and from what sources.
5. The income of the company during the preceding calendar year and from what sources.
6. The expenditures by the company during the same period and for what purposes.
7. The total area of land watered from its works during the preceding season; that part of said area having no water rights attached being given separately.

8. The number of acres of land under said ditch susceptible of irrigation.

9. The capacity of its works and the quantity of water carried during the said season as nearly as known.

10. The amounts of recorded appropriations and the date of each.

Said statement shall be sworn to by the proper official of said corporation. If the proper official, or principal accounting officer of said corporation shall neglect or refuse to file the statement herein required, the said recorder shall notify him of such failure, and if for 30 days after said notification he still neglects or refuses to file such statement, he shall be guilty of a misdemeanor, and shall be subject to a fine not exceeding $300, or to imprisonment in the county jail of his county for not more than six months, or to both such fine and imprisonment. Said statement required to be filed under this section shall be kept on file in the office of said recorder and shall be open to inspection.

Hist. '99, p. 380, § 35, reen. R. C. § 2844, reen. C. L. ib.

"Department of reclamation" substituted for "state engineer" upon authority '19, c. 8, § 37, p. 65.

Cited: McDuffee v. Hayden etc. Co. (1913) 25 I. 370, 138 P. 503.

CHAPTER 193.

HOMESTEAD CORPORATIONS.

§ 4848. [2845] **Definition and term of existence.** Corporations organized for the purpose of acquiring lands in large tracts, paying off incumbrances thereon, improving and subdividing them into homestead lots or parcels, and distributing them among the shareholders, and for the accumulation of a fund for such purposes, are known as homestead corporations, and must not have a corporate existence for a longer period than 10 years. [R. S. § 2720.]

Hist. R. S. § 2720, reen. R. C. § 2845, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 557: Kerr's C. ib.

§ 4849. [2846] **Requirements as to by-laws.** Such corporations must specify in their by-laws the times when the instalments of the capital stock are payable, the amount thereof, and the fines, penalties or forfeitures incurred in case of default. A printed copy of the articles of incorporation and by-laws must be furnished to any shareholder on demand. [R. S. § 2721.]

Hist. R. S. § 2721, reen. R. C. § 2846, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 558: Kerr's C. ib.

§ 4850. [2847] **Sale of delinquent stock.** Whenever any shares of stock are declared forfeited by resolution of the board of directors, the directors may advertise the same for sale, giving the name of the subscriber and the number of shares by notice of not less than three weeks, published at least once a week in a newspaper of general circulation in the city, town or county where the principal place of business of such corporation is located. Such sale must be made at auction, under the direction of the secretary of the company. The corporation may be a bidder, and the shares may be disposed of to the highest bidder for cash. No defect, informality or irregularity in the proceedings respecting the sale invalidates it, if notice is given as herein provided. After the sale is made, the secretary must, on receipt of the purchase money, transfer to the purchaser the shares sold, and after deducting from the proceeds of such sale all instalments then due, and all expenses

and charges of sale, must hold the residue subject to the order of the delinquent subscriber. [R. S. § 2722.]

Hist. R. S. § 2722, reen. R. C. § 2847, reen. C. L. ib. **Comp. leg.—Cal.** Same: Civ. C. 1872, § 559: Kerr's C. ib.

§ 4851. [2848] **Limitation on indebtedness.** Homestead corporations may borrow money for the purposes of the corporation not exceeding at any one time one-fourth of the aggregate amount of shares or parts of shares actually paid in, and the income thereof; no greater rate of interest must be paid therefor than 12 per cent per annum. For the purpose of completing the purchase of lands intended to be divided and distributed, they may borrow on the security of their shares on the land thus purchased, or that owned by the corporation at the time of procuring the loan, any sum of money which, together with the interest contracted to become due thereon, will not exceed 90 per cent of the unpaid amount subscribed by the shareholders; but no loan must be made to the corporation for a term extending beyond that of its existence. [R. S. § 2723.]

Hist. R. S. § 2723, reen. R. C. § 2848, reen. C. L. ib. **Comp. leg.—Cal.** Same: Civ. C. 1872, § 560: Kerr's C. ib.

§ 4852. [2849] **Minors and married women may be stockholders.** Such shares of stock in homestead corporations as may be acquired by children, the cost of which, and the deposits and assessments on which, are paid from the personal earnings of the children, or with gifts from persons other than their male parents, may be taken and held for them by their parents or guardians. Married women may hold such shares as they acquire with their personal earnings, or those of their children, voluntarily bestowed therefor, or from property bequeathed or given to them by persons other than their husbands. [R. S. § 2724.]

Hist. R. S. § 2724, reen. R. C. § 2849, reen. C. L. ib. **Comp. leg.—Cal.** Same: Civ. C. 1872, § 561: Kerr's C. ib.

§ 4853. [2850] **Limitations on real estate holdings.** Homestead corporations must not purchase and sell, or otherwise acquire and dispose of, real property or any interest therein, or any personal property for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property or any interest therein, which in the aggregate exceeds in cash value the sum of $50,000. For any violation of the provisions of this section, corporations forfeit their corporate rights and powers. On the application of any citizen to a court of competent jurisdiction, such forfeiture may be adjudged, and the judgment carries with it costs of proceedings. [R. S. § 2725.]

Hist. R. S. § 2725, reen. R. C. § 2850, reen. C. L. ib. **Comp. leg.—Cal.** Similar: Civ. C. 1872, § 562: Kerr's C. ib.

§ 4854. [2851] **Winding up of corporation.** Except for the purpose of winding up and settling its affairs, every homestead corporation must terminate at the expiration of the time fixed for its existence in the articles of incorporation, or when dissolved as provided in this title. No dividend of funds must be made on termination of its corporate existence until its debts and liabilities are paid; and upon the final settlement of the affairs of the corporation, or upon the termination of its corporate existence, the directors, in such manner as they may determine, must divide its property among its shareholders in proportion to their respective interests, or upon the application of a majority in interest of the stockholders, must sell and dispose of any or all real estate of the corporation upon such terms as may be most conducive to

the interests of all the stockholders, and must convey the same to the purchaser, and distribute the proceeds among the shareholders, or may, at any time, when best for the interests of all the shareholders, cause the lands of the corporation to be subdivided into lots and distributed, by sale for premiums at auction or otherwise, among the shareholders. [R. S. § 2726.]

Hist. R. S. § 2726, reen. R. C. § 2851, reen. C. L. ib. Comp. leg.—Cal. Similar: Civ. C. 1872, § 563: Kerr's C. ib.

§ 4855. [2852] **Payment of premiums.** Such premiums on lots may be made payable at the time they are bid off, and if not so paid on any lot of land, the directors may immediately offer the same for sale again. If made payable at a future day, and any shareholder fails to pay his bid on the day the same is made due and payable, the directors may advertise and sell the shares of stock representing the lots of land on which the premiums remain unpaid, in the manner provided in the by-laws for the sale of shares on account of delinquent instalments and premiums. [R. S. § 2727.]

Hist. R. S. § 2727, reen. R. C. § 2852, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 564: Kerr's C. ib.

§ 4856. [2853] **Publication of annual financial statement.** The actual financial condition of all homestead corporations must, by the directors thereof, be published annually in a newspaper published at the principal place of business of the corporation, for four weeks, if published in a weekly, and two weeks if published in a daily paper. The statement must be made up to the end of each year, and must be verified by the oath of the president and secretary, showing the items of property and liabilities. [R. S. § 2728.]

Hist. R. S. § 2728, reen. R. C. § 2853, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 565: Kerr's C. ib.

§ 4857. [2854] **Same: Publication at capital.** In any case in which a publication is required and no newspaper is published at the principal place of business, the publication may be made in a paper published at the capital of the state. [R. S. § 2729.]

Hist. R. S. § 2729, reen. R. C. § 2854, reen. C. L. ib. Comp. leg.—Cal. Similar: Civ. C. 1872, § 566: Kerr's C. ib.

CHAPTER 194.

GUARANTY, TITLE AND TRUST COMPANIES.

Cross ref. The savings departments of all companies organized under this chapter are under the supervision of the department of commerce and industry: § 5235.

§ 4858. [2961] **Powers and rights of companies.** Companies incorporated under the provisions of this chapter shall have the power and right:

1. To furnish abstracts of title to real estate; to guarantee the title, and to make insurance of every kind pertaining to or connected with titles to real estate, and to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor.

2. To receive and hold on deposit and in trust and as security, estate, real and personal, including the notes, bonds, obligations of estates, individuals, companies and corporations, and the same to purchase, collect, adjust and settle, sell and dispose of, in any manner with or without proceedings in law or equity, and for such price, and on such terms as may be agreed on between them and the parties contracting with them.

3. To act as trustee, assignee, receiver, guardian, executor, administrator, and to take, accept and execute trusts of every description not inconsistent with the laws of this state or of the United States, and the president or secretary of any such company may take the oath necessary to qualify it to act in such capacity, and such company shall be bound thereby; and to receive deposits of money and other personal property and to issue their obligations therefor; to invest their funds in and to purchase real and personal securities, and to loan money on real and personal security.

4. To act as fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and distribute money, transfer, register and countersign certificates of stocks, bonds or other evidences of indebtedness, and to receive and manage any sinking fund thereof on such terms as may be agreed upon.

5. To take, receive and hold any and all such pieces of real property as may have been or may hereafter be the subject of any insurance made by such companies under the powers conferred by their charter, and the same to grant, bargain, sell, convey and dispose of in any such manner as they see proper.

6. To purchase and sell real estate and take charge of the same.

7. To become security for the payment of all damages that may be assessed and directed to be paid for lands taken in the building of any railway, or for the purposes of any railway, or for the opening of streets or roads or for any purpose whatsoever where land or property is authorized by law to be taken.

8. To become security upon any writ of error or appeal, or in any proceeding instituted in any court in this state, in which security may be required. [R. C. § 2961.]

Hist. '01, p. 26, § 1; am. '07, p. 545, § 1; am. R. C. § 2961, reen. C. L. ib.

§ 4859. Enlargement of powers of existing corporations. Any company heretofore incorporated under the act of which this and the preceding sections are amendments, may exercise any or such portion of the additional powers or privileges granted by the preceding section as it may desire, by filing with the recorder of the county of its principal place of business a resolution of its shareholders, certified by its secretary, passed at any regular or special meeting thereof, adopting the provisions of this and the preceding sections, or such portion thereof as it may desire, and filing a copy thereof, certified by such county recorder, with the secretary of state and the department of commerce and industry.

Hist. '01, p. 26; am. '07, p. 545, § 2, reen. R. C. § 2962, reen. C. L. ib. "Department of commerce and industry" substituted for "bank commissioner" on authority '19, c. 8, § 28, p. 56.

§ 4860. [2963] **Capital required.** Before exercising any of the powers hereby conferred, each such corporation shall have a paid up capital of not less than $25,000, an affidavit of which fact, made by the treasurer thereof, shall be filed in the office of the secretary of state, and a copy of such affidavit certified under the seal of the office of the secretary of state shall be evidence of compliance with the requirements hereof. ['01, p. 26, § 2.]

Hist. '01, p. 26, § 2, reen. R. C. § 2963, reen. C. L. ib.

§ 4861. [2964] **Capital deemed security.** Whenever such companies shall receive and accept the office or appointment of assignees, receivers, guardians, executors, administrators, or be directed to ex-

ecute any trust whatever, or engage in the compiling of abstracts, the capital of the said company shall be taken and considered as the security required by the law for the faithful performance of their duties as aforesaid, and shall be absolutely liable in case of any default whatever. ['01, p. 26, § 3.]

Hist. '01, p. 26, § 3, reen. R. C. § 2964, reen. C. L. ib.

§ 4862. [2965] **Executors may deposit securities.** Any executor, administrator, guardian or trustee having the custody or control of any bonds, stocks, securities or other valuables belonging to others, shall be authorized to deposit the same for safe keeping with said companies. ['01, p. 26, § 4.]

Hist. '01, p. 26, § 4, reen. R. C. § 2965, reen. C. L. ib.

§ 4863. [2966] **Court may direct deposit.** Every court into which moneys may be paid by parties, or be brought by order or judgment, may, by order, direct the same to be deposited with any such corporation. ['01, p. 26, § 5.]

Hist. '01, p. 26, § 5, reen. R. C. § 2966, reen. C. L. ib.

§ 4864. [2967] **Court may examine officers.** Whenever any court shall appoint said companies, assignees, receivers, guardians, executors, administrators, or to execute any trust whatever, the said court may, in its discretion, examine the officers of said company under oath or affirmation, as to the manner in which its investments are made, and the security afforded to those by or for whom its engagements are held. ['01, p. 26, § 6.]

Hist. '01, p. 26, § 6, reen. R. C. § 2967, reen. C. L. ib.

CHAPTER 195.

NONPROFIT COOPERATIVE ASSOCIATIONS.

§ 4865. Associations authorized: Number of incorporators. It shall be lawful for five or more persons to form a cooperative association for any purpose where pecuniary profit is not their object. ['13, c. 54, § 1, p. 164.]

Hist. '13, c. 54, § 1, p. 164, reen. C. L. 214:1.

§ 4866. Application of general corporation law. Every such cooperative association shall be governed by the laws of this state relating to the organization and conduct of private corporations, except such as are inconsistent with the provisions of this chapter. ['13, c. 54, § 2, p. 164.]

Hist. '13, c. 54, § 2, p. 164, reen. C. L. 214:2.

§ 4867. Who may become members. Corporations, associations and copartnerships, as well as persons, may become incorporators and members of such a cooperative association, provided the same is not organized or conducted for the purpose, directly or indirectly, of fixing the price, or regulating the production, of any article of commerce or of produce of the soil, or of consumption by the people. ['13, c. 54, § 3, p. 164.]

Hist. '13, c. 54, § 3, p. 164, reen. C. L. 214:3. Cross ref. Constitutional limitation: Const. XI, 2.

§ 4868. Interests of members equal: Membership certificates. In such an association the rights and interests of all members shall be equal, and no member can have or acquire a greater interest therein than any other member. Such an association shall not issue any capital stock, but shall issue membership certificates to each member thereof, which certificates can not be assigned so that the transferee thereof can by such transfer become a member of the association, except by resolution of the board of directors and under such regulations as the by-laws may prescribe. ['13, c. 54, § 4, p. 164.]

Hist. '13, c. 54, § 4, p. 164, reen. C. L. 214:4.

§ 4869. By-laws. The by-laws of such an association may, in addition to other provisions prescribed by law, provide for:

1. The number and qualification of members and the terms and conditions of admission.
2. The time, mode, conditions and effect of expulsion or withdrawal from and of restoration to membership.
3. The assignment or transfer of the interest of members, the manner of determining the value, if any, of such interest, and the purchase by the association, at its option, of such interest, upon the death, withdrawal or expulsion of a member.
4. Fees for admission, assessments or dues to carry on the business of the association and reimbursement for services rendered and expenses incurred by the association for its members, the time of payment and manner of collecting amounts due and for forfeiture of the interest of a member in the association for nonpayment thereof.
5. Contracting, securing, paying and limiting the indebtedness of the association, and
6. Other regulations not repugnant to the laws of the state and consonant with the objects of the association. ['13, c. 54, §§ 5, 6, p. 164.]

Hist. '13, c. 54, §§ 5, 6, p. 164, reen. C. L. 214:5.

CHAPTER 196.

RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.

Cross ref. Express reference to this chapter: Powers of benevolent societies over neglected children: § 7902.

Cited: Ada Co. v. Boise etc. Club (1911) 20 I. 421, 118 P. 1086, 38 L. R. A. (N. S.) 101; Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 391, 396, 133 P. 899.

ARTICLE 1.

GENERAL PROVISIONS.

§ 4870. Formation of corporations. Any number of persons associated together for any purpose where pecuniary profit is not their object may, in accordance with the rules, regulations or discipline of such association, elect directors, the number thereof to be not less than three nor more than 35, and may incorporate themselves as provided in this title: *Provided,* That whenever, according to the custom of any religious, social or benevolent corporation, the management of the real estate of such corporation is under the control of one board and the promotion, operation and maintenance of such corporation, under the control of another board, then such corporation, when incorporated, may elect both such boards, the former to consist of not less than three nor more than five, and the latter to consist of not less than five nor more than 35, in accordance with the usual customs or rules of such corpora-

tion in so far as they do not conflict with the provisions of this chapter: *Provided further,* That, when such boards are elected by any such corporation, such boards shall have charge of the management of the real estate of such corporation and the promotion, operation and management thereof, respectively. [C. L. § 3011.]

Hist. R. S. § 2760, reen. R. C. § 3011; am. ' 11, c. 74, § 1, p. 227; compiled and reen. C. L. § 3011.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 593; as amended: Kerr's C. ib.

Cited: Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 133 P. 899.

§ 4871. Additional requirements of articles. In addition to the requirements of chapter 186 the articles of incorporation of any such association must set forth the holding of an election for directors or such other boards as such corporation may elect to operate under in conformity with section 4870, the time and place where same was held, that a majority of the members of such association who were present at such meeting voted at such election, and the result thereof; which facts must be verified by the presiding officer or secretary of the meeting: *Provided, however,* That before any election of directors or other boards, as herein provided for, shall be held, notice of the time and place of holding such election shall be given by publication at least two weeks in some newspaper in the city or town in which such election was held, and if there be no newspaper in such city or town, then in some newspaper in the county where such election is held, and also by posting a like notice in a conspicuous place on the building where such election is to be held for the same length of time. If no newspaper be published in the county where such election is to be held, the posting of the notice hereinbefore required shall be sufficient notice. The fact of having given the notice, as herein required, and in the manner required, shall be set forth in the articles of incorporation and verified as other facts herein are required to be done. [C. L. § 3012.]

Hist. R. S. § 2761, reen. R. C. § 3012; am. '11, c. 74, § 2, p. 228, and '11, c. 165, § 1, p. 562; compiled and reen. C. L. § 3012. '11, c. 74, § 3, p. 229, contained validating clause which was omitted from C. L. as special. (See § 9458, subd. 37.)

Comp. leg.—Cal. Similar: Civ. C. 1872, § 594: Kerr's C. ib.

§ 4872. Amendment of articles. The articles of incorporation of any religious, social or benevolent corporation may be amended in any manner at any regular meeting of the members of such corporation by a vote of a majority of a quorum attending such meeting: *Provided,* Public notice of the intention to amend the articles of incorporation shall have been given by publication at least once a week for four weeks in a newspaper published in the county wherein such meeting is to be held, such notice to designate the regular meeting at which it is intended to vote on the proposition of amending the articles of incorporation, and shall state the manner in which it is intended to amend the articles of incorporation. ['13, c. 40, § 1, p. 143.]

Hist. '13, c. 40, § 1, p. 143, reen. C. L. § 3012a.

§ 4873. Same: Filing of certificates. A certificate signed and verified by the presiding officer and the secretary, or recording officer of such meeting, must be made showing a strict compliance with the requirements of section 4872. Duplicates of such certificate must be made and one filed in the office of the county recorder and one in the office of the secretary of state, as provided for original articles of incor-

poration, and thereupon such articles shall stand amended. ['13, c. 40, § 2, p. 143.]

Hist. '13, c. 40, § 2, p. 143, reen. C. L. § 3012b.

§ 4874. Power to hold property. All such corporations may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto; but no such corporation must own or hold more real estate than may be necessary for the business and objects of the association; the title of all property, real and personal, held by or for said association at the time of its incorporation, shall pass immediately to and become vested in the said corporation, and thereafter such corporation may take, receive, mortgage, alienate or convey its real or personal property in the same manner as other private corporations, and its corporate power may be exercised in such manner as may be provided by its by-laws. ['11, c. 165, § 2, p. 562.]

Hist. R. S. § 2762, reen. R. C. § 3013; am. '11, c. 165, § 2, p. 562, reen. C. L. § 3013.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 595; as amended: Kerr's C. ib.

Power to mortgage: Regulations concerning mortgage prescribed under former statutes and repealed by the '13 amendment to this section, were considered in: Portneuf Lodge v. Western etc. Saving Co. (1899) 6 I. 673, 59 P. 362; Hobbs v. Twin Falls C. Co. (1913) 24 I. 380, 133 P. 899.

Title to property upon division in church: Where a division occurs in a church or religious organization and one faction withdraws or forms another organization, the title to the property will remain in the old organization and be subject to the control and disposition of those who adhere to the doctrines and tenets of such church or organization as originally taught. Apostolic etc. Union v. Knudson (1912) 21 I. 589, 123, P. 473.

Same: Pending suit: Where opposing factions of a religious society each seek to have the other restrained from using a church for purposes of worship, the trial court has jurisdiction to order an injunction pendente lite, which in effect gives each faction the right to use the church at stated times. Wayne v. Alspach (1911) 20 I. 144, 116 P. 1033.

§ 4875. Same: Additional property. In addition to that provided for in the preceding section, Masons, Odd Fellows, pioneer incorporated associations and fraternal orders generally may hold such real estate as may be necessary to carry out their charitable purposes, or for the establishment and endowment of institutions of learning connected therewith. ['19, c. 131, p. 426.]

Hist. R. S. § 2763, reen. R. C. § 3014, reen. C. L. § 3014; am. '19, c. 131, p. 426.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 596; as amended: Kerr's C. ib

§ 4876. [3016] **Provisions of by-laws.** Corporations organized for purposes other than for profit may in their by-laws, ordinances, constitutions or articles of incorporation, in addition to the provisions in chapter 186, provide for:

1. The qualifications of members, mode of election and terms of admission to membership.
2. The fees of admission and dues to be paid to their treasury by members.
3. The expulsion and suspension of members for misconduct or nonpayment of dues; also for restoration to membership.
4. Contracting, securing, paying and limiting the amount of their indebtedness.
5. Other regulations not repugnant to the laws of the state and consonant with the objects of the corporation. [R. S. § 2765.]

Hist. R. S. § 2765, reen. R. C. § 3016, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 599; similar as amended: Kerr's C. ib.

Cited: Hobbs v. Twin Falls Canal Co. (1913) 24 I. 380, 133 P. 899.

Void by-law: A by-law of a fraternal beneficiary insurance society which by its provisions nullifies the terms of a benefit certificate issued to a member, providing that the same shall be payable upon the death of the member, is void. Gaffney v Royal Neighbors of America, 31 I. 549, 174 P. 1014.

§ 4877. [3017] **Death benefit associations.** Associations may be formed for the purpose of paying to the nominee of any member a sum upon the death of said member not exceeding $3 for each member of such association. No such association must exceed in number 1000 persons. It may upon the death of each member, levy an assessment upon each member living at the time of the death, not exceeding $3 for each member, and collect the same, and pay the same to the nominee of such deceased; and may also provide for the payment of such annual payments by members as may be deemed best. Such annual assessment upon any one member must not be raised above the annual assessment established at the time such member joined such association. Such association, by its name, may sue and be sued, and may loan such funds as it may have on hand, and may own sufficient real estate for its business purposes, and such other real estate as it may be necessary to purchase on foreclosure of its mortgages: *Provided,* Such real estate so obtained through foreclosure shall be sold and conveyed within five years from the day title is obtained, unless the district court of the proper district shall, upon petition and good cause shown, extend the time. [R. S. § 2766.]

Hist. R. S. § 2766, reen. R. C. § 3017, reen. C. L. ib.

§ 4878. Lodges of Masons and Odd Fellows. The grand lodges which were incorporated under an act of the legislature of the territory of Idaho, entitled "An act to provide for the incorporation of the grand and subordinate lodges of Free and Accepted Masons and the grand and subordinate lodges of the Independent Order of Odd Fellows in this territory," approved January 9, 1866, and which lodges are now in existence, may, on or before January 1, 1912, file in the office of the secretary of state, and all subordinate lodges now existing which were incorporated under the above-mentioned act, may file in the offices of the secretary of state and of the county recorder of the county in which their principal place of business is situated, an acceptance of the provisions of this chapter; and thereafter all such corporations shall be deemed incorporated under the provisions of this chapter for the period of 50 years from and after the filing of such acceptance, and shall have all of the powers and rights and be subject to all the limitations and provisions of this chapter . [C. L. § 3017a.]

Hist. '11, c. 164, p. 561; compiled and reen. C. L. § 3017a.

The act referred to is '66, c. 44, p. 194.

ARTICLE 2.

CORPORATIONS SOLE.

§ 4879. [3018] **Corporation sole.** Incorporations may be formed for acquiring, holding and disposing of church or religious society property, for the benefit of religion, for works of charity and for public worship, in the manner hereinafter provided in this chapter. ['95, p. 24, § 1.]

Hist. '95, p. 24, § 1, reen. '99, p. 236, § 1, reen. R. C. § 3018, reen. C. L. ib.

§ 4880. [3019] **Execution of articles.** Any person being the archbishop, bishop, president, trustee in trust, president of stake, overseer, presiding elder, rabbi or clergyman, of any church or religious body, who shall have been duly chosen, elected or appointed, in conformity with the constitution, canons, rights, regulations or discipline of said church or religious society, and in whom shall be vested the legal title

to the property of such church or religious society, may make and subscribe written articles of incorporation in duplicate, and acknowledge the same before some officer authorized to take acknowledgments, and file one of such articles in the office of the secretary of state and retain possession of the other. ['03, p. 302, § 1.]

Hist. '95, p. 24, § 2, reen. '99, p. 236, § 2; am. '03, p. 302, § 1, reen. R. C. § 3019, reen. C. L. ib.

§ 4881. [3020] **Contents of articles.** The articles of incorporation shall specify:

1. The name assumed by the corporation and by which it shall be known.

2. The object of said corporation.

3. The estimated value of the property at the time of making the articles of incorporation.

4. The title of the person making such articles. ['95, p. 24, § 3.]

Hist. '95, p. 24, § 3, reen. '99, p. 236, § 3, reen. R. C. § 3020, reen. C. L. ib.

§ 4882. [3021] **Powers of corporation sole.** Upon making and filing for record articles of incorporation as herein provided, the person subscribing the same and his successor in office, by the name or title specified in the articles, shall thereafter be deemed and is hereby created, a body politic and a corporation sole, with continual perpetual succession, and shall have power to acquire and possess, by donation, gift, bequest, devise or purchase, and to hold and maintain, property, real, personal and mixed, and to grant, sell, convey, rent or otherwise dispose of the same as may be necessary to carry on or promote the objects of the corporation; and shall have authority to borrow money and to give written obligations therefor, and to secure the payment thereof by mortgage or other lien, upon real or personal property, when necessary to promote said objects. ['03, p. 302, § 2.]

Hist. '95, p. 24, § 4, reen. '99, p. 236, § 4; am. '03, p. 302, § 2, reen. R. C. § 3021, reen. C. L. ib.

§ 4883. [3022] **Same.** Such corporations shall have the power to contract and to be contracted with, to sue and be sued, plead and be pleaded in all courts of justice, and to have and use a common seal by which all deeds and acts of such corporation shall pass and be authenticated. ['95, p. 24, § 5.]

Hist. '95, p. 24, § 5, reen. '99, p. 236, § 5, reen. R. C. § 3022, reen. C. L. ib.

§ 4884. [3023] **Execution of deeds and other instruments.** All deeds and other instruments of writing shall be made in the name of the corporation, and signed by the person representing the corporation in the official capacity designated in the articles of incorporation, and be sealed with the seal of the corporation, an impression of which seal shall be filed in the office of the secretary of state. ['03, p. 302, § 3.]

Hist. '95, p. 24, § 6, reen. '99, p. 236, § 6; am. '03, p. 302, § 3, reen. R. C. § 3023, reen. C. L. ib.

Ultra vires: Where property had been conveyed to a religious organization and the grantee was named in the conveyance as "The Apostolic Holiness Church of Post Falls, Idaho, subject to the International Apostolic Holiness Union," a deed thereafter executed by "Reverend C. D. Erb, Pastor, C. M. Venters, Secretary," without being first authorized by the organization or society, is an act ultra vires and does not pass the title to such property. Apostolic etc. Union v. Knudson (1912) 21 I. 589, 123, P. 473.

§ **4885.** [3024] **Articles as evidence.** The articles of incorporation, or a certified copy of the ones filed and recorded in the office of the secretary of state, shall be evidence of the existence of such corporation. ['95, p. 24, § 7.]

Hist. '95, p. 24, § 7, reen. '99, p. 236, § 7, reen. R. C. § 3024, reen. C. L. ib.

§ **4886.** [3025] **Successor as corporation sole.** In the event of the death or resignation of any such archbishop, bishop, president, trustee in trust, president of stake, overseer, presiding elder, rabbi or clergyman, or of his removal therefrom, by the person or body having the authority to remove him when such person is at the time a corporation sole, his successor in office as such corporation sole, shall be vested with the title to any and all property held by his predecessor, as such corporation sole, with like power and authority over the same, and subject to all the legal liabilities and obligations thereto. Such successor shall file in the office of the county recorder of each county wherein any of said real property is situated a certified copy of his commission, certificate or letter of election or appointment. ['03, p. 302, § 4.]

Hist. '99, p. 236, § 8, enacted by '03, p. 302, § 4, reen. R. C. § 3025, reen. C. L. ib.

§ **4887.** [3026] **Title in abeyance pending appointment.** In case of the death, resignation or removal of any such archbishop, bishop, president, trustee in trust, president of stake, overseer, presiding elder, rabbi or clergyman, who, at the time of his death, resignation or removal, was holding the title to trust property, for the use or benefit of any church or religious society, and not incorporated as a corporation sole, the title to any and all such property held by him, of every nature and kind, shall not revert to the donor nor vest in the heirs of such deceased person, but shall be deemed to be in abeyance after such death, resignation, or removal, until his successor is duly appointed to fill such vacancy, and, upon the appointment of such successor, the title to all the property held by his predecessors, shall, at once, without any act or deed, vest in the person appointed to fill such vacancy. ['03, p. 302. § 5.]

Hist. '99, p. 236, § 9, enacted by '03, p. 302, § 5, reen. R. C. § 3026, reen. C. L. ib.

CHAPTER 197.

INSTITUTIONS OF LEARNING.

§ **4888.** [3027] **Who may form corporations.** Any number of persons not less than five, may form a corporation to found, establish and maintain a college, academy, seminary or other institution of learning, by executing and filing articles of incorporation in the manner provided by law for private corporations. ['93, p. 14, § 1.]

Hist. '93, p. 14, § 1, reen. '99, p. 169, § 1, reen. R. C. § 3027, reen. C. L. ib.

§ **4889.** [3028] **Articles of incorporation.** The articles of incorporation shall set forth:

1. The name of the corporation.
2. The purposes for which it it formed.
3. The place where the institution is to be located.
4. The number of its directors or trustees, and the names and addresses of those who are first appointed. ['93, p. 14, § 2.]

Hist. '93, p. 14, § 2, reen. '99, p. 169, § 2, reen. R. C. § 3028, reen. C. L. ib.

§ 4890. [3029] **Number of directors.** The number of directors or trustees shall not be less than five, nor more than 18, a majority of whom shall be residents of the state of Idaho. ['93, p. 14, § 3.]

Hist. '93, p. 14, § 3, reen. '99, p. 169, § 3, reen. R. C. § 3029, reen. C. L. ib.

§ 4891. [3030] **Certificate of the secretary of state.** When the articles of incorporation are filed as provided in section 4898, the secretary of state shall issue a certificate over the great seal of the state, stating that a copy of the articles of incorporation has been filed in his office containing the necessary statement of facts. ['93, p. 14, § 4.]

Hist. '93, p. 14, § 4, reen. '99, p. 169, § 4, reen. R. C. § 3030, reen. C. L. ib.

§ 4892. [3031] **Amendment of articles.** The articles of incorporation may be altered or amended in any particular except as to the purposes for which the corporation is formed, and such alteration or amendment shall have effect from and after the time of filing a certificate of the same, executed by at least two-thirds of the directors or trustees, in the same manner as the original articles are filed. When such alteration or amendment changes the name, the secretary of state shall issue a certificate stating the fact. ['93, p. 14, § 5.]

Hist. '93, p. 14, § 5, reen. '99, p. 169, § 5, reen. R. C. § 3031, reen. C. L. ib.

§ 4893. [3032] **Powers of corporations.** Such corporation shall have power of perpetual succession, and in addition to the powers granted by law to other private corporations, shall have power to take by purchase, gift, grant, devise or bequest, and to hold for the use of such corporation, any real or personal property whatsoever, and to sell, convey, mortgage or otherwise use the same as may be considered most conducive to the interests of such institution; but no such corporation must own or hold more real estate than may be necessary for the business and objects of the corporation, and such corporation shall have no power to divert any gift, grant, bequest or devise from the specific purpose designated by the donor. ['93, p. 14, § 6.]

Hist. '93, p. 14, § 6, reen. '99, p. 169, § 6, reen. R. C. § 3032, reen. C. L. ib.

§ 4894. [3033] **Election of directors or trustees.** Such corporation shall by its by-laws provide for the election of directors or trustees, in such manner, at such times and places, for such periods, and from such persons, as may be considered most conducive to its interests: *Provided,* a majority of such directors or trustees shall be bona fide residents of the state of Idaho. ['93, p. 14, § 7.]

Hist. '93, p. 14, § 7, reen. '99, p. 169, § 7, reen. R. C. § 3033, reen. C. L. ib.

§ 4895. [3034] **Powers of directors.** The directors shall have the control of the affairs and property of the corporation, and may appoint and fix salaries of president, principal and professors, tutors and other teachers, and such other officers and agents as they may deem necessary, and remove them at pleasure; and may prescribe the course of study and the discipline to be observed in the institution, or any department thereof, and may grant such literary honors and degrees as are usually granted by like institutions, and give suitable diplomas in testimony thereof. ['93, p. 14, § 8.]

Hist. '93, p. 14, § 8, reen. '99, p. 169, § 8, reen. R. C. § 3034, reen. C. L. ib.

§ 4896. [3035] **Religious tests prohibited.** No religious test whatever shall be required of any applicant for admission into any institu-

tion of learning existing under the provisions of this chapter. ['93, p. 14, § 9.]

Hist. '93, p. 14, § 9, reen. '99, p. 169, § 9, reen. R. C. § 3035, reen. C. L. ib.

§ 4897. [3036] **Corporations for private gain prohibited.** No corporation whose purpose is private gain shall ever be incorporated or continued in existence by virtue of the provisions of this chapter. ['93, p. 14, § 10.]

Hist. '93, p. 14, § 10, reen. '99, p. 169, § 10, reen. R. C. § 3036, reen. C. L. ib.

CHAPTER 198.

AGRICULTURAL FAIR CORPORATIONS.

§ 4898. [3037] **Power to hold real estate.** Agricultural fair corporations may purchase, hold, or lease any quantity of land, not exceeding in the aggregate 160 acres, with such buildings and improvements as may be erected thereon, and may sell, lease, or otherwise dispose of the same at pleasure. This real estate must be held for the purpose of erecting buildings and other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactories, stock raising, and general domestic industry. [R. S. § 2775.]

Hist. R. S. § 2775, reen. R. C. § 3037, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 620: Kerr's C. ib.

§ 4899. Limitation on indebtedness. Such corporation shall have the power to contract debts or liabilities in an amount not exceeding 30 per centum of the actual value of its real property; and it may also create a debt not exceeding $5000 for the purpose of real property, securing same by mortgage on the property of the corporation. ['17, c. 155, p. 481.]

Hist. R. S. § 2776, reen. R. C. § 3038; am. '17, c. 155, p. 481, reen. C. L. § 3038.

§ 4900. [3039] **Not to be conducted for profit.** Agricultural fair corporations are not conducted for profit, and have no capital stock or income other than that derived from charges to exhibitors and fees for membership, which charges, together with the term of membership and the mode of acquiring the same, must be provided for in their by-laws. Such fees must never be greater than to raise sufficient revenue to discharge the debt for the real estate and the improvements thereon, and to defray the current expenses of fairs. [R. S. § 2777.]

Hist. R. S. § 2777, reen. R. C. § 3039, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 622: Kerr's C. ib.

CHAPTER 199.

GAS CORPORATIONS.

§ 4901. [3041] **Consent of municipality must be obtained.** No corporation hereafter formed must supply any city or town with gas, or lay down mains or pipes for that purpose in the streets or alleys thereof, without permission from the city or town authorities. [R. S. § 2787.]

Hist. R. S. § 2787, reen. R. C. § 3041, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 628.

Cross ref. Must secure certificate of convenience and necessity from public utility commission: § 2474.

§ 4902. [3042] **Duty to furnish gas on application.** Upon the application in writing of the owner or occupant of any building or premises distant not more than 100 feet from any main of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas as required for such building or premises, and can not refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of 10 days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of $50 as liquidated damages, and $5 a day as liquidated damages, for every day such refusal or neglect continues thereafter. [R. S. § 2788.]

Hist. R. S. § 2788, reen. R. C. § 3042, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 629; similar but applies also to electricity: Kerr's C. ib.

§ 4903. [3043] **Same: Applicant must defray expenses.** No corporation is required to lay a service pipe where serious obstacles exist to laying it, unless the applicant, if required, deposits in advance with the corporation, a sum of money sufficient to pay the cost of laying such service pipe, or his proportion thereof. [R. S. § 2789.]

Hist. R. S. § 2789, reen. R. C. § 3043, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 630: Kerr's C. ib.

§ 4904. [3044] **Right to inspect meters.** Any agent of a gas corporation, exhibiting written authority signed by the president or secretary thereof for such purpose, may enter any building or premises lighted with gas supplied by such corporation, to inspect the gas meters therein, to ascertain the quantity of gas supplied or consumed. Every owner or occupant of such buildings who hinders or prevents such entry or inspection must pay to the corporation the sum of $50 as liquidated damages. [R. S. § 2790.]

Hist. R. S. § 2790, reen. R. C. § 3044, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 632; similar applying also to electricity: Kerr's C. ib.

§ 4905. [3045] **Discontinuance of supply.** All gas corporations may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied, or the rent for any meter, pipes, or fittings provided by the corporation as required by his contract; and for the purpose of shutting off the gas in such case, any employee of the corporation may enter the building or premises of such person, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of any day, and remove therefrom any property of the corporation used in supplying gas. [R. S. § 2791.]

Hist. R. S. § 2791, reen. R. C. § 3045, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 632; similar but also applies to electricity: Kerr's C. ib.

CHAPTER 200.

LAND AND BUILDING CORPORATIONS.

§ 4906. Organization. Corporations organized for the purpose of erecting buildings and making improvements on real estate, or for the accumulation of savings and funds of its members and lending same upon real property, may raise funds in shares not exceeding $200 each, payable in full or in periodical instalments. Such bodies are known as land and building corporations and may be organized with or without capital stock. ['19, c. 190, § 2, p. 574.]

Hist. R. S. § 2796, reen. R. C. § 3046, reen. C. L. § 3046; am. '19, c. 190, § 2, p. 574.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 639.

Usury not authorized: There is no provision in this chapter which authorizes a building and loan association to extort usurious rates of interest from its debtors. Fidelity Savings Assn. v. Shea (1899) 6 I. 405, 55 P. 1022. See also Stevens v. Home Savings etc. Assn. (1898) 5 I. 741, 51 P. 779; Ford v. Wash. Nat. etc. Assn. (1904) 10 I. 30, 76 P. 1010, 109 A. S. R. 192.

§ 4907. [3047] **Power to borrow money.** Any such corporation may borrow money for the purpose of carrying out its objects, and may give as security therefor its shares or mortgages upon its real estate. [R. S. § 2797.]

Hist. R. S. § 2797, reen. R. C. § 3047, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 640: Kerr's C. § 641.

§ 4908. Purchase of real estate: Loans. Any such corporation may purchase real estate and erect buildings for its members and make loans upon, and secured by, improved real property. ['19, c. 190, § 3, p. 574.]

Hist. R. S. § 2798, reen. R. C. § 3048, reen. C. L. ib.; am. '19, c. 190, § 3, p. 574.

Comp. leg.—Cal. See Civ. C. 1872, § 641: Kerr's C. § 640.

§ 4909. [3049] **Insurance of members.** Such corporation may insure, in some life insurance company, the lives of its members and debtors. In case of the death of a debtor or member so insured, the amount recovered on the policy, must be applied to extinguish the indebtedness, including the premium paid, and the residue, if any, must be paid to the legal representative of the decedent. [R. S. § 2799.]

Hist. R. S. § 2799, reen. R. C. § 3049, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 642.

§ 4910. [3050] **Power to hold real estate.** Any such corporation may purchase, hold, and convey real estate, as follows:

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed $20,000.
2. Such as may, from time to time, be necessary to supply the wants of members, the cost of which held unallotted to the members thereof at any one time, must not exceed the sum of $50,000.
3. Such as has been mortgaged, pledged, or conveyed to it in trust, to secure money loaned or to secure the purchase price thereof in pursuance of the regular business of the corporation. [R. S. § 2800.]

Hist. R. S. § 2800, reen. R. C. § 3050, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 643.

§ 4911. [3051] **Contents of by-laws.** The by-laws of such corporation must specify the amount of the periodical subscriptions or payments to be made by each member, the time and manner in which such payments are to be made; the fines and forfeitures for default; the time and manner of election of directors and other officers, and their terms of office; the manner in which real estate may be distributed, allotted or sold to its members; the terms and conditions upon which loans may be made to its members, and by them repaid to the corporation; the manner in which a person may become, and cease to be, a member; the conditions on which members may withdraw from the corporation, and the provisions for the payment to withdrawing members of the sums of money due them, arising from subscriptions or payments, and the proportion of the profits such withdrawing members may receive on withdrawal. [R. S. § 2801.]

Hist. R. S. § 2801, reen. R. C. § 3051, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 644.

§ 4912. [3052] **Annual statement.** The secretary of any such corporation must, once in each year during the existence of the corpora-

tion, prepare a full and explicit statement of the financial affairs thereof, comprising a balance sheet, statements of receipts and expenditures, profit and loss, and assets and liabilities, which must be audited and verified by two competent persons (not directors) elected by the general body of shareholders, and be countersigned by the president and secretary. A copy of such statement must be printed and circulated among the members, and must appear immediately after the annual meeting of the corporation, daily at least one week, or weekly at least four weeks, in one or more newspapers published at the place of business of the corporation. [R. S. § 2802.]

Hist. R. S. § 2802, reen. R. C. § 3052, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 645: Kerr's C. § 644.

§ 4913. [3053] **Liability of shareholders.** Every present and past member of such corporation is personally liable for such proportion of all its debts and liabilities, incurred during his membership, as the number of shares subscribed by him bears to the whole number of subscribed shares; but no past member is liable for such contribution if more than one year elapsed since he ceased to be a member before suit is commenced, nor for any debt or liability contracted after the time at which he ceased to be a member, nor unless it appears to the court that the corporation is unable to satisfy such debts and liabilities; nor must any contribution be required from any member or past member exceeding the amount unpaid on the shares in respect to which it is liable. [R. S. § 2803.]

Hist. R. S. § 2803, reen. R. C. § 3053, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 646; repealed 1874.

§ 4914. [3054] **Consolidation and transfer of assets.** Any two or more such corporations may unite and become incorporated in one body, with or without any dissolution or division of the funds of such corporation, or either of them; or any such corporation may transfer its engagements, funds and property to any other such corporation upon such terms as may be agreed upon by two-thirds of the members of each of such bodies present at general meetings of the members, convened for the purpose by notice stating the object of the meeting, sent through the post office to every member, and by general notice appearing daily at least one week, or weekly at least two weeks, in some newspaper published at the place of the principal business of the corporation; but no such transfer can prejudice any right of any creditor of either corporation. [R. S. § 2804.]

Hist. R. S. § 2804, reen. R. C. § 3054, reen. C. L. ib.

Cited: Equitable Trust Co. v. Great Shoshone etc. Co. (1915) 228 F. 516.

Comp. leg.—Cal. Same: Civ. C. 1872, § 647.

§ 4915. [3055] **Married women and minors as members.** Married women and minors may be admitted as members, and may take and hold shares in such corporations, and may execute all necessary instruments, and give all necessary acquittances, and sell and transfer their shares in like manner as other members. [R. S. § 2805.]

Hist. R.S. § 2805, reen. R. C. § 3055, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 648; repealed 1874. See Kerr's C. § 643.

TITLE XXXVIII. INSURANCE.

Hist. The first insurance law was enacted '01, p. 165. As subsequently amended it was reenacted in the R. C. The law was entirely rewritten by '11, c. 225, p. 710, and c. 228, p. 732, all former enactments being expressly repealed. Subsequent amendments are: '12, c. 5, p. 10; '13, c. 31, p. 129; '13, c. 97, p. 385; '13, c. 166, p. 535; '13, c. 184, p. 589; '13, c. 185, p. 593; '15, c. 145, p. 317; '15, c. 171, p. 392; '17, c. 105, p. 381; '17, c. 108, p. 387; '17, c. 123, p. 410, and '17, c. 140, p. 449. As embodied in Compiled Laws the law was rearranged and the longer sections subdivided.

The law as enacted in '11, and reenacted in Compiled Laws created an insurance department and provided for the appointment of an insurance commissioner and a deputy.

'19, c. 8, § 51, p. 69, repealed C. L. 220:1-7, 11-13; § 38 of the same act (§ 351 herein) abolished the insurance department and the offices of the insurance commissioner and his deputy, and § 28 (§ 284 herein) vested their powers and duties in the department of commerce and industry.

The section notes "Compiled upon authority '19, c. 8," etc., indicate that the substitutions of offices and officials authorized by that act have been made accordingly; the text of preexisting law not being changed except in so far as necessary in making such substitutions.

CHAPTER 201.

SUPERVISION OF INSURANCE COMPANIES.

ARTICLE 1.

§ 4916. Examiners. The department of commerce and industry may employ persons to make personal examinations of the condition and affairs of insurance companies when necessary, as required by law.

Hist. '11, c. 228, part of § 9, p. 734, reen. C. L. 220:8; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4917. Attorney general's duty. Whenever the department of commerce and industry may think necessary it shall call upon the attorney general of the state for legal counsel and such assistance as may be necessary to enforce the provisions of the insurance laws.

Hist. '11, c. 228, part of § 9, p. 734, reen. C. L. 220:9; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4918. Records of office public. The office of said department of commerce and industry in relation to insurance and insurance companies shall be deemed a public office, and the records, books and papers thereof or on file therein shall be deemed public records of this state.

Hist. '11, c. 228, part of § 10, p. 734; compiled and reen. C. L. 220:10; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4919. Reports. The department of commerce and industry shall have printed annually, on or before the 1st day of July, and transmit to the governor, a report which shall contain the official transactions of the department and contain in a condensed form statements made to the department by every insurance company authorized to do business in this state pursuant to the provisions of this title, and such statements and reports shall be audited and corrected by the department, all arranged in tabular form or in abstracts, which report shall also contain:

1. A statement of all insurance companies authorized to do business in this state during the year ending the 31st day of December next preceding, with their names, locations, amounts of capital, dates of incorporation and of the commencement of business, and kinds of insurance in which they are engaged respectively.

2. A statement of the insurance companies whose businesses have been closed since making the last report and the reasons for closing the same, with the amount of their assets and liabilities so far as the same are known or can be ascertained by the department.

3. The names and compensation of the clerks employed by the department and the whole amount, itemized, of the expenses of the department during such period.

4. A detailed statement of the moneys and fees of office received by the department and for what purposes.

In addition to the annual reports herein provided the department of commerce and industry shall have printed and issue, immediately preceding the meeting of the legislature, a biennial report which shall contain recommendations regarding insurance legislation which in the opinion of the department shall seem desirable, in addition to other data that the department may consider of interest to the legislature.

Sufficient copies of such annual and biennial reports shall be laid before the legislature meeting after the issuing of such reports for the use and information of its members, and in addition the department of commerce and industry shall have printed the necessary number of copies of such reports for its use.

Hist. (See '01, p. 165, § 9, reen. R. C. § 169) '11, c. 228, § 12, p. 734; am. '13, c. 185, § 3, p. 595; compiled and reen. C. L. 220:14; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Reports of departments responsible to governor: § 271. Reports to be delivered to secretary of state on or before Dec. 1: § 411.

§ 4920. Certified lists of companies to county clerks. The department of commerce and industry shall furnish each of the clerks of the district courts of this state, quarterly, a certified list of all insurance companies doing business in this state under and by authority of this title, and such certificates shall be posted in the offices of such clerks for the inspection of the public.

Hist. '13, c. 185, § 4, p. 596, reen. C. L. 220:15; compiled upon authority '19, c. 8, § 28, p. 56.

ARTICLE 2.

CLASSIFICATION OF INSURANCE.

Cross ref. Express reference to this article: Capital and surplus of domestic companies: § 4946. Certificate of authority of foreign companies: § 4950.

§ 4921. Insurance classified. All insurance business in this state is classified into 14 classes, defined by the following sections of this article. [C. L. 220:16.]

Hist. (See '11, c. 228, § 57, p. 756) '13, c. 97, § 10, p. 397; compiled and reen. C. L. 220:16.

§ 4922. Class 1: Fire and marine. Fire and marine insurance, upon buildings and other property, against loss or damage by fire, lightning, wind storms, cyclones, tornadoes, hail or earthquakes, water from the breakage or leakage of sprinklers, pumps or other apparatus erected for extinguishing fires, and water pipes; and against accidental injury to such sprinklers, pumps or other apparatus; and against loss or damage arising from the prevention or suspension of rent or use and occupation of any building, plant or manufacturing establishment due to the hazard or peril insured against; and upon vessels, boats, cargoes, goods, merchandise, freight and other property against loss or damage by the risks of lake, river, canal and inland transportation and navigation; including insurance upon automobiles, whether stationary or being operated under their own power, and reinsurance of any risks taken in this class; but not

upon ocean marine risks, and other casualty insurance risks. ['13, c. 97, § 10, subd. 1, p. 397.]

Hist. '13, c. 97, § 10, subd. 1, p. 397, reen. C. L. 220:17.

Cross ref. Express references to this section: Qualifications: § 4951. Deposits required: § 4973. Annual statement and tax: § 4995.

§ 4923. Class 2: Marine. Marine insurance, including ocean and inland risks, transportation and automobiles, but not including any other casualty insurance as hereinafter provided. ['13, c. 97, § 10, subd. 2, p. 397.]

Hist. '13, c. 97, § 10, subd. 2, p. 397, reen. C. L. 220:18.

Cross ref. Express references to this section: Qualifications: § 4952. Deposits required: § 4973. Annual statement and tax: § 4995.

§ 4924. Class 3: Life. Life insurance, including endowments and annuities, but not including health or accident or sickness insurance, or any casualty insurance as hereinafter provided. ['13, c. 97, § 10, subd. 3, p. 397.]

Hist. '13, c. 97, § 10, subd. 3, p. 397, reen. C. L. 220:19.

Cross ref. Express references to this section: Qualifications: § 4953. Deposit required: § 4974. Annual statement and tax: § 4996.

§ 4925. Class 4: Accident. Accident insurance, and either sickness or health insurance, including insurance against injury, disablement or death resulting from traveling or general accident and against disablement resulting from sickness and every insurance appertaining thereto. ['13, c. 97, § 10, subd. 4, p. 397.]

Hist. '13, c. 97, § 10, subd. 4, p. 397, reen. C. L. 220:20.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4926. Class 5: Fidelity and surety. Fidelity and surety insurance, including the guaranteeing of persons holding places of public or private trust, guaranteeing the performance of contracts other than insurance policies; or guaranteeing and executing all bonds, undertakings and contracts of suretyship. ['13, c. 97, § 10, subd. 5, p. 397.]

Hist. '13, c. 97, § 10, subd. 5, p. 397, reen. C. L. 220:21.

Cross ref. Express references to this section: Qualifications: § 4954. Deposits required: § 4974. Annual statement and tax: § 4996.

§ 4927. Class 6: Liability. Liability insurance, including all insurance against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person for which the insured is liable. ['13, c. 97, § 10, subd. 6, p. 397.]

Hist. '13, c. 97, § 10, subd. 6, p. 397, reen. C. L. 220:22.

Cross ref. Express references to this section: Qualifications: § 4955. Deposits required: § 4974. Annual statement and tax: § 4996.

§ 4928. Class 7: Plate glass. Plate glass insurance, including all insurance against breakage of glass, whether local or in transit. ['13, c. 97, § 10, subd. 7, p. 398.]

Hist. '13, c. 97, § 10, subd. 7, p. 398, reen. C. L. 220:23.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4929. Class 8: Boiler and machinery. Boiler and machinery insurance, including insurance upon steam boilers, and upon pipes, engines and machinery connected with and operated thereby, against explosion and accident, and against loss or damage to life, person or property resulting therefrom. ['13, c. 97, § 10, subd. 8, p. 398.]

Hist. '13, c. 97, § 10, subd. 8, p. 398, reen. C. L. 220:24.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4930. Class 9: Burglary. Burglary insurance, including insurance against loss by burglary, house-breaking or theft. ['13, c. 97, § 10, subd. 9, p. 398.]

Hist. '13, c. 97, § 10, subd. 9, p. 398, reen. C. L. 220:25.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4931. Class 10: Sprinkler. Sprinkler insurance, including insurance against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers or water pipes. ['13, c. 97, § 10, subd. 10, p. 398.]

Hist. '13, c. 97, § 10, subd. 10, p. 398, reen. C. L. 220:26.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4932. Class 11: Credit. Credit insurance, including insurance or guaranty either by agreement to purchase uncollectible debts, or otherwise to insure against loss or damage from the failure of persons indebted or to become indebted to the insured, or to meet existing or contemplated liabilities. ['13, c. 97, § 10, subd. 11, p. 398.]

Hist. '13, c. 97, § 10, subd. 11, p. 398, reen. C. L. 220:27.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4933. Class 12: Team and vehicle. Team and vehicle insurance, including insurance against loss or legal liability for loss because of damage to property caused by the use of teams or vehicles, whether by accident or collision, or by explosion of any engine, tank, boiler, pipe or tire of any vehicle, and including insurance against theft of the whole or any part of any vehicle. The term "vehicle," as here used, includes, in addition to its ordinary meaning, elevators, automobiles and bicycles, but does not include ships, vessels, boats, nor railroad rolling stock. ['13, c. 97, § 10, subd. 12, p. 398.]

Hist. '13, c. 97, § 10, subd. 12, p. 398, reen. C. L. 220:28.

Cross ref. Express references to this section: Requirements: § 4957. Deposits: § 4974. Annual statement and tax: § 4996.

§ 4934. Class 13: Live stock. Livestock insurance, upon the lives of horses, cattle and other live stock, and against theft of and accident to such live stock. ['13, c. 97, § 10, subd. 13, p. 398.]

Hist. '13, c. 97, § 10, subd. 13, p. 398, reen. C. L. 220:29.

Cross ref. Express references to this section: Qualifications: § 4956. Deposits required: §4974. Annual statement and tax: § 4996.

§ 4935. Class 14: Miscellaneous. Miscellaneous insurance, including insurance upon any risk not included within or under either of the foregoing classes, and which is a proper subject of insurance, not prohibited by law or contrary to sound public policy. ['13, c. 97, § 10, subd. 14, p. 398.]

Hist. '13, c. 97, § 10, subd. 14, p. 398, reen. C. L. 220:30.

Cross ref. Express references to this section: Requirements: § 4974. Deposits: § 4974. Annual statement and tax: § 4996.

ARTICLE 3.

QUALIFICATION OF COMPANIES.

Cross ref. Limited partnership may not conduct insurance business: § 5784.

§ 4936. Companies must file articles and by-laws. Every insurance company transacting business in this state shall file with the department of commerce and industry in duplicate its charter or articles of incorporation and amendments thereto, duly certified to by the secretary of state or proper officer of the company's home state or country; and a copy of its by-laws, together with the names and residences of each of

its officers and directors, all of which shall be certified under the hands of the president and secretary of the company: *Provided,* That every foreign insurance company fully complying with the provisions of this article shall be exempt from complying with the provisions of sections 4772 to 4779.

Hist. (See R. C. § 2882) '11, c. 228, part of § 19, p. 740; am. '13, c. 97, § 7, p. 392, reen. C. L. 220:31; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4937. Examination by attorney general necessary before filing. When application is made to the department of commerce and industry by a number of persons desiring to become incorporated as an insurance corporation or for authorization to transact the business of insurance in this state, pursuant to any articles of incorporation or charter presented for filing in the department, or any amendment thereto, required by law to be filed or to be approved by the department of commerce and industry, the department shall not file such articles of incorporation, or charter, or grant a certificate of authority, until such articles of incorporation, charter or amendment shall have been examined by the attorney general and certified by him to the department to be in accordance with the requirements of law.

Hist. '11, c. 228, part of § 19, p. 740, reen. '13, c. 97, § 7, p. 392, reen. C. L. 220:32; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4938. Duplicate names prohibited. No certificate of authority to transact the business of insurance in this state shall be granted by the department of commerce and industry to any corporation hereafter applying therefor, if such corporation has the same name as another corporation authorized to transact such business in this state at the time of granting such certificate, or a name so nearly resembling it as to be calculated to deceive.

Hist. '11, c. 228, § 20, p. 741, reen. C. L. 220:33; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4939. Companies limited to business for which licensed. No insurance corporation shall transact any business in this state not specified in the certificate of authority granted by the department of commerce and industry.

Hist. '11, c. 228, part of § 16, p. 738; am. '13, c. 97, § 4, p. 389, reen. C. L. 220:34; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4940. Domestic and foreign mutual life companies. No domestic mutual life insurance company shall be permitted to do business in this state unless it is possessed of an actual paid up cash guaranty fund or surplus of not less than $100,000, and no such foreign company shall be permitted to do business unless possessed of surplus over all liabilities for the protection of policy holders amounting to not less than $100,000.

The cash or securities representing the minimum surplus required by this chapter of domestic life insurance companies incorporated on the mutual plan shall be deposited with the department of commerce and industry in the same manner as provided in sections 4962 to 4965 pertaining to investments of domestic and foreign stock insurance companies.

Hist. '11, c. 228, § 24, p. 742, reen. C. L. 220:35; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Surplus of life insurance companies: § 4941.

§ 4941. Same: Surplus must be paid in cash. No life insurance company incorporated under the mutual plan shall transact any business in this state until the surplus as provided in section 4940 has been fully paid in cash. ['11, c. 228, § 52, p. 756.]

Hist. '11, c. 228, § 52, p. 756, reen. C. L. 220:36.

Domestic Companies.

§ 4942. Formation of new companies: Certificate of authority. Whenever any number of persons shall associate to form an insurance company for any of the purposes named in the preceding article they shall file a copy of the articles of incorporation with the department of commerce and industry, which shall submit the same to the attorney general for examination; and, if found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution of this state, he shall certify and deliver back the same to the department, which shall commission the persons named in the certificate of incorporation, or a majority of them, to open books for the subscription of stock in the company at such time and place as they shall deem it convenient and proper, and shall keep the same open until the full amount specified in the certificate of incorporation is subscribed.

When the said articles of incorporation have been deposited with the department of commerce and industry, and the law in all other respects has been complied with by the company, the department shall make an examination, or cause one to be made by some competent and disinterested person appointed by it for that purpose; and, if it shall be found that the capital stock of the company, to the amount required by law, has been paid in and is possessed by it, in money or such other securities as are required by law, and that the same is the bona fide property of such company, and that such company has in all respects complied with the law relating to insurance, then the department of commerce and industry shall issue to such company a certificate of authority to commence business as proposed in their articles of incorporation.

Hist. '11, c. 228, part of § 48, p. 754, reen. C. L. 220:37; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4943. Same: Mutual companies. The provisions of the foregoing section shall also apply to companies formed upon the mutual or assessment plan. ['11, c. 228, part of § 48, p. 755.]

Hist. '11, c. 228, part of § 48, p. 755, reen. C. L. 220:38.

§ 4944. Increase of capital stock. Any existing insurance company, corporation or organization, or any company formed under the provisions of this chapter, may at any time increase the amount of its capital stock after giving notice thereof for four consecutive weeks in some newspaper published in the county where the organization is located and by filing with the department of commerce and industry a copy of such advertisement, subscribed and sworn to by the publisher or editor of said paper, after having been so advertised, together with a declaration, under its corporate seal, signed by the president and two-thirds of its board of directors and by the stockholders representing three-fourths of its capital stock, of their desire to so increase the capital: *Provided,* That said increase in capital stock shall be fully paid up in cash or securities contemplated in this chapter.

Hist. '11, c. 228, § 50, p. 755, reen. C. L. 220:39; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4945. Classes of business permitted. The provisions of sections 4950 to 4957, inclusive, shall apply to the classes of business to be transacted by domestic joint stock insurance companies, but shall not apply to the requirements as to capital or surplus of such companies. ['13, c. 97, § 9, subd. 8, p. 396.]

Hist. '13, c. 97, § 9, subd. 8, p. 396, reen. C. L. 220:40.

§ 4946. Capital and surplus of domestic companies. Any domestic insurance company may be authorized to transact business in this state if it shall have a fully paid in cash capital and surplus as follows:

General—If transacting one or more of classes 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 14 provided in article 2 of this chapter, it must have a capital of not less than $100,000; and if transacting business in class 3 of said article 2 it must also have a cash surplus equal to 50 per cent of its paid in capital.

Fidelity and surety—If transacting business in class 5 of said article 2 it must have a fully paid in cash capital of not less than $250,000, with a cash surplus of not less than $50,000.

Live stock—If transacting business in class 13 of said article 2 it must have a fully paid in cash capital of not less than $25,000 with a cash surplus equal to 50 per cent of its said capital.

The surplus provided in this section may be used in establishing the company in business without impairment of the company. [C. L. 220:41.]

Hist. '11, c. 228, § 21, p. 741; am. '13, c. 97, § 8, p. 392; compiled and reen. C. L. 220:41.

§ 4947. Domestic stock insurance company. No insurance company incorporated on the stock plan shall be authorized to transact business in this state until capital stock named in its articles of incorporation has been subscribed and the minimum amount provided in section 4946 has been fully paid in cash. ['11, c. 228, § 51, p. 756.]

Hist. '11, c. 228, § 51, p. 756, reen. C. L. 220:42.

Foreign Companies.

§ 4948. Foreign companies limited to classes authorized for domestic. A foreign insurance corporation may transact in this state only such kinds of business as, under the laws of this state, a like domestic corporation may be authorized to transact. ['13, c. 97, part of § 4, p. 389.]

Hist. '11, c. 228, part of § 16, p. 738; am. '13, c. 97, § 4, p. 389, reen. C. L. 220:43.

§ 4949. Appointment of commissioner as legal agent. No foreign insurance company shall, directly or indirectly, issue policies, take risks or transact any business in this state until it shall have first appointed, in writing, the commissioner of commerce and industry and his successor in office to be the true and lawful attorney for such company in and for this state upon whom all lawful process in any action or proceeding against the company may be served. Said power of attorney shall stipulate and agree upon the part of the company that any lawful process upon the company which is served upon said attorney shall be of the same legal force and validity as if served upon the company, and that the authority shall continue in force so long as any liabilities remain outstanding against the company in this state. A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the department of commerce and industry, and copies certified by the commissioner of commerce and industry shall be deemed sufficient evidence, and service upon such attorney shall be deemed sufficient service upon the principal: *Provided,* That every foreign insurance company fully complying with the provisions of this section shall be exempt from complying with the provisions of sections 4772 to 4779.

Hist. '11, c. 228, § 27, p. 743; am. '13, c. 97, § 13, p. 400, reen. C. L. 220:44; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4950. Foreign companies: Certificate of authority. Any foreign insurance company having the required amount of capital, or assets, when permitted by its articles of incorporation or charter, may be authorized and licensed by the department of commerce and industry to make insurance in this state under one or more of the classes prescribed in article 2 of this chapter: *Provided,* That said provisions requiring a surplus shall not apply to any joint stock insurance company licensed to do business in this state on January 1, 1913, or be so construed as to require the maintenance of such surplus by such company after admission into this state.

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, p. 393, reen. C. L. 220:45; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4951. Fire and inland marine companies: Qualifications. Any foreign stock insurance company making insurance in this state under class 1 of article 2 of this chapter shall have a capital stock fully paid up in cash of not less than $200,000, and a surplus of not less than $50,000; but such company shall not make insurance in this state in any other of said classes of insurance specified in article 2 except in classes 2 and 12; and shall not make insurance in class 2 without having additional capital of at least $100,000; and shall not make insurance in class 12 in addition to class 1 without having additional capital of at least $50,000; or in addition to classes 1 and 2 without having a capital stock of at least $350,000. [C. L. 220:46.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 1, p. 394; compiled and reen. C. L. 220:46.

Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4952. Marine insurance company: Qualifications. Any foreign stock insurance company making insurance in this state under class 2 of article 2 of this chapter shall have a capital stock of at least $100,000 fully paid, and a surplus of not less than $50,000; but such company shall not make insurance in this state in any other of said classes of insurance except in classes 1 and 12, nor make insurance in class 1 without having additional capital of at least $200,000; nor make insurance in class 12 in addition to class 2 without having an additional capital of at least $50,000; nor in addition to classes 1 and 2 without having a capital stock of at least $350,000. ['13, c. 97, § 9, subd. 2, p. 394.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 2, p. 394, reen. C. L. 220.47.

Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4953. Life insurance companies: Qualifications. Any foreign stock insurance company making insurance in this state under class 3 of article 2 of this chapter shall have a capital stock fully paid of at least $100,000, and a surplus of not less than $50,000 but such company shall not make insurance in this state in any other of said classes of insurance except in class 4; nor make insurance in class 4 without having additional capital of not less than $50,000: *Provided,* That any such company whose charter or articles of incorporation permit it to make life, accident, health and liability insurance, which shall have been licensed to transact liability insurance in this state on the 1st day of January, 1913, and which has a capital of not less than $350,000, shall be permitted, during its continuance in this state, to transact liability business in this state in addition

to the other classes of insurance which it may transact under the provisions of this chapter. ['13, c. 97, § 9, subd. 3, p. 395.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 3, p. 395, reen. C. L. 220:48.
Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4954. Fidelity and surety insurance companies: Qualifications. Any foreign stock insurance company making insurance in this state under class 5 of article 2 of this chapter shall have a capital stock fully paid of not less than $250,000 and a surplus of not less than $100,000; but such company shall not make insurance in this state in any other of said classes of insurance specified in said article 2 except in classes 4, 6, 7, 8, 9, 10, 11, 12 and 14; and it shall not make insurance in class 6 without having additional capital of at least $50,000; such company may make insurance in classes 7, 8, 9, 10, 11, 12 and 14 when it has additional capital of not less than $50,000. ['13, c. 97, § 9, subd. 4, p. 395.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 4, p. 395, reen. C. L. 220:49.
Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4955. Liability insurance companies: Qualifications. Any foreign stock insurance company making insurance in this state under class 6 of article 2 of this chapter shall have a capital stock of at least $200,000 fully paid, and a surplus of not less than $100,000; but such company shall not make insurance in this state in any other of said classes of insurance specified in said section except in classes 4, 5, 7, 8, 9, 10, 11, 12 and 14; and it shall not make insurance in class 5 without having additional capital of at least $100,000. Such company may make insurance in one or all of the following classes: 4, 7, 8, 9, 10, 11, 12 or 14, when it has an additional capital of at least $50,000. ['13, c. 97, § 9, subd. 5, p. 396.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 5, p. 396, reen. C. L. 220:50.
Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4956. Live stock insurance companies. Any foreign insurance company making insurance in this state in class 13 of article 2 of this chapter shall have a capital stock of at least $100,000 fully paid, and a surplus of not less than $50,000. ['13, c. 97, § 9, subd. 6, p. 396.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 6, p. 396, reen. C. L. 220:51.
Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4957. Other companies: Requirements. Any foreign stock insurance company making insurance in this state in either of the following classes specified in article 2 of this chapter, 4, 7, 8, 9, 10, 11, 12 and 14, shall have a capital stock of at least $100,000 fully paid; but such company shall not make insurance in more than one of said classes unless it shall have additional capital of not less than $50,000. ['13, c. 97, § 9, subd. 7, p. 396.]

Hist. '11, c. 228, § 22, p. 742; am. '13, c. 97, § 9, subd. 7, p. 396, reen. C. L. 220:52.
Cross ref. Express references to this section: Application to joint stock insurance companies: § 4945; mutual and fraternal companies: § 4958.

§ 4958. Assessment: Mutual: Fraternal companies. The provisions of the foregoing sections 4950 to 4957, inclusive, shall not apply to life or fire insurance companies operating on the mutual or assessment or fraternal plan. ['13, c. 97, § 9, subd. 9, p. 397.]

Hist. '13, c. 97, § 9, subd. 9, p. 397, reen. C. L. 220:53.

§ 4959. Foreign mutual hail insurance companies. Foreign mutual insurance companies which insure on the assessment plan growing crops

against loss by hail storm, cyclone and tornado, transacting business in this state, must have cash assets of not less than $100,000, of which not less than $50,000 shall be net surplus.

Such companies shall pay the same fees and taxes as required of other foreign insurance companies and be subject to the same regulations so far as the same are applicable thereto, except that such companies shall not be required to maintain a deposit with the department of commerce and industry in order to transact business in this state.

Hist. '13, c. 185, § 17, p. 601, reen. C. L. 220:54; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4960. Assessment life and casualty companies. Companies or associations organized under the laws of this or any other state in the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan shall be licensed by the department of commerce and industry to do business in this state: *Provided, however,* That such company or association shall first file with the department of commerce and industry a certified copy of its charter; a written agreement appointing the commissioner of commerce and industry to be its true and lawful attorney upon whom all lawful process in any action or proceedings against it may be served; a certificate, under oath, of its president and secretary that it is paying and for the 12 months next preceding has paid the maximum amount named in its policy or certificates in full; a statement, under oath, of its president and secretary, of its business for the year ending December 31 preceding; a certified copy of its constitution and by-laws and a copy of its policy and application; a certificate from the proper authority of its home state that said company or association is legally entitled to do business in such state and has at least $100,000 surplus assets subject to its indebtedness, said surplus to be invested as provided in sections 4962 to 4965, governing the investment of all other insurance corporations transacting business in this state. It shall be the duty of the department of commerce and industry to issue a license to any company or association complying with the provisions of this chapter, and every such company or association shall annually thereafter, before such license is renewed, file with the department, on or before the 1st day of March, a statement under oath, of its president, secretary, or like officer, of its financial condition and of its business for the year ending December 31 preceding.

Hist. '11, c. 228, § 58, p. 757, reen. C. L. 220:55; compiled upon authority '19, c. 8, § 28, p. 56.

ARTICLE 4.

GENERAL REGULATIONS.

Dividends.

§ 4961. Restrictions on dividends. The directors of every insurance corporation, at such times as their by-laws may provide, shall make, declare and pay to the stockholders dividends of so much of the net profits of the corporate business and interest on capital invested as to them appears advisable: *Provided,* It shall not be lawful for any insurance company organized under the laws of this state to make any dividend except from surplus profits arising from its business, and in estimating such profits, there shall be reserved therefrom the lawful reserve on all unexpired risks, the amount of all unpaid losses, whether adjusted or unadjusted, all other debts due and payable, or to become due and payable, and all other liabilities including the entire subscribed capital stock; any

dividends made contrary to the provisions of this chapter shall subject the company making them to a forfeiture of its charter, and the department of commerce and industry shall forthwith revoke its certificate of authority: *Provided,* That the department shall give such company at least 10 days' notice in writing of its intention to revoke such certificate, stating specifically the reasons for such revocation: *Provided further,* That nothing in this section shall be construed to prevent the apportionment, accounting and distributing of such surplus to policy holders or members of insurance companies who are entitled to share in the profits of surplus as apportioned to their contracts of insurance.

Hist. (See R. C. § 2861) '11, c. 228, § 21, p. 741; am. '13, c. 97, § 8, p. 392, reen. C. L. 220:56; compiled upon authority '19, c. 8, § 28, p. 56.

Investments.

§ 4962. Minimum cash capital: Domestic companies. The cash capital of every domestic insurance corporation required to have a capital, to the extent of the minimum capital required by law, shall be invested and kept invested in the bonds of the United States, or of this state, not estimated above their current market value, or in the bonds of a county or incorporated city in this state, authorized by law to be issued, not estimated above their par or current market value, or in bonds and mortgages on improved unencumbered real estate worth at least 50 per cent more than the amount loaned thereon. ['13, c. 97, part of § 11, p. 398.]

Hist. '11, c. 228, part of § 25, p. 742; am. '13, c. 97, § 11, p. 398, reen. C. L. 220:57.

Cross ref. Express references to this section: Mutual life companies: § 4940. Assessment life and casualty companies: § 4960. Nature of deposits: § 4975. Requirements of foreign mutual fire insurance companies: § 5088. Capital of live stock insurance companies: § 5094.

§ 4963. Same: Foreign companies. The cash capital of every foreign insurance corporation doing business in this state shall be invested and kept invested in the same class of securities specified for a domestic insurance corporation, except that like securities of the home state or foreign country shall be recognized as a legal investment for the amount of minimum capital required. ['11, c. 228, part of § 25, p. 742.]

Hist. '11, c. 228, part of § 25, p. 742, reen. '13, c. 97, § 11, p. 398, reen. C. L. 220:58.

Cross ref. Express references to this section: Mutual life companies: § 4940. Assessment life and casualty companies: § 4960. Nature of deposits: § 4975. Requirements of foreign mutual fire insurance companies: § 5088. Capital of live stock insurance companies: § 5094.

§ 4964. Surplus. The residue of the capital and surplus money or funds of every domestic or foreign insurance corporation, over and above its capital or money deposit that it may be required to make with the department of commerce and industry may be invested in or loaned on the pledge of any of the securities in which deposits are required to be invested, or in the public bonds of any of the states of the United States or the District of Columbia, or in bonds issued by any of the incorporated cities, counties, townships, school districts or other municipal corporations thereof, or in bonds or notes secured by mortgage or trust deed on improved unencumbered real estate located within said states or in the District of Columbia, or any of them, worth at least 50 per cent more than the amount loaned thereon; or, when so authorized and directed by a majority vote of all the directors or trustees of the company, may be invested in or loaned upon the legally issued bonds of any solvent irrigation district created as by law provided in this state, or in any other state of the United States, whose water rights shall have been legally acquired and finally determined, and shall be fully adequate to supply sufficient water to properly irrigate all land within such district, and whose storage reservoirs,

canals, ditches, flumes, feeders, machinery, equipment and other works and improvements shall have been acquired, owned and constructed, and be unencumbered except as to such bond issue, and shall be reasonably adequate to fully supply and properly serve such district, and shall have been so far constructed and completed as to be in regular operation and use, and adequately irrigating not less than 30 per cent of the lands within such irrigation district; or invested in or loaned on mortgage bonds of railroad companies organized under the laws of said states or the District of Columbia or either of them, or operated therein; or the capital stock, bonds, securities or evidence of indebtedness, which have at the time of investment a market value of not less than their paid in value, issued by any corporation or corporations created under the laws of the United States, or of this or any other state, except the stock of any oil or mining company, or the stock of any fish, fruit or vegetable canning company, but no such company shall invest in more than 10 per cent of the capital stock of any one corporation, nor in any bonds or securities which are in default for interest, nor shall more than 10 per cent of its assets be invested in or loaned upon the stock of any one corporation: *Provided,* That no loan shall be made or retained on any of the above mentioned securities except the bonds or stock issued or created by the United States, exceeding 90 per cent of the market value thereof: *Provided further,* That no loan shall be made by any company on its own stock: *Provided,* Any life insurance company may loan a sum not exceeding the lawful reserve which it holds for any policy on the pledge to it of such policy and its accumulations as collateral security.

Hist. '11, c. 228, part of § 25, p. 742; am. '13, c. 97, § 11, p. 398, reen. C. L. 220:59; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express references to this section: Mutual life companies: § 4940. Assessment life and casualty companies: § 4960. Nature of deposits: § 4975. Requirements of foreign mutual fire insurance companies: § 5088. Capital of live stock insurance companies: § 5094.

§ 4965. Same: Foreign investments of domestic corporations. Every such domestic corporation doing business in other states of the United States or foreign country may invest the required amount to meet its obligations incurred in such other states or foreign country, and in conformity to the laws thereof, in the same kind of securities in such other states or foreign country that such corporation is by law allowed to invest in this state. ['11, c. 228, part of § 25, p. 742.]

Hist. '11, c. 228, part of § 25, p. 742; am. '13, c. 97, § 11, p. 398, reen. C. L. 220:60.

Cross ref. Express references to this section: Mutual life companies: § 4940. Assessment life and casualty companies: § 4960. Nature of deposits: § 4975. Requirements of foreign mutual fire insurance companies: § 5088. Capital of live stock insurance companies: § 5094.

§ 4966. Restrictions on real estate holdings. Insurance corporations transacting business in this state may purchase, hold and convey real property only for the following purposes and in the following manner:

1. The building in which it has its principal office and the land upon which it stands.
2. Such as shall be requisite only for its convenient accommodation in the transaction of its business.
3. Such as shall have been acquired for the accommodation of its business.
4. Such as shall have been mortgaged to it in good faith by way of securities for loans previously contracted or for moneys due.
5. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

6. Such as shall have been purchased at sales upon judgments, decrees and mortgages obtained or made for such debts.

All such real property specified in subdivisions 3, 4, 5, and 6 of this section as shall not be necessary for its accommodation in the convenient transaction of its business, shall be sold and disposed of within five years after the same shall have ceased to be necessary for the accommodation of its business, and it shall not hold such property for a longer period unless it shall procure a certificate from the department of commerce and industry that its interests will suffer materially by the forced sale thereof, in which event the time for the sale may be extended to such time as the department shall direct in such certificate.

No real property shall be acquired by any domestic life insurance corporation under subdivisions 1 or 2 hereof, and no real property within the state shall be acquired under subdivision 2 hereof, except with the approval of the department of commerce and industry.

No real property shall be disposed of by any domestic life insurance corporation and no real property shall be disposed of by any foreign life insurance company by exchange for other real property hereafter substituted as a consideration of the transfer in whole or in part, unless the acquisition of the land shall be requisite for the convenient accommodation of the corporation in the transaction of its business, and shall be approved by the department of commerce and industry, or, if a foreign company, the insurance commissioner of the company's home state.

Hist. (See R. C. § 2860) '11, c. 228, § 47, p. 754, reen. C. L. 220:61; compiled upon authority '19, c. 8, § 28, p. 56.

Actions.

§ 4967. Venue of action: Service of process. Suits may be instituted and prosecuted against any insurance company in any county where a loss occurs, or where the policy holder instituting such suit resides, and the process in any such suit against a foreign company may be served upon the commissioner of commerce and industry of this state as attorney in fact for such company.

Hist. '11, c. 228, § 26, p. 743; am. '13, c. 97, § 12, p. 400, reen. C. L. 220:62; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4968. Failure to satisfy judgment: Revocation of authority. Should any insurance company fail to pay over and satisfy any execution that may lawfully issue or any final judgment against said company within 30 days after the officer holding such execution has demanded payment thereof from the duly authorized officer, agent or attorney of such company in this state or out of it, such officer shall immediately certify such demand and failure to the department of commerce and industry, and thereupon the department shall declare null and void the certificate of authority issued by it to such company. Such company shall be prohibited from transacting any business in this state thereafter until said execution shall be fully satisfied and discharged, and until such department shall renew its certificate of authority to such company.

Hist. '11, c. 228, § 33, p. 745; am. '13, c. 97, § 17, p. 402, reen. C. L. 220:63; compiled upon authority '19, c. 8, § 28, p. 56.

Deposits.

§ 4969. Deposits with department: How made. The department of commerce and industry shall receive and hold on deposit in the

manner provided in this chapter, the securities of domestic companies which are deposited by any such company under the provisions of this chapter for the purpose of securing policy holders, or to comply with any similar law of another state to enable such company to transact business in such state. The department shall furnish, under its official seal, to such company, a certificate certifying that it holds said securities in trust for the benefit of the policyholders of such company. The department of commerce and industry shall give vouchers for all securities deposited with it to the company depositing them. It shall be the duty of the department, upon receipt of such securities from any insurance company, to forthwith deposit the same in the presence of the president or authorized agent of the company in a strong iron box, which shall require two distinct and different keys to unlock the same, one key to be kept by the department, and the other by the company, and the box shall not be opened, except in the presence of the commissioner of commerce and industry or deputy and the said president or authorized agent of the company: *Provided, however,* That in case the company having such securities on deposit shall be adjudged insolvent, or be dissolved, the court may make and enforce the necessary orders to place such securities, or any part of them, at the sole disposal of the court or department of commerce and industry. The boxes shall be placed in the vault of a safe deposit company or national bank in the city of Boise, to be selected by the department, and the insurance company shall pay the several fees for the safe keeping of their several boxes. So long as the company so depositing shall continue solvent, the department shall permit such company to collect and receive the interest and dividends on its securities so deposited and transferred, and, from time to time, to withdraw such securities on depositing other securities in place of those to be withdrawn, such new securities to be of the same value as or greater value than those withdrawn.

Hist. '11, c. 228, part of § 13, p. 735, reen. C. L. 220:64; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4970. Same: Liability of officials. If the commissioner or deputy shall wilfully fail, refuse or neglect to faithfully keep, deposit, account for or surrender, in the manner by law authorized or required, any such securities, as aforesaid, transferred to and received by him or under his custody under the provisions of this chapter, or shall wilfully fail, refuse or neglect to furnish proper certificates of the securities so held by him, as herein provided, said commissioner or his deputy shall be responsible upon his official bond, and suit may be brought upon said bond by any person injured. ['11, c. 228, part of § 13, p. 735.]

Hist. '11, c. 228, part of § 13, p. 735, reen. C. L. 220:65.

§ 4971. Annual certificate of deposits outside state. Every insurance company organized under the laws of any foreign country doing business in this state must, on or before the 1st day of March of each year, file with the department of commerce and industry a certificate from the properly qualified officer of the state wherein its deposits are made, showing the amount and the character of the securities composing such deposit.

Hist. '11, c. 228, § 14, p. 736; am. '12, c. 5, § 1, p. 11; am. '13, c. 97, § 3, p. 387, reen. C. L. 220:66; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4972. Deposits required: Domestic companies. The cash or securities representing the minimum capital or surplus required by this

chapter of domestic joint stock and of domestic companies organized on the mutual or assessment plan, and the legal reserve on all policies of a domestic legal reserve life insurance company shall be deposited with the department of commerce and industry in the manner provided in this chapter.

Hist. '11, c. 228, § 14, p. 736, reen. '12, c. 5, § 1, p. 11, reen. '13, c. 97, § 3, p. 387, reen. C. L. 220:67; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4973. Same: Alien fire and marine. No insurance company organized under the laws of any foreign country, transacting the business permitted in classes 1 and 2, or either of them, including or excluding class 12 of article 2 of this chapter, shall be licensed to transact such business in this state, unless, in addition to complying with the laws of this state, it shall have made a deposit with the department of commerce and industry of this state, or with the duly authorized officer of some other state of the United States, in a sum not less than $200,000.

Hist. '11, c. 228, § 14, p. 736; am. '12, c. 5, § 1, p. 11; am. '13, c. 97, § 3, p. 387, reen. C. L. 220:68; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4974. Same: Foreign companies. No insurance company organized under the laws of any state, territory or district of the United States, or of any foreign country transacting the business permitted in one or more of classes 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of article 2 of this chapter, shall be licensed to transact such business in this state, unless, in addition to complying with the laws of this state, it shall have made a deposit with the department of commerce and industry of this state, or with the duly authorized officer of some other state of the United States, in a sum not less than $100,000.

Hist. '11, c. 228, § 14, p. 736; am. '12, c. 5, § 1, p. 11; am. '13, c. 97, § 3, p. 387, reen. C. L. 220:69; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4975. Same: Nature of deposit. Such deposit shall be an exclusive trust for the benefit and security of all the policyholders of such company in the United States, and may be made in such securities as provided in sections 4962 to 4965, and such deposit of a company organized under the laws of any foreign country shall be deemed, for all purposes of the insurance laws, the capital of the company making it. ['11, c. 228, § 14, p. 736.]

Hist. '11, c. 228, § 14, p. 736, reen. '12, c. 5, § 1, p. 11, reen. '13, c. 97, § 3, p. 387, reen. C. L. 220:70.

Examination of Companies.

§ 4976. Policies subject to inspection of department. The commissioner, his deputy or examiner, shall have the right at any time to inspect any policy, covering any risk in this state, and every policyholder shall produce and exhibit any policy in his possession or control when required for the inspection of the commissioner, his deputy, or examiner. Any person who violates the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, punished by a fine of not exceeding $100. ['13, c. 185, § 9, p. 597.]

Hist. '13, c. 185, § 9, p. 597, reen. C. L. 220:71.

§ 4977. Examination of domestic companies. The department of commerce and industry shall, as often as it deems expedient, and, if a domestic life insurance corporation, at least once in three years, or if any other domestic corporation, association, society or order, at least once in five years, examine into the affairs of any corporation doing

business in this state, and into the affairs of any corporation organized under the laws of this state or having an office in this state, or partnership or individual, which corporation, partnership or individual is engaged in or is claiming or advertising that it is engaged in organizing or receiving subscriptions for or disposing of stock of, or in any manner aiding or taking part in the formation of or business of, an insurance corporation or corporations, or which is holding the capital stock of one or more insurance corporations for the purpose of controlling the management thereof as voting trustee or otherwise. For such purpose the commissioner may appoint as examiners one or more competent persons not officers of or connected with or interested in any insurance corporation other than as policyholders.

Hist. '11, c. 228, part of § 15, p. 736, reen. C. L. 220:72; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4978. Same: Production of evidence. Upon such examination, the commissioner or his deputy or any examiner authorized by him may examine under oath the officers and agents of such corporation, partnership or individual, and all persons deemed to have material information regarding the company's property or business. Every such corporation, partnership or individual, its officers and agents, shall produce its books and all papers in its or their possession relating to its business or affairs, and any other person may be required to produce any book or paper in his custody deemed to be relevant to the examination, for the inspection of the commissioner, his deputy or examiners whenever required; and the officers and agents of such corporation, partnership or individual shall facilitate such examination and aid the examiners in making same so far as it is in their power to do so.

Hist. '11, c. 228, part of § 15, p. 736, reen. C. L. 220:73; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4979. Report of examination. Every such examiner shall make a full and true report of every examination made by him, verified by his oath, which shall comprise only facts appearing upon the books, papers, records or documents of such corporation, or ascertained from the testimony, sworn to, of its officers, agents or other persons examined under oath concerning its affairs, and such conclusions and recommendations as may reasonably be warranted from such facts so disclosed, and said report, so verified, shall be presumptive evidence in any action or proceeding in the name of the people against the corporation, partnership or individual, its officers, or agents, of the facts stated therein.

The department of commerce and industry shall grant a hearing to whoever may be examined before filing any such report, and may withhold any such report from the public inspection for such time as the department may deem proper and may, if it deem it for the interest of the public so to do, publish any such report or the results of any such examination as contained therein, in one or more newspapers of the state.

Hist. '11, c. 228, part of § 15, p. 737, reen. C. L. 220:74; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4980. Cost of examination. The cost of such examinations shall be paid by the company examined and shall include the reasonable expenses of the department of commerce and industry and the compensation and reasonable expenses of its assistants, or person or persons employed therein. Duplicate receipts showing the entire cost of the

examination, authorized by the department, shall be taken and certified to by the company examined, one copy to be retained by the company and the duplicate filed in the office of the department of commerce and industry as a part of the public records. No company, corporation, partnership or individual, so examined shall, directly or indirectly, pay by way of gift, gratuity or otherwise any further sum to said commissioner of commerce and industry, his deputy, assistants, or other person or persons making said examination, either for services rendered, for extra services, for the purpose of legislation, or for any other pretense whatsoever.

Hist. '11, c. 228, part of § 15, p. 737, reen. C. L. 220:75; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4981. Penalty for violation. Any commissioner, examiner, officer, clerk or employee of any insurance company violating any of the provisions of this [the foregoing] section shall be guilty of a misdemeanor. ['11, c. 228, part of § 15, p. 738.]

Hist. '11, c. 228, part of § 15, p. 738, reen. C. L. 220:76; bracketed words inserted for correction.

§ 4982. Revocation of certificate of authority. Whenever it shall appear to the department of commerce and industry from its examination, or the report of the person appointed by the department to make such examination, that the condition of any company examined is unsound, the department shall revoke the certificate of authority granted such company and cause a notification thereof to be published in a daily paper at the capital and mail a copy thereof to each agent of the company, after which notice the agent or agents thereof shall be required to discontinue doing business for such company.

Hist. '11, c. 228, part of § 15, p. 738, reen. C. L. 220:77; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4983. Examination of foreign companies. The department of commerce and industry shall have the same supervision, and, when it deems it necessary, make the same examinations of the business and affairs of every foreign insurance corporation doing business in this state, as of domestic insurance corporations doing the same kind of business, and of its assets, books, accounts and general condition. Every such foreign corporation, its agents and officers, shall always be subject to the same laws, rules and penalties as are imposed upon domestic insurance corporations doing the same kind of business, so far as the same are applicable thereto.

Hist. '11, c. 228, part of § 16, p. 738; am. '13, c. 97, § 4, p. 388, reen. C. L. 220:78; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4984. Examination outside state: Penalty for refusal of company. The department of commerce and industry may, whenever it deems it necessary, either by an official of the department or by a proper person appointed by the department, repair to the general office of such foreign corporation, wherever the same may be, and make an investigation and examination of its affairs and conditions. The department may cancel and revoke the certificate of any such foreign corporation refusing or unreasonably neglecting to comply with the provisions of this section, or to allow the examinations herein provided for to be made, and prevent such corporation from further continuance in business in this state.

Hist. '11, c. 228, part of § 16, p. 738, reen. '13, c. 97, § 4, p. 388, reen. C. L. 220:79; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4985. Examination of companies applying for admission. The department shall, in like manner and upon like condition, examine corporations and companies applying for admission to transact business in this state, and, if the affairs and condition of any such corporation or company do not fully meet with the requirements of law, the department shall withhold its certificate of authority.

Hist. '11, c. 228, part of § 16, p. 738, reen. '13, c. 97, § 4, p. 388, reen. C. L. 220:80; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4986. Certificate from commissioner of another state. A certificate from the insurance commissioner of any state, who has recently examined the affairs of any foreign company, may be accepted as evidence of the condition of the company, in lieu of the examination herein required. ['13, c. 97, part of § 4, p. 389.]

Hist. '11, c. 228, part of § 16, p. 738; am. '13, c. 97, § 4, p. 389, reen. C. L. 220:81.

Impairment of Capital.

§ 4987. Capital: Impairment of. Any insurance company transacting business within this state, whose capital stock shall become impaired to the extent of 25 per cent thereof, shall make good such impairment within 60 days by either an assessment upon the stockholders or the reduction of its capital stock: *Provided,* That such capital stock shall in no case be less than the minimum amount provided by this chapter; and in the event of failure to make good such impairment within the said time, shall forfeit its rights to write any new business in this state until said impairment shall have been made good. ['13, c. 97, § 28, p. 411.]

Hist. '11, c. 228, § 62, p. 759; am. '13, c. 97, § 28, p. 411, reen. C. L. 220:82.

§ 4988. Same: Liability of officers. Any insurance corporation, whose capital stock or assets are impaired within the limitations of the preceding section, and whose president and directors, after knowing the same, may make any new or further insurance, the estates of those who may make such insurance or assent thereto shall be severally and jointly liable for the amount of any loss or losses which may take place under such insurance. ['11, c. 228, § 64, p. 759.]

Hist. '11, c. 228, § 64, p. 759; compiled and reen. C. L. 220:83.

§ 4989. Reduction of capital stock. If the capital stock of any domestic company shall become impaired, such company may, by vote of the majority of the stock represented in a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum required by law, but no part of its assets shall be distributed to its stockholders. The directors, after such reduction of capital stock, may require each stockholder to surrender his certificate and, in lieu thereof, may issue a new certificate for such number of shares as he shall be entitled to. Within 10 days after such meeting, the company shall submit to the department of commerce and industry a certificate of the meeting thereof and the amount of such reduction, together with a statement of the assets and liabilities of the company, signed and sworn to by its president, secretary and a majority of the directors. If the department finds that it will not be prejudicial to the public, it shall indorse its approval on such certificate.

Hist. '11, c. 228, § 61, p. 758, reen. C. L. 220:84; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4990. Liability of stockholders. Each stockholder of any company organized pursuant to this chapter, shall, in his individual capacity, be liable for all debts of such company to the amount of his unpaid stock or subscriptions therefor, and an additional amount equal to the par value of stock held or subscribed for. ['11, c. 228, § 63, p. 759.]

Hist. '11, c. 228, § 63, p. 759, reen. C. L. 220:85.

Cross ref. Express reference to this section: Liability of stockholders in live stock insurance companies: § 5100.

§ 4991. Deficiency in assets of mutual company. If it appears to the department of commerce and industry, from its examination, that the assets of any mutual insurance corporation are insufficient to justify its continuance in business, the department shall determine the amount of the deficiency and request the officers of the corporation to make the same good within a time to be specified, not less than 30 days, nor more than 90 days from the date of such request. Service may be made by mail direct to the corporation at its principal place of business in this state, specified in its charter. Upon receipt of such service or requisition, the directors of the corporation shall forthwith cause such deficiency to be made good, and proof must be filed with the department within the time specified in the requisition that the deficiency has been made good.

Hist. '11, c. 228, § 65, p. 759, reen. C. L. 220:86; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4992. Appointment of receiver for domestic company. Whenever, after examination, the department of commerce and industry is satisfied that any domestic company has failed to comply with any of the provisions of this chapter, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, or whenever their financial condition is such that they are no longer justified in remaining in business, the department of commerce and industry may present the facts relating thereto to the attorney general, who shall, if he deems the circumstances warrant, commence an action in quo warranto, in a court of competent jurisdiction, and such court shall thereupon notify the officers of such company of a hearing, and if it shall then appear that the condition of such company shall justify its being closed, said company shall be enjoined from carrying on any further business, and some person shall be appointed receiver of such company and shall proceed at once to take possession of all books, papers, moneys and other assets of the company and shall forthwith, under the direction of the court, proceed to close the affairs of the company and to distribute its funds to those entitled thereto: *Provided,* That no such proceedings shall be commenced by the attorney general against any such company until notice has been duly served on the officers of the company and a reasonable opportunity given to the company, on a date to be designated in said notice, to show cause why such proceedings should not be commenced: *Provided also,* That no application for injunction against or proceedings for the dissolution of, or the appointment of a receiver for any such domestic company shall be entertained by any court in this state unless the same is made by the attorney general.

Hist. '11, c. 228, § 66, p. 759, reen. C. L. 220:87; compiled upon authority '19, c. 8, § 28, p. 56.

Reinsurance.

§ 4993. Reinsurance of risk. Any insurance company licensed to transact business in this state, may reinsure the whole or any part of any policy obligation in any solvent and responsible insurance company. Every insurance company doing business in this state shall be required to furnish the department of commerce and industry with a list of its reinsuring companies, giving the name and amount and premiums affected in each company.

Hist. '11, c. 228, § 54, p. 756; am. '13, c. 97, § 26, p. 410, reen. C. L. 220:88; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4994. Retiring companies: Reinsurance. No insurance company, impaired, insolvent or retiring from business in this state, shall reinsure its business in this state in any company not admitted to do business in this state, until its plan to effect such reinsurance shall have been submitted to the department of commerce and industry and approved by it in writing. No domestic insurance company shall reinsure all the risks of any other company unless the plan of said reinsurance shall be submitted to the department and be approved by it in writing. In effecting such reinsurance, the reinsuring company shall become liable to the original insured for any loss or damage occurring under the policies reinsured, and shall, within a reasonable time, replace such policies with its own, or by indorsement thereon acknowledge liability thereunder; and in case of cancellation, shall be liable to the original insured for all return premiums.

Hist. '11, c. 228, § 55, p. 756; am. '13, c. 97, § 27, p. 410, reen. C. L. 220:89; compiled upon authority '19, c. 8, § 28, p. 56.

Taxation of Insurance Companies.

§ 4995. Annual tax statement and tax of fire and marine companies. All insurance companies licensed to transact business in this state in classes 1 and 2, or either of them, of article 2 of this chapter, shall file with the department of commerce and industry annually on or before the 1st day of March of each year, a statement, under oath, showing the amount of all gross premiums received by said company on risks situated in this state during the year ending December 31 next preceding, and pay to the department a tax of 2 per cent on the amount of such gross premiums collected in excess of premiums and cancellations returned to such policy holders.

Hist. '11, c. 228, part of § 18, p. 740; am. '13, c. 97, § 6, p. 391, reen. C. L. 220:90; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4996. Annual statement and tax of other companies. All insurance companies licensed to transact business in this state in one or more of classes 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of article 2 of this chapter shall file with the department of commerce and industry annually on or before the 1st day of March of each year, a statement, under oath, showing the amount of all gross premiums received by said company in this state during the year ending December 31 next preceding, and shall pay to the department a tax of 2 per cent on all such gross premiums collected: *Provided, however,* That companies licensed to transact business in class 3 may in computing the gross premiums deduct the amount of refunds, dividends and coupons paid policy holders in the nature of return premiums.

Hist. '11, c. 228, part of § 18, p. 739; am. '13, c. 97, § 6, p. 391, reen. C. L. 220:91; am. '19, c. 119, p. 405; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4997. Reinsuring companies: Credit. Reinsuring companies authorized to transact business in this state may take credit for premiums received on account of reinsurance from authorized companies. Such premiums are to be reported by and the taxes paid thereon by the parent company. ['11, c. 228, part of § 18, p. 740.]

Hist. '11, c. 228, part of § 18, p. 740, reen. '13, c. 97, § 6, p. 391, reen. C. L. 220:92.

§ 4998. Payment of tax. Within 30 days thereafter such insurance companies shall pay or cause to be paid to the department of commerce and industry the tax herein required, which payment of tax when made shall be in lieu of all other taxes upon premiums and upon the personal property of such companies and the shares of stock or assets thereof: *Provided*, That all real property, if any, of such company, shall be listed, assessed and taxed the same as real property of like character of individuals.

Hist. '11, c. 228, part of § 18, p. 740; am. '13, c. 97, § 6, p. 391, reen. C. L. 220:93; compiled upon authority '19, c. 8, § 28, p. 56.

§ 4999. Penalty for failure to pay tax. An organization failing or refusing to render such statement and pay the required tax of 2 per cent thereon for more than 30 days after the time so specified shall be liable to a fine of $25 for each additional day of delinquency, and the taxes may be collected by distraint and same recovered by an action to be instituted by the attorney general in the name of the state in any court of competent jurisdiction. The department of commerce and industry shall revoke the license of any delinquent company until the taxes and fine, should any be imposed, are fully paid, and notice thereof is given to the department.

Hist. '11, c. 228, part of § 18, p. 740; am. '13, c. 97, § 6, p. 391, reen. C. L. 220:94; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5000. Reduced tax for company making local investments. Any insurance company transacting business in this state having more than 50 per cent of its assets invested in bonds or warrants of this state, or bonds or warrants of any county, city or district within this state authorized by law to be issued, or in taxable property within this state, or in first mortgages upon improved, unencumbered real estate within this state, shall pay a tax of 1 per cent upon the premiums collected in this state on risks located in this state, in lieu of the tax provided in the preceding sections. ['13, c. 185, § 16, p. 601.]

Hist. '13, c. 185, § 16, p. 601, reen. C. L. 220:95.

Fees and Licenses.

§ 5001. Annual statement. All insurance companies licensed to do business in this state, unless otherwise provided in this chapter, shall file with the department of commerce and industry annually, on or before March 1, in each year, a statement under oath, upon a form to be prescribed and furnished by the department, stating the amount of all premiums collected or contracted for by the company making such statement, in this state, during the year ending December 31 next preceding; the amounts actually paid policy holders on losses; the amounts paid policy holders as return premiums; the amounts paid policy holders as dividends; the amount of insurance reinsured in other companies authorized to do business in this state, and the amount of premiums paid therefor; and the amount of insurance reinsured in companies,

naming them, not authorized to do business in this state, and the amount of premiums paid therefor; and the amount of reinsurance accepted from admitted companies and the premiums received for such reinsurance or risks located in this state, with the names of the companies so reinsured.

Every foreign insurance company, except life insurance companies, doing business in this state shall cause to be attached to said statement the affidavit of its president, manager or chief executive officer in the United States to the effect that all policies, bonds, duplicate policies or contracts of insurance of every kind and character, and all general and floating policies upon persons and property, resident, situated or located in this state, made, written, placed and caused to be made, written and placed in this state by said company during the year covered by said statement were so done only through agents, resident within this state and legally commissioned and licensed to transact insurance business therein; and that said resident agents had received, or, if the business is still pending, would receive the full commission therefor, when the premiums were severally paid.

No license shall be issued to any company until such annual statement and such affidavit, if required, be filed.

The annual statement made to the department pursuant to this section, or other provisions of law, shall include the substance of that required by what is known as the convention blank form, adopted from year to year by the national convention of insurance commissioners, and shall also include such other information as may be required by the department.

Hist. '11, c. 228, § 28, p. 744; am. '13, c. 97, § 14, p. 401; am. '15, c. 145, § 1, p. 317, reen. C. L. 220:96; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5002. Reinsurance reserve. For the purpose of estimating the liability of insurance companies other than life, the amount required to safely reinsure all outstanding risks should be estimated by taking 50 per cent of gross premiums on all risks and policies in force and that have less than one year to run, and pro rata of all gross premiums on risks that have more than one year to run. ['11, c. 228, § 53, p. 756.]

Hist. '11, c. 228, § 53, p. 756, reen. C. L. 220:97.

Cross ref. Express reference to this section: Pro rata reinsurance reserve in foreign mutual fire insurance companies: § 5091.

§ 5003. General fee schedule. The department of commerce and industry shall collect, in advance, the following fees and licenses, unless otherwise provided:

For filing certified copy of articles of incorporation required by this chapter on the organization of domestic or the entry of foreign insurance company	$10.00
For filing every amendment to articles of incorporation or amended articles of incorporation	10.00
For filing company's power of attorney for the services of process	2.00
For filing annual statement	50.00
For company's state license	50.00
For each agent's certificate of authority	3.00
For certified copy of company's state license	3.00
For each copy of any paper filed in his office, per folio	.20
For affixing the seal of his office and certifying any paper	1.00

For valuing life policies, for each $1000 valued..... .01
For receiving and forwarding a copy of summons or other process served upon the commissioner, as attorney for any company, to be paid by the party requiring such service..... 2.00

Hist. '11, c. 228, part of § 17, p. 739; am. '12, c. 5, § 2, p. 12; am. '13, c. 97, § 5, p. 389; compiled and reen. C. L. 220:98; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5004. Entry of foreign insurance companies. In addition to the fees provided for in the preceding section to be paid to the department of commerce and industry, the department shall collect from each foreign insurance company, upon entry into this state, the same fees as are provided by law to be collected from like domestic corporations by the secretary of state for filing such company's articles of incorporation and amendments thereto; and the department shall deliver such fees to the secretary of state together with a duplicate copy of such articles of incorporation or amendments thereto which shall be filed in the office of the secretary of state.

Hist. '13, c. 97, part of § 5, p. 389, reen. C. L. 220:99; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5005. Department's financial report and accounting. The department of commerce and industry shall make and file with the state auditor on the first day of each month an itemized statement of the moneys received during the preceding month, covering license and other fees, and shall deliver a certified copy of same to the state treasurer. All moneys derived from the sale of licenses, taxation, filing and all other fees shall be deposited with the state treasurer when such amount shall exceed $100, but should such fees during any month amount to less than $100, then at the end of such month. Such moneys shall be credited by the state treasurer to the general fund of the state. A statement of each deposit thus made shall be filed with the state auditor.

Hist. '11, c. 228, § 17, p. 739; am. '12, c. 5, § 2, p. 12; am. '13, c. 97, § 5, p. 389, reen. C. L. 220:100; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5006. Form of licenses and certificates. All licenses and all certificates of authority shall expire annually, on the 31st day of March.

Blank licenses shall be signed and issued by the state auditor to the department of commerce and industry from time to time, as requested, and charged to the department. Such licenses shall be consecutively numbered. The state auditor may also issue to the department 100 or more unnumbered blank agent's licenses, which he shall likewise charge to the department, such licenses to be issued as duplicates of licenses lost or destroyed in transit to the companies, and to be issued only upon affidavit of the company showing the original license has been lost. The company's receipt for duplicates thus issued, accompanied by the affidavit herein required, shall be prima facie evidence that such duplicates have been issued without cost, and upon presentation to the state auditor the department shall be credited upon the books of the auditor for the face amount of such duplicates issued. No charge shall be made against the companies for duplicates so issued.

Hist. '11, c. 228, part of § 17, p. 739; am. '12, c. 5, § 2, p. 12; am. '13, c. 97, § 5, p. 389, reen. C. L. 220:101; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5007. Agent's licenses. All agent's certificates of authority shall be transferable for the unexpired portion of the insurance year without

cost. Agent's certificates shall be issued to individuals only. ['13, c. 97, part of § 5, p. 389.]

Hist. '13, c. 97, part of § 5, p. 389, reen. C. L. 220:102.

Agents.

§ 5008. Risks must be written in authorized companies by licensed agents. All insurance covering persons or property in this state must be written in companies authorized to transact business in this state, and only through their licensed agents; and all such insurance, excepting life insurance, must be written only through licensed agents residing within this state: *Provided,* That the provisions of this section shall not apply to policies of reinsurance. ['13, c. 97, § 15, p. 402.]

Hist. '11, c. 228, § 30, p. 744; am. '13, c. 97, § 15, p. 402, reen. C. L. 220:103.

§ 5009. Foreign companies except life must have resident agents. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, to the end that the state may receive the tax required by law to be paid on the premiums collected for insurance on all persons and property resident or located within this state: *Provided,* This section shall not apply to life insurance companies. ['15, c. 145, § 2, p. 318.]

Hist. '11, c. 228, § 31, p. 744; am. '13, c. 97, § 16, p. 402; am. '15, c. 145, § 2, p. 318, reen. C. L. 220:104.

§ 5010. Penalty for violation by company. Any company wilfully failing to observe or comply with the provisions of section 5008 and 5009 shall be subject to and liable to pay a penalty of $500 for each violation thereof and for each failure to observe and comply with the said sections. Such penalty may be collected and recovered in an action brought in the name of the state in any court having jurisdiction thereof. Any insurance company or association which shall neglect or refuse for 30 days after judgment in any such action to pay the amount of such judgment, shall have its authority to transact business in this state revoked by the department of commerce and industry, and such revocation shall continue for at least one year from date thereof, nor shall any insurance company or association whose authority to transact business in this state shall have been revoked be again authorized or permitted to transact business herein, until it shall have paid the amount of such judgment and shall have filed in the office of the department of commerce and industry a certificate to the effect that the terms and obligations of the provisions of these sections are accepted by it as a part of the right and authority to transact business in this state.

Hist. '11, c. 228, § 32, p. 744, reen. C. L. 220:105; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5011. Penalty for embezzlement by agent. Any insurance agent or solicitor who collects premiums for insurance companies lawfully doing business in this state and who embezzles or fraudulently converts or appropriates to his own use or with the intent to embezzle, takes,

secretes, or otherwise disposes of or fraudulently withholds, appropriates, lends, invests, or otherwise uses or applies any money or substitutes for money received by him as such agent or broker contrary to the instructions or without the consent of the company for or on account of which the same was received by him, shall be deemed guilty of theft of property of the value of the amount involved in either case, and such shall be punished accordingly. ['11, c. 228, § 34, p. 745.]

Hist. '11, c. 228, § 34, p. 745, reen. C. L. 220:106.

Cross ref. Penalty for larceny: §§ 8431-2.

§ 5012. Agent defined. Any person who for compensation, or otherwise, solicits insurance in behalf of any company receiving applications for insurance of any kind whatsoever, or transmitting for a person other than himself an application for a policy of insurance to or from such company, or offers or assumes to act in the negotiation of such insurance or in any manner aids in the transaction of the business of an insurance company incorporated in this state or out of it shall be deemed an agent within the intent and purpose of this chapter. ['11, c. 228, § 36, p. 746.]

Hist. '11, c. 228, § 36, p. 746, reen. C. L. 220:107.

§ 5013. Penalty for acting as agent without license. It shall be unlawful for any person to act within this state as an agent, or otherwise, in soliciting or receiving application for insurance of any kind or class whatever, or in any manner, directly or indirectly aid in the transaction of the business of any insurance company incorporated in this state or out of it without first procuring a certificate of authority from the department of commerce and industry.

Any person who solicits or aids in soliciting business for any insurance company without the certificate herein required, or after such certificate has been withdrawn or revoked, or any agent who accepts an application from any person, who is a nonresident of this state, or a resident thereof not provided with the certificate of authority for an agent, as herein required, and in any way compensates or promises to compensate such person from whom he receives such application shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $100, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Nothing in this chapter shall be considered as prohibiting the authorized agent of any company, duly licensed to transact such business in this state, from exchanging business with the authorized agent of any other company licensed to transact the same character of business in this state.

Provided, That the provisions of this chapter shall not apply to reciprocal or interinsurance associations or organizations.

Hist. '11, c. 228, § 37, p. 746; am. '13, c. 97, § 18, p. 403; am. '15, c. 145, § 3, p. 318, ren. C. L. 220:108; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Who are deemed agents: § 5115.

Agents of Life Insurance Companies.

§ 5014. Life insurance agents: Notice of appointment: License. Upon written notice by a life insurance company or association authorized to transact business in this state of its appointment of a person to act as its agent herein, and certificate, verified by an executive officer or managing agent thereof, that such company or association has duly investigated the character and record of such person, and satisfied it-

self that he is trustworthy to act as its agent and intends to hold himself out in good faith as a life insurance agent, the department of commerce and industry shall, if it is satisfied that the appointee is a trustworthy person, issue to him a license which shall state, in substance, that the company is authorized to do business in this state, and that the person named therein is a constituted agent of the company in this state for the transaction of such business. Such notice and certificate shall be upon forms furnished by the department of commerce and industry.

Hist. '17, c. 140, § 1, p. 449, reen. C. L. 220:109; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5015. Same: Applicant's statement. The notice and certificate provided for in the preceding section shall be accompanied by a statement by the person to be licensed as such agent, upon blanks to be furnished by the department of commerce and industry, and such statement shall set forth the name in full, age, present residence, present occupation, and residence and occupation of such person for two years next preceding the date of such notice, also whether such person is married or single, and if married, the place of residence of his family; whether such person has previously been engaged as an agent writing or soliciting life insurance, and if so, for what company or companies, giving in detail such service for three years previous to the date of such notice, also what portion of his time he intends to devote to the writing of life insurance; whether he has ever been denied a license by any insurance commissioner, or his license been revoked, and the details in regard thereto; whether or not he is indebted to any insurance company for which he has worked, and if so, the amount of such indebtedness, and all the circumstances connected therewith, and whether or not he has arranged or secured the payment of the same. The department of commerce and industry may require such further information as it may desire tending to show the qualification and character of such applicant and his fitness to be licensed as an agent to sell and solicit for the sale of life insurance. If the department of commerce and industry is satisfied after such investigation that the applicant is a proper person to be licensed, it shall grant such license, and it may in its discretion refuse the same.

Hist. '17, c. 140, part of § 2, p. 449, reen. C. L. 220:110; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5016. Same: Revocation of license. The department of commerce and industry may, at any time after the granting of such license, upon ascertaining that it has been deceived by the applicant in his application, or that the person so licensed is not a fit person to write life insurance, or that in the prosecution of his work he is violating any of the provisions of the laws of the state of Idaho with reference to life insurance, or for other good cause shown, and after a hearing, and upon determining that such person is unfit and untrustworthy to act as such agent, revoke such license, and shall notify both the company and the agent of such revocation.

Hist. '17, c. 140, part of § 2, p. 450, reen. C. L. 220:111; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5017. Department's action subject to review. The action of the department of commerce and industry in granting, revoking or renewing, or refusing to grant, revoke or renew such license, shall be subject

to review upon appeal to the district court of the third judicial district of the state of Idaho, in and for the county of Ada.

Hist. '17, c. 140, part of § 2, p. 450, reen. C. L. 220:112; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5018. Termination of agent's authority by company. Upon the termination of the employment of any agent the insurance company or association shall forthwith file with the department of commerce and industry a statement of the facts relative to the termination of such employment and the cause thereof.

Hist. '17, c. 140, part of § 3, p. 450, reen. C. L. 220:113; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5019. Life insurance agent's authority. An agent licensed on request of any such life insurance company or association may place excess or rejected risks in any other company doing business in this state by and with the knowledge and approval of his own company or association, without additional or separate license. Unless revoked by the department or unless the company by written notice to the department cancels the agent's authority to act for it, such license or any other license issued to an agent or any renewal thereof shall expire on the 31st day of March next after its issue. But any license issued may, in the discretion of the department, be renewed for a succeeding year or years by a renewal certificate without requiring the detailed information required by this chapter. While such license remains in force a company shall be bound by the acts of the persons named therein within his apparent authority as its acknowledged agent.

Hist. '17, c. 140, part of § 3, p. 450; compiled and reen. C. L. 220:114; compiled upon authority '19, c. 8, § 28, p. 56.

Miscellaneous Penal Provisions.

§ 5020. Prohibiting publicity of unauthorized statements. No insurance company, or agent thereof, doing business in this state, shall anywhere publish, represent or advertise assets except those actually owned and possessed by it in its own exclusive right, available for the payment of losses and claims, and held for the protection of its policy holders and creditors. ['13, c. 185, § 5, p. 596.]

Hist. '13, c. 185, § 5, p. 596, reen. C. L. 220:115.

§ 5021. Advertisement to show actual paid up capital and surplus. Every advertisement or public announcement, and every sign, circular or card issued by any insurance company doing business in this state purporting to show its financial condition, shall correspond with or include its last verified statement made to the department of commerce and industry.

Hist. '13, c. 185, part of § 6, p. 596, reen. C. L. 220:116; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5022. Penalty for false advertising. For violation of either of the two preceding sections by a company it shall forfeit, for the first offense, to the people of the state, the sum of $250, and for every subsequent offense the sum of $500, which sums may be recovered by an action prosecuted by the department of commerce and industry, the attorney general representing it, and which sums when recovered shall be paid to the state treasurer and credited to the general fund.

Hist. '13, c. 185, latter part of § 6, p. 596, ren. C. L. 220:117; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5023. Misrepresentation. No insurance company, association or society, or any officer, director, agent, broker or solicitor thereof, or any other person, shall issue, circulate or use, or cause or permit to be issued circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, or misrepresent the benefits or privileges promised under any such policy, or the dividend or share of the surplus to be received thereon. ['13, c. 97, part of § 20, p. 405.]

Hist. '13, c. 97, part of § 20, p. 405, reen. C. L. 220:118.

§ 5024. Twisting. No insurance company, association or society, officer, director, agent, broker or solicitor thereof, or any person, firm, association or corporation, shall make any misrepresentation or incomplete comparison of policies, oral, written or otherwise, to any person insured in any company, for the purpose of inducing or tending to induce such person to take out a policy of insurance, or for the purpose of inducing or tending to induce a policy holder in any company to lapse, forfeit or surrender his insurance therein, and take out a policy of insurance in another like company. ['13, c. 97, part of § 20, p. 405.]

Hist. '13, c. 97, part of § 20, p. 405, reen. C. L. 220:119.

§ 5025. Penalty for misrepresentation and twisting. Any insurance company, association or society, agent, broker or solicitor, or any person, firm, association or corporation, violating the provisions of the two preceding sections, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100, or imprisonment in the county jail for not more than six months, or by both such fine and imprisonment, for each such violation.

The department of commerce and industry shall have authority, in its discretion, to revoke the license theretofore issued to any company, association, society, agent or broker, convicted of a violation of the provisions of the two preceding sections.

Hist. '13, c. 97, part of § 20, p. 406, reen. C. L. 220:120; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5026. Rebating prohibited. No insurance company, association or society, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay directly or indirectly, as inducement to insurance or in connection therewith, on any risk in this state, now or hereafter to be written, any rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon; nor shall any such company, association or society, agent, collector or broker, personally or otherwise, offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to such insurance, or in connection therewith, any earnings, profit, dividends or other benefit, founded, arising, accruing or to accrue on such insurance or therefrom, or any other valuable consideration as inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance; nor shall any such company, association or society, agent, collector or broker, personally or otherwise, offer, promise, give, sell or purchase, as inducement to insurance or in connection therewith, any stocks, bonds, securities or property, or any dividends or profits accruing or to accrue thereon, nor except as specified in the policy contract, offer, promise, or give any other thing of value whatsoever, as an inducement to insurance.

No insured person, firm or corporation shall knowingly receive or accept, directly or indirectly, any rebate or premium or part thereof, or agent, solicitor or broker's commission thereon, payable on the policy, or on any policy of insurance or any special favor or advantage in the dividend or other benefit to accrue thereon; nor shall any such person, firm or corporation receive anything of value as an inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance.

Any company, association, society, officer, solicitor, agent, broker or other person who violates any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of $100 for each and every violation, or to imprisonment in the county jail for a period of not less than 90 days nor more than six months, or both such fine and imprisonment.

The department of commerce and industry shall have authority in its discretion to revoke the license theretofore issued to any company, association, society, agent or broker convicted of a violation of the provisions of this section.

Any employee of any person, firm or corporation who shall receive, directly or indirectly, any rebate of premium or part thereof payable on a policy of insurance issued to the person, firm or individual by whom he is employed, or who receives any part of any agent's commission payable on the policy issued to such person, firm or corporation, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine not exceeding $100, or imprisonment in the county jail for not more than 30 days, or both such fine and imprisonment, for each and every such offense.

Nothing in this section shall be so construed as to prohibit any company issuing nonparticipating life insurance from paying bonuses to policy holders or otherwise abating their premiums in whole or in part out of the surplus accumulated from nonparticipating insurance; nor to prohibit any company transacting industrial insurance on the weekly payment plan from returning to policyholders who have made premium payments for a period of at least one year directly to the company at its home or district offices, a percentage of the premiums which the company would have paid for the weekly collection of such premiums; nor to prohibit any life insurance company, doing business in this state, from issuing policies of life or endowment insurances with or without annuities, at rates less than the usual rates of premiums for such policies, insuring members of labor organizations, lodges, beneficial societies or similar organizations, or employees of any employer who, through their secretary or employer may take out insurance in an aggregate of not less than 50 members and pay their premiums through such secretary or employer.

Hist. '11, c. 228, § 38, p. 746; am. '13, c. 97, § 19, p. 403, reen. C. L. 220:121; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5027. Testimony on violation of preceding sections: Immunity. No person shall be excused from testifying or from producing any books, papers, contracts, agreements or documents at the trial or hearing of any person, company or association, charged with violating any provisions of sections 5023 to 5026, on the ground that such testimony or evidence may tend to incriminate himself, but no person shall be prosecuted for any act concerning which he shall be compelled so to

testify, or produce evidence, documentary or otherwise, except for perjury committed in so testifying. ['13, c. 97, § 21, p. 406.]

Hist. '13, c. 97, § 21, p. 406, reen. C. L. 220:122.

§ 5028. Agent to report exact consideration: Penalty. Every agent or other representative of any insurance company issuing a policy on its own behalf in this state, shall report to the company the exact consideration charged and written in the policy, as a premium for the risk assumed. Any officer, manager, agent, solicitor or other representative of any insurance company violating the provisions of this section shall be guilty of a misdemeanor. ['13, c. 185, § 11, p. 597.]

Hist. '13, c. 185, § 11, p. 597, reen. C. L. 220:123.

§ 5029. Penalty for burning or destroying insured property. Any person who wilfully burns or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, or for personal gain, whether the same be the property of, or in possession of, such person or any other, is punishable by imprisonment in the state prison not less than one year nor more than 10 years. ['11, c. 228, § 35, p. 745.]

Hist. (See Cr. and P. '64, § 58) R. S. § 7009, reen. R. C. ib.; am. '11, c. 228, § 35, p. 745, reen. C. L. 220:124. See § 8395.

§ 5030. Penalty for false proofs of loss. Any person who, knowing it to be such, presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance, or who prepares, makes or subscribes false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same be presented or used in support of such a claim, shall be guilty of a misdemeanor. ['13, c. 185, § 8, p. 597.]

Hist. '13, c. 185, § 8, p. 597, reen. C. L. 220:125.

Intent: Under this section an essential element of the offense of swearing falsely to a proof of loss on an insurance policy is the intent to defraud, and unless such intent is shown, the fact that the insured incorrectly stated in the proof of loss his interest in the property destroyed is no defense in an action on a policy which by its conditions is to be void in case of any fraud or false swearing by the insured. Carroll v. Hartford Fire Ins. Co. (1916) 28 I. 466, 154 P. 985.

§ 5031. Policy fee forbidden unless stated in policy: Penalty. It shall be unlawful for any insurance company or for any officer, manager, agent or other representative of any such company, to include in the sum charged or designated in any policy as the consideration for insurance, any fee, compensation, charge or perquisite whatsoever, not specified in the policy. When collected, the same shall be reported as premium. Any insurance company violating the provisions of this section shall be guilty of a misdemeanor. [C. L. 220:126.]

Hist. '13, c. 185, § 10, p. 597; compiled and reen. C. L. 220:126.

General Provisions Relating to Policies.

§ 5032. Policies not conforming to standards. No company or agent shall issue or deliver in this state any policy which conflicts with any provision of this chapter. A policy issued in violation of this chapter shall be held valid and shall be construed as provided in this chapter, and when any provision in a policy is in conflict with any provision of this chapter, the rights, duties and obligations of the company and

policy holder and the beneficiary shall be governed by the provisions of this chapter. ['11, c. 228, § 46, subd. 4, p. 753.]

Hist. '11, c. 228, § 46, subd. 4, p. 753, reen. C. L. 220:127.

Cited: (Dis. op.) Duvall v. Nat. Ins. Co. (1916) 28 I. 356, 367, 154 P. 632, Ann. Cas. 1917E 1112.

Standard form not exclusive: The contractual rights of parties are in no way abridged by a law prescribing a standard form of policy. Carroll v. Hartford F. Ins. Co. (1916) 28 I. 466, 154 P. 985.

§ 5033. Return of unearned premiums. In the event of the total destruction of any insured property, on which the total amount or agreed loss shall be less than the total amount insured thereon, the insuring company or companies shall return to the insured the unearned insurance premium for the excess of the insurance over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid. ['11, c. 228, § 56, p. 756.]

Hist. '11, c. 228, § 56, p. 756, reen. C. L. 220:128.

§ 5034. Mutual companies: Policy must state ownership of profits. Every domestic insurance company incorporated upon the mutual plan shall state clearly in its policies or certificates that the accumulations of profits over and above all proper liabilities shall be the sole property of the members or policy holders in good standing, and that the same shall be distributed in a just and equitable manner, in case such companies are reinsured or cease to do business. ['11, c. 228, § 67, p. 760.]

Hist. '11, c. 228, § 67, p. 760, reen. C. L. 220:129.

ARTICLE 5.

SPECIAL PROVISIONS RELATING TO LIFE, ACCIDENT AND HEALTH INSURANCE

§ 5035. Life insurance company: Statement. Every company, corporation or society transacting the business of life insurance within the state of Idaho shall publish or cause to be published soon after the 1st of January and prior to the 1st of April, in some paper published in the capital, a statement showing the exact condition of its affairs on the last day of the month of December preceding. ['11, c. 228, § 29, p. 744.]

Hist. R. C. § 2866; am. '11, c. 228, § 29, p. 744, reen. C. L. 220:130.

§ 5036. Discrimination prohibited: Immunity for testifying: Penalty. No life insurance corporation doing business in this state shall make or permit any discrimination between individuals of the same class and of equal expectancy of life, in the amount of payment or return of premiums or rates charged for policy of insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the policy; nor shall any such company permit an agent thereof to offer or make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to any person to insure, or give, sell or purchase, or offer to give, sell or purchase as such inducement or in connection with such insurance, any stock, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accruing thereon, or any valuable consideration or inducement whatsoever not specified in the policy; nor shall any person knowingly receive as such inducement, any rebate of premium, or any special favor or advantage in the dividends or other benefits accruing thereon, or any paid employment or contract for serv-

ices of any kind or any valuable consideration or inducement whatever, not specified in policy.

No person shall be excused from attending and testifying and producing any books, papers or other documents before any court or magistrate upon any violation, proceeding or trial for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction made, or thing confirming which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any claim, investigation or proceeding.

Any violation of the provisions of this section shall constitute a misdemeanor, and upon conviction shall subject the party offending to the payment of a fine of not more than $300, or to imprisonment in the county jail for a period not exceeding six months, or to both such fine and imprisonment, and if it shall appear to the satisfaction of the department of commerce and industry that any corporation is issuing policies or making contracts that are in violation of this section, the department shall revoke the authority of such corporation to do business in this state.

Hist. '11, c. 228, § 41, p. 747, reen. C. L. 220:131; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5037. Life and endowment policies: Standard provisions. No policy of life or endowment insurance other than industrial insurance, annuity and pure endowments with or without return premium, shall be issued or delivered in this state until a copy of the form thereof has been filed at least 30 days with the department of commerce and industry, unless before the expiration of said 30 days the department shall have approved the same in writing; nor if the department of commerce and industry notifies the company in writing that in the opinion of the department the form of said policy does not comply with the laws of this state, specifying the reasons for its opinion: *Provided,* That upon petition of the company the opinion of the department of commerce and industry shall be subject to review by any court of competent jurisdiction.

Nor shall any such policy be so issued or delivered unless it contains, in substance, the following provisions:

1. That the insured is entitled to a grace of either one month, or 31 days, within which the payment of any premium after the first year may be made, during which period of grace the policy shall continue in force; the company may impose an interest charge not in excess of 6 per cent per annum for the number of days of grace elapsing before the payment of the premium, and in case the policy becomes a claim during the said period of grace, the amount of such premiums, with interest and any deferred instalments of the annual premium, may be deducted from the face of the policy in settlement.

2. That the policy, so far as it relates to life or endowment insurance, shall be incontestable after two years from its date of issue, except for nonpayment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war.

3. That the policy and the application therefor shall constitute the entire contract between the parties thereto, and that all statements made by the insured, in the absence of fraud, shall be deemed repre-

sentations and not warranties; and that no statement shall be used to void the policy unless it is contained in the written application, a copy of which shall be indorsed upon or attached to the policy when issued.

4. That if the age of the insured has been misstated, the amount payable under the policy shall be such as the premium would have purchased at the correct age.

5. That the policy shall participate in the surplus of the company, annually.

6. Specifying an automatic nonforfeiture provision, which must be either a loan, a paid up policy, or an extended term, to which the policy holder is entitled in the event of default in a premium payment after three full annual premiums shall have been paid.

7. That not later than the third anniversary of the policy the holder of the policy, upon a proper assignment thereof to the company, shall be entitled to borrow of the company on the sole security of the policy, an amount not to exceed the cash surrender value thereof; any indebtedness to the company and interest in advance at an annual rate, not exceeding 6 per cent, may be deducted from the amount of the loan. Said provision shall include such other conditions as, in conformity to the laws of the state of Idaho, the company will impose when the application for the loan is made.

8. Tables showing in figures the cash, paid up and extended insurance options available under the policy each year upon default in premium payments, during the first 20 years of the policy, or for its life if maturity is less than 20 years. The value of these options shall be equivalents based on the reserves, according to the table of mortality and rate of interest assumed, which shall be named in the policy, less a specified surrender charge, not exceeding 2½ per cent of the amount of the insurance.

9. That the proceeds of the policy may be paid in instalments, and a table showing the amounts of the instalments shall be made a part of the policy.

10. That the holder of a policy shall be entitled to have the policy reinstated at any time within three years from the date of any default in payment of premiums, unless the cash value has been paid, or the extension period expired, upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company upon said policy, with interest at a rate not exceeding 6 per cent per annum.

11. That when the first year is on preliminary term basis, the policy must so state, and the policy may also provide that the company shall have the right to defer payment of the cash value or the making of the loan (unless for the purpose of paying renewal premiums on policies in such company) for a period not exceeding 90 days.

Any of the foregoing provisions or portions thereof not applicable to industrial insurance policies or to single premium or nonparticipating or term policies need not to that extent be incorporated therein, and any such policy may be issued or delivered in this state which, in the opinion of the department, contains provisions on any one or more of the several foregoing requirements more favorable to the policy holder than hereinbefore required. The provisions of this section shall not apply to policies of reinsurance.

Hist. '11, c. 228, § 42, p. 748; am. '13, c. 97, § 22, p. 406; am. '15, c. 171, § 1, p. 392, reen. C. L. 220:132; compiled upon authority '19, c. 8, § 28, p. 56.

Contestability (Subd. 2): By this section contestability is limited to two years, but the statute does not prohibit the parties from contracting that the period of

contestability shall be less than two years nor from agreeing that policy shall not be contestable after its delivery. (Morgan, J. dissents) Duvall v. Nat. Ins. Co. (1916) 28 I. 356, 154 P. 632, Ann. Cas. 1917E 1112.

Any defense on account of fraudulent warranties in an application for insurance is precluded under a clause making the policy incontestable from date. (Morgan, J. dissents) Ib.

Constitutionality: Subds. 1, 7 and 10 of this section do not violate the provisions of the constitution of this state or of the United States, in that such provisions permit the taking of property without due process of law. Continental etc. Co. v. Hattabaugh (1912) 21 I. 285, 121 P. 81.

There is no provision in the state or federal constitution which in any way limits the power of the legislature in making a classification of persons or corporations writing insurance within the state of Idaho, and placing in a separate class those persons or corporations who loan money upon policies written, and limit the charge to be made for the use of such loans to 5 per cent. Ib.

Provisions regulating interest: Subds. 1, 7 and 10 of this section which regulate and fix the rate of interest to be charged by life insurance companies doing business within the state, upon loans of money upon the policy and forbearances in the collection of dues upon the policy, are provisions which are required to be made a part of the policy of life insurance, and are not independent conditions or agreements. Continental etc. Co. v. Hattabaugh, supra.

Tables showing insurance options: The requirement of subd. 8 that a life insurance policy shall contain as a part of the policy a table, etc., is not an unfair or unreasonable requirement, and may be enforced by the insurance commissioner. Continental etc. Co. v. Hattabaugh, supra.

Contract: Under this section the application and the policy constitute the contract of insurance. Riordan v. Equitable Life Ins. Soc. 31 I. 657, 175 P. 586.

§ 5038. Same: Prohibited provisions. No policy of life or endowment insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, if it contain any of the following provisions:

1. A provision limiting the time within which any action at law or in equity may be commenced to less than three years after the cause of action shall accrue.

2. A provision by which the policy shall purport to be issued or to take effect more than six months before the original application for the insurance was made: *Provided,* That no policy shall be dated back so as to make the applicant of a lower insurable age.

3. A provision by which the settlement at the maturity of any policy after the expiration of the contestable period thereof, shall be of less value than the amount insured on the face of the policy plus dividend additions, if any, less any indebtedness to the company on or secured by the policy and less any premium that may, by the terms of the policy, be deducted. This paragraph shall not apply to substandard policies, nor to any nonforfeiture provision which employs the cash value less indebtedness, if any, to purchase automatic paid up or extended insurance.

4. A provision for forfeiture of the policy for failure to repay any loan on the policy, or to pay interest on such loan, while the total indebtedness on the policy is less than the loan value thereof. ['13, c. 97, part of § 23, p. 408.]

Hist. '11, c. 228, § 43, p. 749; am. '13, c. 97, part of § 23, p. 408, reen. C. L. 220:133.

§ 5039. Life insurance policies of foreign companies. The policies of a life insurance company, not organized under the laws of this state, may contain any provision which the law of the state, territory, district or country under which the company is organized prescribes shall be in such policies when issued in this state, and the policies of a life insurance company organized under the laws of this state may, when issued or delivered in any other state, territory, district or country contain any provisions required by the laws of the state, territory, district or country in which the same are issued, anything in this chapter to the contrary notwithstanding. ['13, c. 97, part of § 23, p. 409.]

Hist. '13, c. 97, part of § 23, p. 409, reen. C. L. 220:134.

§ 5040. Participating and nonparticipating bases. No life insurance company operated on the mutual plan shall be permitted to transact the business of life insurance in the state of Idaho unless it shall confine its business to policies written on a participating basis: *Provided,* That all term and paid up policies may be issued on a nonparticipating basis.

All joint stock life insurance companies authorized to transact business in the state of Idaho may be permitted to operate on both a participating and nonparticipating basis. [C. L. 220:135.]

Hist. '11, c. 228, § 44, p. 750; am. '13, c. 97, § 24, p. 409; am. 15, c. 171, § 2, p. 394; compiled and reen. C. L. 220:135.

§ 5041. Same: Method of accounting. No life insurance company doing business upon both the participating and nonparticipating basis shall be permitted to operate in the state of Idaho unless such company shall maintain a system of accounting in its business which segregates its participating from its nonparticipating business and which system shall clearly show the profits and losses upon each class of business mentioned, and the annual reports filed each year with the department of commerce and industry by all such companies shall clearly disclose such information.

Hist. '17, c. 123, § 1, p. 410; compiled and reen. C. L. 220:136; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5042. Health and accident policies: Standard provisions. No policy of insurance against loss or damage from disease or by bodily injury by accident, or both, of the assured shall be issued or delivered in this state:

1. Until a copy of the form thereof and the table of rates or manual of risks of the company has been filed at least 30 days with the department of commerce and industry, unless, before the expiration of said 30 days, the department shall have approved the same in writing.

2. Nor if the department of commerce and industry notifies the company in writing that, in the opinion of the department, the form of said policy does not comply with the laws of this state, specifying the reasons for its opinion: *Provided,* That upon the petition of the company the opinion of the department of commerce and industry shall be subject to review by any court of competent jurisdiction.

3. Nor shall such policy be so issued or delivered unless every portion is plainly printed in type not smaller than long primer or 10-point type.

4. Nor unless there is printed on the first page thereof and on its filing back, in type not smaller than 18-point or great primer, a brief description of the policy.

5. Nor unless the exceptions be printed with the same prominence as the benefits to which such exceptions apply.

6. Nor unless it contains in substance the following provisions:

a. A provision that such policy, with a copy of the application therefor, if any, and of such other papers as may be attached to or indorsed thereon shall constitute the entire contract of insurance, except as the same may be affected by any table of rates or classification of risks filed by the company with the department of commerce and industry.

b. A provision that no statement made by the applicant for insurance, which statement is not incorporated in or indorsed on the policy issued to such applicant, shall avoid the policy or be used in evidence, and no provision of the charter, constitution or by-laws shall be used in

defense of any claims arising under any such policy unless such provisions are incorporated in full in the policy, but this requirement shall not be deemed to apply to the table of rates or manual of classification of risks of any company filed with the department of commerce and industry prior to the date of the occurrence of the injury or commencement of the sickness for which indemnity is claimed.

c. A provision that specifies the time within which notice of accident or disability shall be given which time shall be not less than 20 days from the date of the accident, nor less than 10 days from the date of the beginning of disability from sickness upon which claim is based: *Provided, however,* In case of accidental death, immediate notice thereof may be required, unless the notices herein specified may be shown not to have been reasonably possible.

d. A provision that notice of a claim for indemnity shall be deemed sufficient when given to the office or agent of the company specified in the policy.

e. A provision that under every such policy, if a past due premium shall be accepted by the company or by a branch office or by an authorized agent of the company in the city, town or county in which the insured shall reside, or by the duly authorized agent of the company who accepted the last premium on the policy, such acceptance shall reinstate the policy in full as to disability resulting from accidental bodily injuries thereafter sustained, but shall only reinstate the policy as to disability from disease beginning more than 10 days after the date of such acceptance.

f. A provision that if the insured is injured or contracts disease after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified (except ordinary duties about his residence or while engaged in recreation), the company shall pay such proportion of the indemnities provided in the policy as the premium paid would have purchased at the rate, but within the limits fixed by the company for such hazardous occupation according to the company's rates and classification of risks filed with the department of commerce and industry in this state prior to the occurrence of the injury or the commencement of the disease for which indemnity is claimed.

g. A provision that the company will pay the benefits promised within 60 days of the receipt by it of due proofs of death or disability.

h. A provision that the policy may be cancelled at any time by the company by written notice delivered to the insured or mailed to him at his last address as shown by the records of the company and the tender of the company's check for the unearned portion of the premium, but that such cancellation shall be without prejudice to any claim arising on account of disability commencing prior to the date on which the cancellation takes effect.

i. A provision that no such policy shall limit the time within which proofs of claim shall be furnished to the company to a period less than 90 days from the date of death, dismemberment or loss of sight or from the termination of any other disability.

Hist. '11, c. 228, § 45, p. 750; compiled and reen. C. L. 220:137; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5043. Health and accident policies: Prohibited provisions. No such policy insuring against accidental bodily injuries or disease or

death shall be issued or delivered in this state if it contains in substance, any of the following provisions:

1. A provision limiting the time within which an action at law or in equity may be commenced to less than one year from the date when the final proof of claim is filed with the company.

2. A provision that no such policy shall authorize the deduction of any premium or assessment from any indemnity payable under the terms of the policy, except such premium or assessment as may be due or covered by written order or note at the time of payment of the indemnity. ['11, c. 228, first part of § 46, p. 752.]

Hist. '11, c. 228, first part of § 46, p. 752, reen. C. L. 220:138.

§ 5044. Health and accident policies of foreign companies. The policies of insurance against accidental injury or disease of a company not organized under the laws of this state may contain any provision which the law of the state, territory or district of the United States under which the company is organized prescribes shall be in such policies when issued in this state; and the policies of insurance against accidental injury or disease of a company organized under the laws of this state may, when issued or delivered in any other state, territory, district or country, contain any provisions required by the laws of the state, territory, district or country in which the same are issued, anything in this chapter to the contrary notwithstanding. ['11, c. 228, § 46, subd. 5, p. 753.]

Hist. '11, c. 228, § 46, subd. 5, p. 753, reen. C. L. 220:139.

§ 5045. Penalty for violation. Any company, corporation or association to which this chapter applies, or any officer thereof, which issues or delivers in this state, or to any citizen thereof, any accident or health policy or contract in wilful violation of the provisions of this chapter, shall be punished by a fine of not more than $500 for each offense, and the department of commerce and industry may revoke the license of any foreign company or agent thereof which violates any provision of this chapter.

Hist. '11, c. 228, § 46, subd. 7, p. 753, reen. C. L. 220:140; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5046. Group insurance policies. The provisions of this chapter relating to the form of health and accident policies shall not apply to or affect any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation, copartnership, association or individual employer, police or fire department, underwriters corps, salvage bureau, or life associations or organizations, where the officers, members or employees or classes or departments thereof are insured against specified accidental bodily injuries or diseases while exposed to the hazards of the occupation or otherwise, for a premium intended to cover the risks of all the persons insured under such policy. [C. L. 220:141.]

Hist. '11, c. 228, § 46, part of subd. 6, p. 753; compiled and reen. C. L. 220:141.

§ 5047. Life insurance policies with accident and health provisions. The provisions of this act prescribing the form of health and accident policies shall not apply to or affect contracts of life insurance or contracts supplemental thereto which shall contain provisions intended to safeguard such life insurance against lapse, or that shall provide a special surrender value therefor in the event that the insured thereunder

shall, by reason of accidental bodily injury or disease, be unable to continue the premium payments thereon. [C. L. 220:142.]

Hist. '11, c. 228, § 46, part of subd. 6, p. 753; compiled and reen. C. L. 220:142.

§ 5048. Valuation of life policies. All valuations of the policies of life insurance companies shall be made by the department of commerce and industry according to the standard of valuation adopted by the company: *Provided,* That the minimum standard of valuation for all policies issued in this state on and after the 1st day of January, 1914, shall be the American experience table of mortality, and interest at 3½ per cent per annum, and that not more than one year shall be used as a preliminary term. The department may make extra charges in particular cases of invalid lives and other extra hazards; may value policies in groups; may use approximate averages for fractions of a year, and may at its option assume as accurate the valuations of the department of insurance of any other state; and shall value policies other than ordinary and 20 payment life, according to the modified preliminary term, with 20 payment life policies as a basis for such valuation.

Hist. '11, c. 228, § 49, p. 755; am. '13, c. 97, § 25, p. 410; am. C. L. 220:143; am. '19, c. 46, § 1, p. 146; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5049. Medical examination must be made. No life insurance company organized under the laws of, or doing business in, this state, shall enter into any contract of insurance upon lives within this state, except industrial insurance or where premiums are payable monthly or oftener, or what is commonly known as group insurance, without having previously made, or caused to be made, a prescribed medical examination of the insured by a legally qualified practicing physician. ['13, c. 185, § 12, p. 598.]

Hist. '13, c. 185, § 12, p. 598, reen. C. L. 220:144.

§ 5050. False statement in application for insurance. Any solicitor, agent, examining physician, or other person, who knowingly and wilfully makes a false or fraudulent statement or representation in or relative to an application for life, accident or health insurance, or who makes any such statement for the purpose of obtaining a fee, commission, money or benefit in a company, transacting such business under the provisions of this chapter, shall be guilty of a misdemeanor. ['13, c. 185, § 7, p. 596.]

Hist. '13, c. 185, § 7, p. 596, reen. C. L. 220:145.

§ 5051. Assessment policies must be so stamped. Every policy or certificate issued to a resident of the state of Idaho by any corporation transacting business of life or casualty upon the assessment plan therein or admitted into this state under the laws of Idaho, shall print in bold type in red ink on every policy or certificate issued upon the life or lives of property of the citizens of Idaho, making one of the principal lines next to the top thereof the words "Issued upon the assessment plan," and the words "Assessment plan" shall be conspicuously printed in red ink in and upon every application, circular, card, advertisement and other printed document issued, circulated or caused to be circulated by such corporation within this state. ['11, c. 228, § 59, p. 758.]

Hist. '11, c. 228, § 59, p. 758, reen. C. L. 220:146.

§ 5052. Valuation of assessment life insurance policies. It shall not be lawful for any association transacting business on the assessment plan to issue policies upon the natural premium or stipulated premium

plan at a lower rate than the net premium computed on a basis of the terms of the policy, and the American experience table of mortality and 4½ per cent interest. And said companies or associations must at all times maintain a reserve on said basis. ['11, c. 228, § 60, p. 758.]

Hist. '11, c. 228, § 60, p. 758, reen. C. L. 220:147.

ARTICLE 6.

SPECIAL PROVISIONS RELATING TO FIRE INSURANCE.

§ 5053. Fire insurance policy standard form. No fire insurance company, except county mutuals, shall issue any fire insurance policy covering on property or interest therein in this state, other than on the form known as the New York standard, as now or may be hereafter constituted, except as follows:

1. A company may print on or in its policy its name, location and date of incorporation, plan of operation, whether stock or mutual, and if mutual whether on cash premium or assessment plan; and if it be a stock company, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and, if it is issued by an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at....."; and, if a mutual company, must state the contingent mutual liability of its policy holders or members for payment of losses and expenses not provided for by its cash funds until it shall have accumulated surplus assets of not less than $50,000, which it must maintain in securities deposited with the properly qualified officer of some state of the United States for the protection of all the policy holders of the company, and, while it maintains such surplus assets on deposit, it may issue its policies with the statement thereon that the liability of the policy holder is limited to the premium paid, as provided in sections 5088, 5089, 5091.

2. A company may print or use in its policies printed forms of description and specifications of the property insured.

3. A company insuring against damage by lightning may print in the clause enumerating the perils insured against the additional words, "also any damage by lightning whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance the words, "whether by fire, lightning or both."

4. A domestic company may print in its policies any provisions which it is authorized or required by the law to insert therein, and any foreign company may, with the approval of the department of commerce and industry, so print any provision required by its charter or deed of settlement, or by the laws of its own state or country, not contrary to the laws of this state; but the department shall require any provision which, in its opinion modifies the contract of insurance in such a way as to affect the question of loss to be appended to the policy by an indorsement or rider as hereinafter provided.

5. The blanks in said standard form may be filled in in print or in writing.

6. A company may print upon policies issued in compliance with the preceding provisions of this section the words "Idaho standard policy."

7. A company may write upon the margin or across the face of the policy, or write or print in type not smaller than nonpareil upon a slip. slips, rider or riders to be attached thereto, provisions adding to or relating to those contained in the standard form; and all such slips, riders,

indorsements and provisions must be signed by the officers or agents of the company so using them.

8. If the policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance such regulation shall apply to and form a part of the policy as the same may be written or printed upon, attached or appended thereto.

9. Every policy shall have legibly inscribed upon its face and filing back suitable words to designate whether the company making such insurance be a stock or mutual company.

The word "noon" occurring in the policy shall be construed to be the noon of standard time of the place where the property covered by the policy is situated.

Hist. '13, c. 185, § 13 p. 598; compiled and reen. C. L. 220:148; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Standard form not exclusive: § 5032.

Construed: This unique section was not intended by the legislature to abridge any contractual rights which an applicant for fire insurance would have had prior to its enactment, or to confer upon insurance companies any immunity for the negligence of their agents in incorrectly reducing an insurance contract to writing. Carroll v. Hartford F. Ins. Co. (1916) 28 I. 466, 154 P. 985.

Right of recovery on a fire insurance policy cannot be defeated by the insertion of a condition voiding it, if the interest of the insured be other than unconditional and sole ownership, where the agent of the insurer had knowledge that the insured applied for a policy on his interest as a mortgagee. Ib.

Judicial criticism: The adoption by reference merely of the law of another state, as in the case of the reference herein to "New York standard" as now or may be hereafter constituted is anomalous. Carroll v. Hartford F. Ins. Co. supra.

Time of instituting action: A failure to submit proof of loss within the time specified in a standard fire insurance policy is not fatal to an action on the policy. Southern Idaho Conference etc. v. Hartford F. Ins. Co. (1917) 31 I. 130, 169 P. 616.

§ 5054. Registration of title by fire insurance company. Every fire insurance company licensed to transact business in this state shall file with the department of commerce and industry the title under which it proposes to write any fire insurance in this state, and such title shall be registered by the department, together with the name of the insurance company filing such title.

Such insurance company shall be entitled to issue policies of insurance for the one title so registered and no more: *Provided,* That any joint stock fire insurance company or companies may register one additional title and issue policies of fire insurance under such additional title upon the payment of an annual fee of $100. Upon such filing and payment of such fee such company or companies shall be authorized by the department of commerce and industry to issue policies under such additional title during the current insurance year and annually thereafter upon payment of such annual fee: *Provided further,* That where two or more duly authorized fire insurance companies, one of which companies is not issuing policies in this state under its own title, jointly desire to register an additional title, such additional title may be registered without the payment of the registry fee herein provided and license shall be issued without cost under such additional title during such time as one of the companies joining in registering such title is not transacting business under its own title in this state.

The agents of companies issuing policies under such additional title shall be licensed in the same manner as provided for agents for the parent company.

The business transacted by companies under such additional title shall be reported in the business of the parent company or companies and the taxes thereon paid by such company or companies.

Hist. '13, c. 185, § 14, p. 600; compiled and reen. C. L. 220:149; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5055. Unauthorized fire insurance. All persons, firms, companies or corporations, obtaining fire insurance upon property situated in this state, in companies not authorized to transact business in this state, shall file with the department of commerce and industry a statement or declaration under oath setting forth the name of the company and its location, the number of the policy, the amount of insurance, rate, premium and description of property insured in such unauthorized company, and shall be required to pay a tax thereon of 10 per cent of the premiums paid on such policies to the said department of commerce and industry; and shall pay a further fee to the department of $1 on each policy in such unauthorized company for making record of said statement or declaration, which record shall be kept for the information of the department of commerce and industry of this state.

If any person, firm, company or corporation obtaining fire insurance in such unauthorized company shall fail or neglect for 20 days after taking such insurance to file the report and to pay the taxes and fees herein provided to be paid to the department of commerce and industry, the department is hereby authorized to begin suit against such person, firm, company or corporation, in any court of competent jurisdiction, in its name as department of commerce and industry, for said taxes and fees, and in addition thereto shall recover from such person, firm, company or corporation in any such suit a penalty equal to the amount of said taxes so unpaid, plus the sum of $100. The attorney general of the state shall file and prosecute all such suits when requested so to do by the department of commerce and industry, and the moneys so recovered shall be paid to the state treasurer as other fees received by the department.

Hist. '13, c. 185, § 15, p. 600, reen. C. L. 220:150; compiled upon authority '19, c. 8, § 28, p. 56.

Foreign contracts, unconstitutional: When applied to contracts of insurance made and to be performed outside of the state, covering property within the state, this section is unconstitutional, as depriving persons of liberty without due process of law. Hyatt v. Blackwell Lbr. Co. 31 I. 452, 173 P. 1083.

ARTICLE 7.

DOMESTIC MUTUAL FIRE INSURANCE COMPANIES.

Note: The predecessor of this law was '03, p. 74, reen. R. C. §§ 2905-24. The former law was held valid on the theory that the legislature may enact a law relative to one class of insurance so long as it is general in its terms as to that particular class of business. Ida. Mutual etc. v. Myer (1904) 10 I. 294, 77 P. 628.

§ 5056. Organization. Twenty-five or more persons, citizens of this state, may form a corporation to carry on the business of fire insurance on the mutual plan; but no such corporation shall begin to do business until a guaranty fund of at least $25,000 has been provided and deposited in cash or in such securities as are permitted by law in case of stock companies with the department of commerce and industry, under the conditions named in this chapter, the same to be held as security for the payment of all losses and other policy liabilities of such companies.

Hist. '11, c. 228, part of § 68, p. 760, reen. C. L. 220:151; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5057. Word "mutual" must appear in name. Every mutual fire insurance company shall embody the word "mutual" in its title, which shall appear upon the first page of every policy and renewal receipt in some suitable manner. ['11, c. 228, § 72, p. 763.]

Hist. '11, c. 228, § 72, p. 763, reen. C. L. 220:152.

§ 5058. Directors. Any company so incorporated shall thereupon have the power to elect directors by vote of incorporators, but the directors so elected shall serve but one year, when an election by the members shall be held. The number of such directors shall be not less than nine nor more than 15, and in all meetings of the members each shall have one vote and shall vote in person, by mail or by proxy, but no one person shall vote more than five proxies. ['11, c. 228, part of § 68, p. 760.]

Hist. '11, c. 228, part of § 68, p. 760, reen. C. L. 220:153.

§ 5059. Certificate of authority. When such company has paid the fees required by law, and fully complied with all other statutes, the department of commerce and industry shall furnish such company with a certificate of authority to do business in this state, and shall issue to such company, as provided for other insurance corporations, a certificate showing the amount and purpose of the guaranty fund deposit with the department.

Hist. '11, c. 228, part of § 68, p. 761, reen. C. L. 220:154; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5060. Annual statement. It shall be the duty of the president and secretary to prepare annually, under oath, a full and complete statement of the conditions of the company on the 31st day of December preceding, said statement to be presented at the annual meeting of the company. A copy of said statement shall be filed in the office of the department of commerce and industry not later than the 1st day of February of each year.

Hist. '11, c. 228, § 75, p. 763, reen. C. L. 220:155; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5061. Fees. Domestic, mutual or assessment fire insurance companies shall pay to the department of commerce and industry the following fees:

For filing articles of incorporation	$10.00
For filing annual statement	10.00
For annual license	50.00
And for each agent's certificate of authority	3.00

Hist. '11, c. 228, § 83, p. 765, reen. C. L. 220:156; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5062. By-laws. The members of mutual fire insurance companies or the board of directors, as may be provided in the articles of incorporation, shall make such by-laws, not inconsistent with this chapter, as they may deem necessary for the management of said company. All amendments of the by-laws shall be furnished to the members in such manner and form as the by-laws shall provide. ['11, c. 228, § 74, p. 763.]

Hist. '11, c. 228, § 74, p. 763, reen. C. L. ?20:157.

§ 5063. Guaranty fund certificates of domestic mutual fire and casualty companies. Guaranty fund certificates may be issued to provide a guaranty fund for domestic fire insurance companies incorporated upon the mutual plan, and for domestic casualty insurance companies incorporated upon the mutual plan; such fund to be held as security for the payment of all losses and other policy liabilities of such companies. Guaranty fund certificates may draw interest or dividends not exceeding, in the aggregate, 8 per cent per annum, which shall only be paid from the profits of the company. Said certificates can only be retired or redeemed by using the profits of the company for that purpose, but the full fund

as required of each kind of mutual company by this chapter must at all times be maintained. Such guaranty fund shall be a liability until redeemed or retired. It shall only be used to pay policy claims or liabilities when the contingent mutual liability of the policy holders has been drawn upon and found insufficient to meet the losses of policy claims, or when the directors from any cause fail to provide for the payment of policy claims. ['11, c. 228, part of § 86, p. 767.]

Hist. '11, c. 228, part of § 86, p. 767, reen. C. L. 220:158.

§ 5064. Same: Profits defined. The profits of a domestic mutual insurance company or association are that portion of its cash funds not required for the payment of losses and expenses not set apart for the unearned premium reserve, or any other purpose required by law. ['11, c. 228, part of § 86, p. 767.]

Hist. '11, c. 228, part of § 86, p. 767, reen. C. L. 220:159.

§ 5065. Notes receivable. No note shall be accepted for a premium or a part of a premium, or as a part of any fund of a mutual fire insurance company, nor valued as an asset unless such note shall be, and shall state upon its face, that it is a lien upon the property insured, and a copy of said note shall thereupon be recorded in the office of the clerk and recorder of the county where the property is situated, and shall be and become a lien upon such property of like force and effect as a mortgage against the same, and no such note shall be surrendered, nor any part of the cash paid upon the premium returned while the policy for which it was given remains in force. The fee for the recording of such note shall be 25 cents in each case. ['11, c. 228, part of § 68, p. 761.]

Hist. '11, c. 228, part of § 68, p. 761, reen. C. L. 220:160.

§ 5066. Premium notes not transferable. Mutual fire insurance companies which shall receive notes in consideration of premiums on their policies shall be required to insert on the face of each note the following words, to wit: "It is hereby understood and agreed that this note is not transferable." ['11, c. 228, § 73, p. 763.]

Hist. '11, c. 228, § 73, p. 763, reen. C. L. 220:161.

§ 5067. Contingent mutual liability of members. Every such company must, in its by-laws, and must, in its policies, fix by a uniform rule the contingent mutual liability of its members for the payment of losses and expenses; and such contingent liabilities shall be not less than one nor more than three annual cash premiums in addition to the one that is written in the policy; and such liability shall be agreed to in writing by each applicant for insurance before the policy is issued; but such liability shall cease with the expiration of the time for which a cash premium has been paid in advance, except for liability incurred during such time. ['11, c. 228, part of § 68, p. 761.]

Hist. '11, c. 228, part of § 68, p. 761, reen. C. L. 220:162.

§ 5068. Liability of members: Assessments. Every person who effects insurance in a mutual fire insurance company and continues to be insured, and his heirs, executors, administrators and assigns, shall thereby become members of the company during the period of insurance; shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability.

The directors shall, as often as they deem necessary, settle and deter-

mine the sum to be paid by the several members thereof, and publish the same in such manner as they may choose, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of such liability, and shall be paid to the officers of the company within 30 days next after the publication or mailing of such notice: *Provided,* That whenever such company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of incurred losses and expenses, it shall be deemed as having impaired its capital, and shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to the several liabilities; and no such company shall borrow money or create a debt, unless for necessary operating expenses, to continue beyond the period when such assessment may be collected and applied to the payment thereof, and no member shall be assessed for liabilities incurred prior to his membership. ['11, c. 228, § 69, p. 761.]

Hist. '11, c. 228, § 69, p. 761, reen. C. L. 220:163.

§ 5069. Enforcement of assessments. If a member neglects or refuses, for a space of 30 days after the publication or mailing of notice of an assessment, and after demand for payment, to pay the sum assessed upon him as his proportion of any loss or expense as aforesaid, the corporation may sue for and recover the whole amount of contingent liability, with the cost of suit; but execution shall only issue for assessments and costs as they accrue, and every such execution shall be accompanied by a list of losses or expenses for which the assessment is made: And, *Provided further,* That no member of such company shall ever be required to pay for any expense or loss occasioned by fire more than the whole amount of his contingent liability. ['11, c. 228, part of § 70, p. 762.]

Hist. '11, c. 228, part of § 70, p. 762, reen. C. L. 220:164.

§ 5070. Same: Evidence of assessment. In actions for the recovery of assessments duly levied by the directors of any mutual fire insurance company of this state, or for money due on the liability of the members of any such company, the official statement of the president or secretary of such company, under seal and sworn to, shall be received in court as evidence of the facts essential for making the same, and that such assessment, for the nonpayment of which any such action is commenced, has been duly levied and notice thereof given. ['11, c. 228, § 71, p. 762.]

Hist. '11, c. 228, § 71, p. 762, reen. C. L. 220:165.

§ 5071. Withdrawal of members: Termination of liability. Any member of such company may withdraw therefrom at any time by giving the company notice thereof in writing and paying his or her share of claims or liabilities for losses or expenses then existing against the company, surrendering his or her policy and paying such cancellation fee as may be provided by the board of directors, in which case his liability ceases; but no member, his or her heirs, executors, administrators or assigns can avoid liability to such company for their pro rata share of the unpaid claims against the company accruing when a member. ['11, c. 228, § 78, p. 763.]

Hist. '11, c. 228, § 78, p. 763, reen. C. L. 220:166.

§ 5072. Property of members only insurable. No mutual fire insurance company shall have the power to insure the property of others than members of the company. ['11, c. 228, part of § 68, p. 761.]

Hist. '11, c. 228, part of § 68, p. 761, reen. C. L. 220:167.

§ 5073. Limitations on amount of policies. Domestic mutual fire insurance companies shall not issue policies on any one risk or hazard to exceed $1000 until it has $300,000 of insurance in force, when policies of $2000 may be issued; or

Issue policies of more than $2000 on any one risk until there is $1,000,000 of insurance in force, at which time policies of $3000 may be issued; or

Issue policies for more than $3000 until there is $2,000,000 of insurance in force, when policies may be issued at the discretion of the company.

Provided, however, No real property shall be insured for more than three-fourths of its value. ['11, c. 228, § 77, p. 763.]

Hist. '11, c. 228, § 77, p. 763, reen. C. L. 220:168.

§ 5074. Cancellation of policies. Such company for good and sufficient reasons apparent to it, may cancel any policy by giving the member notice to that effect, and releasing him or her from further assessments, and thereupon such member shall send in his or her policy to the company. ['11, c. 228, § 79, p. 764.]

Hist. '11, c. 228, § 79, p. 764, reen. C. L. 220:169.

§ 5075. Payment of losses. Losses shall be adjusted and become due and payable within 60 days after losses occur. ['11, c. 228, § 76, p. 763.]

Hist. '11, c. 228, § 76, p. 763, reen. C. L. 220:170.

§ 5076. Partial proportionate payment of losses. If the whole amount of the contingent liability of members shall at any time be insufficient to pay expenses and the losses occasioned by any fire or fires, the insured who are entitled to receive payments for losses sustained, for which the company is liable upon its policies, shall receive from and out of such contingent liabilities of members, on account of their respective losses, a proportionate share of the whole amount of such liability, according to the amount of their respective losses: *Provided, however,* That nothing herein contained shall be deemed nor construed to affect or take away the rights of such policy holders in the guaranty fund of such company. ['11, c. 228, part of § 70, p. 762.]

Hist. '11, c. 228, part of § 70, p. 762, reen. C. L. 220:171.

§ 5077. Losses collectible by action. Suits at law may brought against said company by a member or members thereof for losses sustained if payment is withheld after such losses are adjusted and become due. ['11, c. 228, § 80, p. 764.]

Hist. '11, c. 228, § 80, p. 764, reen. C. L. 220:172.

§ 5078. Reinsurance regulations. No domestic insurance company organized upon a mutual or the assessment plan shall transfer its risk to or reinsure them in any other corporation unless the said contract of transfer or reinsurance is first submitted to and approved by two-thirds vote of the membership, to be taken by person, mail or proxy at a meeting called for this purpose. Written or printed notice clearly describing the purpose of the meeting shall be mailed to each policy holder or indemnity certificate holder not less than 20 days nor more than 90 days before the day fixed for said meeting. A certified copy of such proposed contract of transfer or reinsurance shall be filed in the department of commerce and industry, and the call for such meeting shall be submitted to the department for its approval.

In case such transfer or reinsurance of the corporation is to result in

any increase in the premium or rate of insurance of those already holding contracts, or in any reduction of the amount of insurance in lieu of such advance in premium, the fact shall be set forth in the call for a new meeting.

The meeting and the counting of votes shall be held and done under the supervision of the commissioner of the department for the purpose of seeing that the by-laws of the company and the laws of the state are fully observed. The commissioner shall, before the transfer is finally made, report upon the nature of the contract of reinsurance or transfer and as to the methods employed to secure the consent of its members or policy holders thereto, and also as to the disposition of any funds belonging to the members or policy holders of the company that is to be reinsured: *Provided,* The commissioner may, if, in his judgment, the law has been violated or members deprived of their rights or of their joint assets, apply to the district court for an injunction restraining such transfer or reinsurance.

Hist. '11, c. 228, § 82, p. 764, reen. C. L. 220:173; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5079. Insolvent companies: Duty of department. If upon examination it shall appear to the department of commerce and industry that the condition of any mutual company incorporated or authorized to transact business under this chapter is not such as to justify it continuing in business, the department shall apply to the district court of the county where the principal office of such company is located for an order restraining such company from doing further business, and the court may appoint a receiver or issue such decrees and orders as may best serve the interests of the members or policy holders and of the public; the disbursement or distribution of the guaranty fund or assets of the company shall then be made under the direction of the court: *Provided, however,* That the guaranty fund shall first be used to pay policy claims or losses; the balance of the fund or funds remaining shall be used to pay creditors, if any, and the then remaining portion of the fund shall be used to redeem outstanding guaranty fund certificates, or if none are outstanding, it shall be distributed among the members of the company as the court may direct.

Hist. '11, c. 228, § 81, p. 764, reen. C. L. 220:174; compiled upon authority '19, c. 8, § 28, p. 56.

ARTICLE 8.

COUNTY MUTUAL FIRE INSURANCE COMPANIES.

§ 5080. Organization: Farmers' lodges permitted to operate. Twenty-five or more persons, citizens of Idaho and owning insurable property in any county in this state, may form a county mutual fire insurance company in such county for the purpose of insuring each other and for the purpose of insuring church property and public halls that may be situated within the territory in which they do business against loss by fire, lightning, tornado, windstorm or hailstorm on property situated in the county in which the headquarters of the association are located and in not more than four other counties adjacent thereto: *Provided,* That the grange or similar association or organizations now operating upon the lodge or mutual cooperative plan may operate under this chapter in all or any counties of this state. ['17, c. 105, part of subd. 87, p. 382.]

Hist. '11, c. 228, part of § 87, p. 767, reen. '13, c. 31, p. 129; am. '17, c. 105, p. 382, reen. C. L. 220:175.

Membership: Under constitution school districts are prohibited from becoming members of a county mutual fire insurance

company. It may be that a postponed contingent liability is not an indebtedness within meaning of constitution, but it is a liability which may become an indebtedness. Sch. Dist. No. 8 v. Twin Falls etc. Co. (1917) 30 I. 400, 164 P. 1174.

§ 5081. Name: Articles of incorporation. Such company shall adopt the name of county mutual fire insurance company preceded by some distinctive name, and the articles of incorporation shall state the name of the town or city in which the head office shall be located and of the counties in which it is proposed to do business. They shall also state the objects of the organization as being one or more of the objects set forth in this article, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses which may occur to its members. The kinds of property proposed to be insured and the casualties specified in this article proposed to be insured against shall also be specified in the articles of incorporation. ['11, c. 228, part of § 87, p. 768.]

Hist. '11, c. 228, part of § 87, p. 768; substantially reen. '13, c. 31, p. 130; substantially reen. '17, c. 105, p. 382, reen. C. L. 220:176.

§ 5082. Directors: By-laws: Certificate of authority. After a certified copy of these articles is filed with the department of commerce and industry and approved by the attorney general, and the incorporators are advised that the same is approved, they may proceed to select directors and officers and to make their constitution and by-laws.

The directors selected by the incorporators shall not be less than nine nor more than 15 in number, and shall serve one year, when an election by the members shall be held and the term of no director thereafter shall be more than three years. Members shall have one vote each, and shall vote for directors in person or by proxy, or by mail, but no person shall vote more than five proxies.

Before granting any insurance such company shall file with the department of commerce and industry, in addition to a certified copy of the articles of incorporation approved by the attorney general, a copy of the constitution and by-laws and forms of certificates of members or of insurance, and if the department finds that the laws have been complied with, it shall issue a certificate of authority for such company to commence business.

Hist. '11, c. 228, part of § 87, p. 768, reen. '13, c. 31, p. 130; substantially reen. '17, c. 105, p. 382; compiled and reen. C. L. 220:177; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5083. Fees. Such companies shall pay to the department of commerce and industry the following fees:

For filing articles of incorporation.....$10.00
For filing annual statement..... 10.00

Hist. '11, c. 228, part of § 87, p. 769; am. '13, c. 31, p. 131, reen. '17, c. 105, p. 383, reen. C. L. 220:178; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5084. Supervisory power of department. Such companies shall make such statements of accounts and records of the business and financial conditions as may be required by the department of commerce and industry, which shall furnish blank forms for such purpose; and the department shall have the same right to visit and examine such company, and the same supervisory authority over such company as is given the department by law over mutual companies or associations, and it shall have the power to revoke the license of such companies for failure to settle loss with reasonable promptness, and publish such revocation in such a manner as may best serve the interests of the policy holders and the public.

Hist. '11, c. 228, part of § 87, p. 769, substantially reen. '13, c. 31, p. 131, reen. '17, c. 105, p. 383, reen. C. L. 220:179; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5085. Liability of members. All the policies issued by the company must state specifically that the liability of each member is not limited. All persons becoming members of such company must sign the constitution and by-laws, and shall be held in law to comply with all the provisions and requirements of the company. ['11, c. 228, part of § 87, p. 768.]

Hist. '11, c. 228, part of § 87, p. 768, reen. '13, c. 31, p. 130, reen. '17, c. 105, p. 383, reen. C. L. 220:180.

Limit of liability: A person cannot become member without becoming an insurer of property of other members and his liability will be limited only by amount of insurance in force and solvency of members. Sch. Dist. No. 8 v. Twin Falls etc. Co. (1917) 30 I. 400, 164 P. 1174.

§ 5086. Insurable property. Such company shall in no instance have the power to insure the property of others than members of the company. Said county mutual fire insurance companies shall be permitted to insure churches or public halls located outside of incorporated cities. No such company shall insure any property beyond the limits of the territory comprised in the formation of the company, as herein provided, nor shall it insure any property within the limits of any incorporated city or town, except that located upon tracts of land of not less than five acres in area located within the limits of any city, town or village, nor shall it expose itself to loss on any one risk to an amount in excess of that provided for in section 5073. ['17, c. 105, part of subd. 87, p. 382.]

Hist. '11, c. 228, parts of § 87, p. 767, reen. '13, c. 31, p. 129; am. '17, c. 105, p. 382, reen. C. L. 220:181.

§ 5087. Assessments. County mutual fire insurance companies may assess and collect from the owners or trustees of churches or public halls, and may assess and collect from their members, such sums of money as may be necessary to pay losses from fire, lightning, tornado, wind storm or hail storm, from time to time as such losses occur, and to pay such expenses as may be approved by the board of directors.

The assessment and collections of such sums shall be regulated by the constitution and by-laws of the company, which must, however, provide that assessments to cover losses can not be levied in advance of the occurrence of such losses, except that any such company may, in its by-laws, provide for an emergency fund, which fund shall at no time exceed one-half of 1 per cent of the amount of insurance in force, out of which fund losses to the extent of the money on hand therein may be paid. [C. L. 220:182.]

Hist. '11, c. 228, parts of § 87, p. 767; am. '13, c. 31, p. 129; am. '17, c. 105, p. 382; compiled and reen. C. L. 220:182.

ARTICLE 9.

FOREIGN MUTUAL FIRE INSURANCE COMPANIES.

§ 5088. Requirements. Any mutual fire insurance company organized or incorporated under authority other than that of the state of Idaho, before being authorized to do business in this state, shall be required to file with the department of commerce and industry a financial statement showing its condition of December 31 next preceding the date of its application for admission, signed by its president, and secretary under oath, and showing that it is possessed of accumulated assets of not less than $200,000, of which not less than $50,000 shall be net surplus over and above all liabilities, said liabilities to include reinsurance reserve calculated on a pro rata basis, which surplus must always be maintained, and must be kept invested in securities as provided in sections 4962, 4963, 4964, 4965, relating to the investment of surplus of joint stock insurance companies: *Provided,* That such surplus must be deposited with the depart-

ment of commerce and industry of this state, or the appropriate department of such company's home state for the protection of all its policy holders. Such mutual fire insurance company must also furnish a certificate from the insurance commissioner of the state in which said corporation or association is incorporated, certifying that, in the judgment of the state insurance commissioner, the statement is correct, and that the corporation or association is possessed of $200,000 accumulated assets, of which not less than $50,000 is net surplus.

Hist. '11, c. 228, part of § 84, p. 765, reen. C. L. 220:183; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Statement on policy: § 5053, subd. 1.

§ 5089. Certificate of authority. The department of commerce and industry, upon receipt and examination of such statement and certificate and upon satisfying itself of the correctness thereof, and if the company, corporation or association has complied in all other respects with the laws of this state, applicable as shown by this chapter, shall issue to such corporation or association a certificate of authority, granting it full power to transact business in this state.

Hist. '11, c. 228, part of § 84, p. 766, reen. C. L. 220:184; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Statement on policy: § 5053, subd. 1.

§ 5090. Fees. Foreign mutual fire insurance companies organized under any other laws than the laws of this state shall pay the same fees required of all other joint stock insurance companies doing business in this state. ['11, c. 228, § 85, p. 767.]

Hist. '11, c. 228, § 85, p. 767, reen. C. L. 220:185.

§ 5091. Liability of members. Each and every policy holder shall be liable to pay his proportionate share of any assessment in accordance with the provisions of law and his contract on account of all losses and expenses incurred while a member. Any such corporation or association shall charge and collect upon its policies the full premium in cash, and may, in its by-laws, fix the liability of its members for the payment of losses and expenses not provided for by its cash funds: *Provided,* That the liability of a member to assessment shall be not less than the amount of one annual premium in addition to the annual cash premium of his policy: *Provided, however,* That corporations or associations which have accumulated in the regular course of business, assets of not less than $200,000, of which not less than $50,000 is net surplus over and above a pro rata reinsurance reserve, which reserve shall at no time be less than that provided in section 5002, shall have power, while in that condition, to limit the liability of its policy holders to the amount of premium stated in the policy, which premium shall be not less than the premium charged by solvent stock companies for insuring similar risks, such limitation of liability to continue only during the time such corporation or association is in such financial condition: *Provided further,* That every such corporation or association must print upon its policies such conditions as will define the liability of a policy holder: *Provided further,* That any such corporation or association may classify its risks according to the various hazards covered, and any saving experienced by the company in loss ratio, expenses of management or from any other source may be returned to the policy holders in the various classifications according to the experience of the company in said classes, and as determined by the board of directors of the company. ['11, c. 228, part of § 84, p. 766.]

Hist. '11, c. 228, part of § 84, p. 766, reen. C. L. 220:186.

Cross ref. Express reference to this section: Statement on policy: § 5053, subd. 1.

ARTICLE 10.

LIVE STOCK INSURANCE COMPANIES

Hist. This article was preceded by '05, p. 150, reen. R. C. §§ 2925-37.

§ 5092. Organization of companies. Any number of citizens of this state, not less than five, may organize an insurance company for the purpose of insuring the owners of live stock against loss to such stock by death from any cause, and against theft or accident. ['11, c. 228, § 109, p. 778.]

Hist. '11, c. 228, § 109, p. 778, reen. C. L. 220:187.

§ 5093. Articles of incorporation. The person desiring to organize an insurance company under this chapter shall make and subscribe written articles of incorporation setting forth the name of the corporation, the purpose of incorporating under this chapter, and the locality of the principal office of the company, the names and residences of the subscribers to the articles of incorporation and the amount of stock subscribed by each, and shall file a copy of said articles with the county recorder of the county in which is designated their principal place of business in this state, and shall also file a certified copy of said articles with the secretary of state of this state, and in the office of the department of commerce and industry.

Hist. '11, c. 228, § 110, p. 778, reen. C. L. 220:188; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5094. Minimum capital: How invested: Deposit with department. No domestic joint stock, life stock insurance company shall transact any business in the state with less capital than $25,000, of which not less than $25,000 shall be paid up in full; nor until the minimum amount of capital provided in this section shall have been invested in such securities as provided in sections 4962, 4963, 4964, 4965, pertaining to the investment of joint stock insurance companies, nor until such company has made a deposit of such securities representing the minimum capital with the department of commerce and industry: *Provided,* That said company shall be permitted at all times to collect the interest or dividends on its securities so deposited, and from time to time to withdraw such securities, or any part thereof, by substituting other securities of equal or greater value.

Hist. '11, c. 228, § 112, p. 779, reen. C. L. 220:189; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5095. Directors and officers. Business of any company organized under this chapter shall be managed and conducted by not less than five nor more than seven directors, who shall each be the owner of not less than five shares of the capital stock of such company. Said directors shall hold office for one year, and until their successors are elected and qualified, unless otherwise provided by the by-laws of the company. ['11, c. 228, § 113, p. 779.]

Hist. '11, c. 228, § 113, p. 779, reen. C. L. 220:190.

§ 5096. By-laws: Election of officers. Such by-laws may be adopted as may be deemed proper for the regulation and government of the company's business. Such by-laws shall provide, however, for the annual meeting of the stockholders, at which time the board of directors shall be elected; which board of directors shall meet within five days subsequent to the meeting of the stockholders, and shall from their number choose a president and vice president, and shall, either from their number or from the stockholders, elect a secretary and treasurer, the duties of which of-

ficers and the manner of filling vacancies in such offices to be fully provided for in the by-laws of the company. ['11, c. 228, § 114, p. 779.]

Hist. '11, c. 228, § 114, p. 779, reen. C. L. 220:191.

§ 5097. Limit of risk. No live stock insurance company doing business in this state shall place upon any one risk or animal a greater amount than one-twentieth of its paid up capital. ['11, c. 228, § 115, p. 779.]

Hist. '11, c. 228, § 115, p. 779, reen. C. L. 220:192.

§ 5098. Issuance of policies. Every company organized under the provisions of this chapter may make and issue policies of insurance against loss of live stock by reason of death from any cause, accident or theft within the limits of the state of Idaho: *Provided,* That such companies may transact business in any other state of the United States, subject to the laws of said state. ['11, c. 228, § 116, p. 779.]

Hist. '11, c. 228, § 116, p. 779, reen. C. L. 220:193.

§ 5099. Form of policies: Adjustment of losses. The policies of said company shall be in such form as may be prescribed by the board of directors, and shall be subscribed by the president and secretary, and all losses under policies for which the company may be liable shall be adjusted as provided in the policy contract or in such manner as may be directed by the board of directors, within such time as may be limited in the policy, not exceeding, however, 60 days from the date of receiving notice of loss: *Provided,* That the period within which suit may be brought upon any policy shall not be limited to less than 12 months from date of loss. ['11, c. 228, § 117, p. 780.]

Hist. '11, c. 228, § 117, p. 780, reen. C. L. 220:194.

§ 5100. Liability of stockholders. Stockholders of companies organized under the provisions of this chapter shall each be liable personally for any losses or debts of the company to the extent provided for in section 4990. ['11, c. 228, § 118, p. 780.]

Hist. '11, c. 228, § 118, p. 780, reen. C. L. 220:195.

§ 5101. Annual statement. It shall be the duty of the president and secretary of any company doing business under the provisions of this chapter, on or before the 1st day of March of each year, to prepare and file in the office of the department of commerce and industry a statement, certified under the oath of said president and secretary, exhibiting the financial condition of the company as of December 31 preceding, said statement to be compiled in conformity with the forms required by the department.

Hist. '11, c. 228, § 119, p. 780, reen. C. L. 220:196; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5102. Fees. There shall be collected from each live stock insurance company organized under this chapter the same fees as are exacted from all other joint stock insurance companies doing business under this chapter. ['11, c. 228, § 120, p. 780.]

Hist. '11, c. 228, § 120, p. 780, reen. C. L. 220:197.

ARTICLE 11.

FIDELITY AND SURETY COMPANIES.

§ 5103. Application of chapter. The provisions of this chapter shall apply to all companies organized under the laws of this state or of any

other state, territory or district of the United States, or of any foreign government, for the purpose of issuing surety, guaranty or indemnity bonds, guaranteeing persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; or guaranteeing and executing all bonds, undertakings and contracts of suretyship. ['13, c. 97, § 29, p. 411.]

Hist. The act of '05, p. 394, brought under one law the acts of '99, p. 337, and '99, p. 187. '05, p. 394, § 3, reen. R. C. § 2938, reen. '11, c. 228, § 88, p. 770; am. '13, c. 97, § 29, p. 411, reen. C. L. 220:198.

Cross ref. Express reference to this section: Acceptance of unauthorized companies as surety: § 5117.

§ 5104. Conditions precedent to doing business: Deposit. Every insurance company transacting surety and fidelity insurance in this state must be authorized to do business under the laws of the state, territory, district or government where incorporated, and empowered under its charter or articles of incorporation to become surety upon such bond, undertaking, obligation, recognizance or guaranty; must have the capital and surplus hereinbefore provided in this chapter and comply with all other provisions of this chapter applicable to such companies.

Such company, if it be organized under the laws of any other state, territory or district of the United States or of any foreign country, shall, before any certificate of authority to do business in this state shall issue, deposit with the state treasurer of this state, money or bonds of the United States or of this state, or interest paying bonds when they are at or above par, or any other state of the United States or the District of Columbia, or the bonds of any county or municipal corporation of this or any other state of the United States or the District of Columbia to the actual market value of not less than $25,000.

The said money or bonds so deposited with the state treasurer shall be an exclusive trust for the benefit of the holders of the obligations of such company in this state, to remain with said treasurer in trust, to answer any default of said company as surety upon any such obligation established by final judgment upon which execution may lawfully be issued against said company; such company, however, at all times shall have the right to collect the interest, dividends and profits upon such securities, and from time to time withdraw such securities or portions thereof, substituting therefor others of equally good character and value, to the satisfaction of the department of commerce and industry, and such securities shall not be sold under any process against such company until after 40 days' notice to said company, specifying the date, place and manner of such sale, and the process under which and the purposes for which it is to be made, accompanied by a copy of such process. The state of Idaho shall be held responsible for the safety of all deposits made under the provisions of this section. Such company shall not be permitted to withdraw from the state treasurer such deposit of money or bonds for a period of one year after discontinuing business within this state, or while any suit is pending or any judgment against said company in this state shall remain unpaid. Said deposit shall at all times be maintained at said sum of $25,000 or more, and for a failure for a period of 40 days after notice by the department of commerce and industry given by registered letter addressed to the president of said company at its home office to replenish and so maintain the same, the authority of said company to do business in this state shall be revoked by the department.

Hist. '99, p. 337, § 2; am. '05, p. 394, § 1; am. R. C. § 2939; am. '11, c. 228, § 89, p. 770; am. '13, c. 97, § 30, p. 411, reen. C. L. 220:199; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5105. Certificate of authority. The department of commerce and industry, upon due proof that such company possesses the qualifications specified in this chapter, and that it has in all things complied with the laws of this state relating to surety companies or applicable thereto, shall issue to such company a certificate authorizing said company to do business until and including March 31 thence next ensuing, and thereafter such certificate shall issue on April 1 as hereinbefore provided, for a period of one year. Said certificate shall be evidence of the authority of such company to do business in this state, and to become and to be accepted as sole surety on all private bonds and contracts, and on all bonds, undertakings, recognizances and obligations required or permitted by law of [or] the charter, ordinances, rules or regulations of any municipality, board, body, organization or public officer and of the solvency and credit of such company for all authorized purposes and its sufficiency as such surety.

Hist. '99, p. 337, § 3; am. '05, p. 396, first part of § 1(3), reen. R. C. § 2940; am. '11, c. 228, § 90, p. 772, reen. C. L. 220:200; compiled upon authority '19, c. 8, § 28, p. 56. Bracketed word inserted for correction.

Cross ref. Express references to this section: Penalty for acting for unauthorized company: § 5116. Acceptance of unauthorized company as surety: § 5117.

Cited: Libby v. Spokane Valley etc. Co. (1908) 15 I. 467, 98 P. 715.

§ 5106. Reimbursement for premiums on fiduciary and official bonds. Any judge, court or officer whose duty it is to pass upon the amount of bonds of any assignee, trustee, receiver, guardian, executor, administrator or other fiduciary required by law to give bond or undertaking as such, and whenever such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary has given bond or undertaking with a surety company or companies as surety or sureties thereon, as herein provided, shall allow, in the settlement of the account of such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary a reasonable premium, subject to the limitations hereinafter provided, paid to any such company or companies for becoming his surety on such bond or undertaking.

In all other cases where, by the provisions of this chapter a corporate surety or guarantor is given or required, except notaries public, the premium to be paid to any such company or companies for becoming such surety or guarantor shall be paid out of the general funds of the divisions of government by or for which the person giving such bond or undertaking was appointed or elected: *Provided, however,* That the premium shall in no case exceed in the aggregate one-half of 1 per cent per annum on the amount of such bond or undertaking: *Provided also,* That such company or companies have complied, and shall continue to comply, with the laws of this state relative to such companies. ['05, p. 397, last part of § 1, subd. 3.]

Hist. '99, p. 337, § 3; am. '05, p. 397, last part of § 1(3), reen. R. C. § 2941, reen. '11, c. 228, § 91, p. 772, reen. C. L. 220:201.

§ 5107. Notice to county recorders. Whenever any surety company not organized under the laws of the state of Idaho shall have complied with the laws of this state as in this chapter and as otherwise by law provided, it shall be the duty of the department of commerce and industry on the first day of the next succeeding month to send to the county recorder of each county in this state a notice, stating that such surety company has complied with the laws of this state and is authorized to write risks of the kind and character authorized in its certificate of authority to do business, stating therein in general terms the risks authorized to be written

by such company. Such notice shall be issued by said department of commerce and industry over its seal of office, and shall be received in evidence as a sufficient justification of such surety, and of its authority to do business in this state until the end of the insurance year in which the same may have been issued, or until notice be given of withdrawal from, or of cancellation of its license to do business in this state. Such certificate shall be kept on file in the offices of the county recorders of the respective counties, subject to inspection as other public records, and any party interested may have certified copies thereof which shall be admissible in evidence with like effect as the original.

If any company shall withdraw from this state, or if its license shall be cancelled, the department of commerce and industry shall give notice of such withdrawal from the state or cancellation of license to do business, forthwith, by mailing a certificate of such fact to the county recorder of each county of the state, and also by sending notice to each agent resident within the state authorized to do business for said company, as shown by the records of the department, at the address shown in said records.

The certificates of authority to be sent monthly as in this section provided shall include in one certificate all companies which have been authorized to do business during the preceding month, and may also include all companies which have withdrawn or whose certificate of authority may have been cancelled during such month, and unless deemed for the public interest that notice be given forthwith, all notices of withdrawal from the state, and also all notices of cancellation of licenses to do business, may be made part of such monthly certified statement, and copies thereof sent to agents of said company, and the county recorders at the first of the month only in lieu of sending such notice forthwith: *Provided,* That the certificate of authority to be sent monthly to county auditors contain a list of the companies authorized to transact surety business in this state shall be in force and effect until notice is duly served of the withdrawal or cancellation of authority of some authorized company, or the authorization of a company not included in the department's former certificate of authority.

Hist. '99, p. 337, § 9; am. '05, p. 398, § 1(9), reen. R. C. § 2943; am. '11, c. 228, § 92, p. 772, reen. C. L. 220:202; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Justification of surety: § 7183. Libby v. Spokane Valley etc. Co. (1908) 15 I. 467, 98 P. 715.

Justification: This section contemplates that a surety company may be called upon to justify, just the same as any other surety, and prescribes the method of justification. Where exceptions have been taken to a surety company, as surety upon an undertaking on appeal, then such company must comply with the requirements of § 7183, by giving notice that it will justify and by justifying. The method of justifying is by presenting to the court before whom the justification is to be made the notice or a certified copy thereof required to be given by the state insurance commissioner to the county recorder of each county. This is a sufficient justification. Libby v. Spokane Valley etc. Co. (1908) 15 I. 467, 98 P. 715.

§ 5108. [2944] **Penalty for failure to pay judgment.** If any surety company doing business under this chapter shall neglect or refuse for a period of 90 days to pay any final judgment rendered against it upon any bond or undertaking made or guaranteed by it under the provisions of this chapter, it shall forfeit all right to do business in this state and its certificate of authority shall be revoked: *Provided,* If any appeal from said judgment shall be taken within said 90 days, accompanied by an undertaking as is provided in cases of appeals under the general statutes of this state, then and in that case such period of 90 days shall begin to run from the date the remittitur from the supreme court affirm-

ing said judgment in whole or in part shall be filed in the district court. ['05, p. 399, § 1, subd. 12.]

Hist. '99, p. 337, § 12; am. '05, p. 399, § 1(12), reen. R. C. § 2944, reen. '11, c. 228, § 93, p. 774, reen. C. L. 220:203.

§ 5109. [2945] **Surety bonds recognized in lieu of all other bond requirements.** Whenever any bond, undertaking, recognizance or other obligation is by law, or by the charter, ordinances, rules or regulations of any municipality, board, body, organization, court, judge or public officer, required or permitted to be made, given, tendered or filed with surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company qualified as in this chapter provided. Such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law, charter, ordinance, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such sureties shall be residents or householders, or freeholders, or either or both, or possess any other qualifications. All courts, judges, heads of departments, boards, bodies, municipalities and public officers of every character shall accept and treat such bond, undertaking, obligation, recognizance or guaranty, when so executed by such company, as conforming to, and fully and completely complying with every such requirement of every such law, charter, ordinance, rule or regulation. [R. C. § 2945.]

Hist. '99, p. 337, § 1; am. R. C. § 2945, reen. '11, c. 228, § 94, p. 774, reen. C. L. 220:204.

Cited: Gatward v. Wheeler (1904) 10 I. 66, 77 P. 23.

Justification of company sureties: When an undertaking on appeal from a justice court is excepted to, the appellant may, in lieu of a justification of sureties, file the undertaking of a surety company, but such undertaking must be accompanied with documentary evidence showing prima facie that such surety company has qualified to do business in this state by complying with the requirements of this act, and that the execution of such undertaking has been authorized by the surety company, executed by agents or officers authorized to execute it, and notice of filing such undertaking and evidence must be given the respondent. Numbers v. Rocky Mt. Bell Tel. Co. (1900) 7 I. 408, 63 P. 381.

§ 5110. [2946] **Release of surety.** The surety or the representative of any surety, upon the bond of any trustee, committee, guardian, assignee, receiver, executor or administrator, or other fiduciary, may apply by petition to the court wherein such bond is directed to be filed, or which may have jurisdiction of such trustee, committee, guardian, assignee, receiver, executor or administrator, praying to be relieved from further liability as such surety, for the acts or omissions of the trustee, committee, guardian, assignee, receiver, executor or administrator or other fiduciary, which may occur after the date of the order relieving such surety to be granted as herein provided for, and to require such trustee, committee, guardian, assignee, receiver, executor or administrator, or other fiduciary, to show cause why he should not account and said surety be relieved from such further liability as aforesaid, and said principal be required to give a new bond.

Thereupon, upon filing of said petition, said court shall issue such order returnable at such time and place and to be served in such manner as said court shall direct, and may restrain such trustee, committee, guardian, assignee, receiver, executor or administrator or other fiduciary from acting except in such manner as it may direct to preserve the trust estate.

Upon the return of such order to show cause, if the principal in the bond account in due form of law and file a new bond duly approved, then said court must make an order releasing said surety, filing the petition as aforesaid, from liability upon the bond for any subsequent act or default of the principal. In default of said principal thus accounting and filing such new bond, said court shall make an order directing such trustee, committee, guardian, assignee, receiver, executor or administrator, or fiduciary to account in due form of law within 30 days, and that if the trust fund or estate shall be found or made good and paid over or properly secured, such surety shall be discharged from any and all further liability as such for the subsequent acts or omissions of the trustee, committee, guardian, assignee, receiver, executor or administrator, or fiduciary, after the date of the surety being so relieved or discharged and discharging such trustee, committee, guardian, assignee, receiver, executor or administrator, or fiduciary. ['99, p. 338, § 4.]

Hist. '99, p. 338, § 4, reen. R. C. § 2946, reen. '11, c. 228, § 95, p. 774, reen. C. L. 220:205.

§ 5111. [2947] **Agreement for protection of surety.** It shall be lawful for any party of whom a bond, undertaking or other obligation is required to agree with his surety or sureties for the deposit of any or all moneys and assets for which such surety or sureties are or may be held responsible with a bank, savings bank, safe deposit or trust company authorized by law to do business as such, or other depository approved by the court or a judge thereof, if such deposit is otherwise proper, for the safe keeping thereof and in such manner as to prevent the withdrawal of such moneys and assets or any part thereof without the written consent of such surety or sureties or an order of the court or a judge thereof, made on such notice to such surety or sureties as such court or judge may direct. ['99, p. 339, § 5.]

Hist. '99, p. 339, § 5, reen. R. C. § 2947, reen. '11, c. 228, § 96, p. 775, reen. C. L. 220:206.

§ 5112. [2948] **Expenses of bonds as costs.** Any receiver, assignee, guardian, trustee, committee, executor, administrator, or curator, or other fiduciary required by law or the order of any court or judge to give a bond or other obligation, as such may include as a part of the lawful expense of executing his trust such reasonable sum paid a company authorized under the laws of this state so to do for becoming his surety on such bond as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding 1 per cent per annum on the amount of such bond. In all actions and proceedings a party entitled to recover disbursements therein shall be allowed and may tax and recover such sum paid such company for executing any bond, recognizance, undertaking, stipulation or other obligation therein, not exceeding, however, 1 per cent on the amount of the liability upon such bond, recognizance, undertaking, stipulation, or other obligation during each year the same has been in force. ['99, p. 339, § 6.]

Hist. '99, p. 339, § 6; R. C. § 2948, repealed and reen. '11, c. 228, § 97, p. 775, § 125, p. 781, reen. C. L. 220:207.

§ 5113. Companies must receive government certification. No foreign insurance company, transacting business of surety and fidelity insurance, shall be authorized to transact such business in this state except during such time as it shall comply with all the requirements of the federal government relative to such companies, and hold unrevoked a cer-

tificate of the secretary of the treasury of the United States, showing that such company is qualified to write bonds for the federal government. All such companies doing business in this state shall file quarterly a certificate from the secretary of the treasury, showing such qualification: *Provided,* That no surety company doing business in this state shall assume a liability on any one risk in an amount greater than 10 per cent of its capital and surplus, unless the same shall be reinsured in some other solvent company in such an amount as shall reduce its liability on said risk to 10 per cent of its capital and surplus: *Provided further,* That any company failing or refusing to comply with all the provisions of this section shall be disqualified from doing business in this state, and its license shall be revoked by the department of commerce and industry.

Hist. '99, p. 339, § 7, reen. R. C. § 2949; am. '11, c. 228, § 98, p. 776; am. '13, c. 97, § 31, p. 413, reen. C. L. 220:208; compiled upon authority '19, c. 8, § 28, p. 56.

Requirement of federal law: The federal statutes referred to (2 U. S. Comp. St. 2315) require the appointment of resident agents for service of process; the deposit of a copy of charter and statement of assets and liabilities with the attorney general of the United States, who shall issue a certificate of authority; the subsequent filing of quarterly statements with the attorney general, and fix the federal jurisdiction of suits against the company.

§ 5114. [2950] **Company estopped to plead ultra vires.** Any company giving any bond or recognizance under sections 5109-5113 shall be estopped in any proceeding to enforce the liability which it shall have assumed to incur to deny its corporate power to execute such instrument or assume such liability. ['99, p. 340, § 11.]

Hist. '99, p. 340, § 11, reen. R. C. § 2950, reen. '11, c. 228, § 99, p. 776, reen. C. L. 220:209.

§ 5115. [2952] **Who are deemed agents.** Any person who solicits business for or in behalf of such corporation or makes or transmits for any person other than himself any application for a guarantry or security, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a contract of guaranty or security, or who shall examine or investigate the character of any applicant for a guaranty or security for any person or persons other than himself, or who shall refer any applicant for a guaranty or security to such corporation, whether any of said acts shall be done at the instance or request, or by the employment of such corporation or other corporation or person, or any person who shall issue indemnifying bonds or contracts, whose solvency and compliance with his said bonds or obligations is guaranteed directly or indirectly by any corporation, shall be held to be the agent of the corporation so far as relates to all the liabilities and penalties prescribed by section 5013. ['93, p. 86, § 8.]

Hist. '93, p. 86, § 8, reen. '99, p. 187, § 8, reen. R. C. § 2952, substantially reen. '11, c. 228, § 101, p. 777, reen. C. L. 220:210.

§ 5116. Penalty for acting for unauthorized company. Any person performing any of the acts or things mentioned in the preceding section for any such corporation without said corporation having first complied with the provisions of this chapter and having received the certificate of authority from the department of commerce and industry as provided in section 5105, shall be deemed guilty of a misdemeanor and, for conviction thereof, for the first offense, shall be fined in any sum not less than $1000, and not more than $2000, and imprisoned in the county jail for a period of three months, and for each subsequent offense such per-

son shall be fined in any sum not less than $2000 and confined in the county jail for a period of six months.

Hist. '93, p. 86, § 9, reen. '99, p. 187, § 9; am. R. C. § 2953, reen. '11, c. 228, § 102, p. 777, reen. C. L. 220:211; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5117. Acceptance of unauthorized companies as surety: Penalty. Any person or persons, association or corporation who shall knowingly accept as surety or guarantor any corporation created for the purpose, or either of them, mentioned in section 5103, without such corporation having previously complied with all the provisions and requirements of the laws of this state relating to such corporation, and having received from the department of commerce and industry the certificate of authority provided for in section 5105, shall forfeit as a penalty the sum of $1000, to be recovered by suit in the name of the state in any court of competent jurisdiction, such suit to be brought by the attorney general upon request of the department of commerce and industry.

Hist. '93, p. 86, § 10, reen. '99, p. 187, § 10; am. R. C. § 2954, reen. '11, c. 228, § 103, p. 777; am. '13, c. 97, § 32, p. 413, reen. C. L. 220:212; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5118. Payment of bonds furnished corporations. It shall be unlawful for any firm or individual, railroad or other corporation doing business within this state to collect or retain from the wages of the persons in their employ the cost of any guaranty or security furnished the said firm, individual or railroad or other corporation, covering the said employees, unless such employees shall have agreed to pay the premium on such guaranty or security. ['13, c. 97, § 33, p. 414.]

Hist. '93, p. 86, § 14, reen. '99, p. 187, § 15, reen. R. C. § 2958, reen. '11, c. 228, § 106, p. 778; am. '13, c. 97, § 33, p. 414, reen. C. L. 220:213.

§ 5119. Applicant may require copy of bond. Any company complying with the provisions of this act issuing bonds of indemnity, guaranty or security shall, upon request, furnish the applicant with a true and complete copy of the original bond furnished the firm or individual, railroad or other corporation. ['13, c. 97, § 34, p. 414.]

Hist. '93, p. 86, § 15, reen. '99, p. 187, § 15, reen. R. C. § 2959, reen. '11, c. 228, § 107, p. 778; am. '13, c. 97, § 34, p. 414, reen. C. L. 220:214.

§ 5120. [2960] **Application of law to individuals.** Nothing contained in this chapter shall be construed to apply to any citizen or person of this state offering or becoming surety, upon bonds or otherwise, for any other citizen or person without compensation to himself or herself. ['93, p. 86, § 16.]

Hist. '93, p. 86, § 16, reen. '99, p. 187, § 16, reen. R. C. § 2960, reen. '11, c. 228, § 108, p. 778, reen. C. L. 220:215.

ARTICLE 12.

INTERPRETATION.

§ 5121. Definitions. In this chapter, unless the context otherwise requires:

"Company" or "insurance company," "corporation" or "insurance corporation" shall include all corporations, associations, partnerships or individuals engaged as principals in the insurance business, excepting fraternal and benevolent orders and societies.

"Domestic" designates those companies incorporated or formed under the laws of this state.

"Foreign," when used without limitations, designates those companies incorporated or formed under authority other than that of the state of Idaho.

"Insurance" is a contract where one party, called the "insurer," for

a consideration undertakes to pay money or its equivalent, or to do an act valuable to another party, called the "insured," or to his "beneficiary," upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury.

"Reinsurance" means a contract by which an insurer procures a third party to insure it against loss or liability by reason of such original insurance.

Hist. '11, c. 228, § 1, p. 732; am. '13, c. 97, § 1, p. 386; compiled and reen. C. L. 220:216; compiled upon authority '19, c. 8, § 28, p. 56; obsolete part of section omitted.

§ 5122. Application of chapter: Fraternal beneficiary associations. This chapter shall not apply to or affect fraternal beneficiary associations, societies or orders with representative form of government operating on a lodge system, or the beneficiary certificates or policies issued by them. ['11, c. 228, § 46, subd. 3, p. 752.]

Hist. '11, c. 228, § 46, subd. 3, p. 752, reen. C. L. 220:217.

CHAPTER 202.

RECIPROCAL OR INTERINSURANCE CONTRACTS.

Hist. Interinsurance regulations seem to have been first treated in '11, c. 228, § 87, latter part, pp. 769-70, but omitted in the amendment of said section, '13, c. 31, p. 129.

§ 5123. Contracts authorized: Subscribers defined. Individuals, partnerships and corporations of this state, hereby designated subscribers are hereby authorized to exchange reciprocal or interinsurance contracts with each other, or with individuals, partnerships and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. ['13, c. 166, § 1, p. 535.]

Hist. '13, c. 166, § 1, p. 535, reen. C. L. 221:1.

§ 5124. Attorney in fact may execute. Such contracts may be executed by an attorney in fact, agent or other representative, herein designated attorney, duly authorized and acting for such subscribers. ['13, c. 166, § 2, p. 535.]

Hist. '13, c. 166, § 2, p. 535, reen. C. L. 221:2.

§ 5125. Declaration must be filed with department. Such subscribers so contracting among themselves shall, through their attorney, file with the department of commerce and industry a declaration, verified by the oath of such attorney, setting forth:

1. The name or title of the office at which such subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization or by any insurance corporation or association as in the opinion of the department is calculated to result in confusion or deception.
2. The kind or kinds of insurance to be effected or exchanged.
3. A copy of the form of policy contract or agreement under or by which such insurance is to be effected or exchanged.
4. A copy of the form of power of attorney or other authority of such attorney under which such insurance is to be effected or exchanged.
5. The location of the office or offices from which such contracts or agreements are to be issued.
6. The applications have been made for indemnity upon at least 100 separate risks aggregating not less than $1,500,000 as represented

by executed contracts or bona fide applications to become concurrently effective, or, in case of liability or compensation insurance, covering a total pay roll of not less than $1,500,000.

7. That there is on deposit with such attorney and available for the payment of losses a sum not less than $25,000.

Hist. '13, c. 166, § 3, p. 535, reen. C. L. 221:3; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5126. Authority of commissioner to accept service of process. Concurrently with the filing of the declaration provided for by the terms of section 5125, the attorney shall file with the department of commerce and industry an instrument in writing executed by him for said subscribers, conditioned that upon the issuance of certificate of authority provided for in section 5132, service of process may be had upon the commissioner of commerce and industry in all suits in this state arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through such attorney.

Three copies of such process shall be served and the commissioner of commerce and industry shall file one copy, forward one copy to said attorney, and return one copy with his admission of service.

Hist. '13, c. 166, § 4, p. 536, reen. C. L. 221:4; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5127. Statements of risks and responsibility. There shall be filed with the department of commerce and industry by such attorney a statement under oath of such attorney, showing the maximum amount of indemnity upon any single risk, and such attorney shall, whenever and as often as the same shall be required, file with the department a statement, verified by his oath, to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least 100,000 subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than 10 per cent of the net worth of such subscriber.

Hist. '13, c. 166, § 5, p. 536, reen. C. L. 221:5; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5128. Reserve. There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to 50 per cent of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. Net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than $25,000, and if at any time 50 per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. ['13, c. 166, § 6, p. 536.]

Hist. '13, c. 166, § 6, p. 536, reen. C. L. 221:6.

§ 5129. Annual statement. Such attorney shall annually, on or before the 1st day of March, make report to the department of commerce and industry showing that the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency herein provided for, and the department may in its dis-

cretion make such an examination as may be necessary to verify the statements contained in said report: *Provided, however,* That such attorney shall not be required to furnish the names and addresses of any subscribers.

Hist. '13, c. 166, § 7, p. 537, reen. C. L. 221:7; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5130. Power of corporations to exchange insurance. Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers and franchises specified in its articles of incorporation have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. ['13, c. 166, § 8, p. 537.]

Hist. '13, c. 166, § 8, p. 537, reen. C. L. 221:8.

§ 5131. Penalty for acting as attorney in fact without authority. Any attorney who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this chapter, or directly or indirectly solicit or negotiate any application for same without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subjected to a fine of not less than $100 nor more than $1000. ['13, c. 166, § 9, p. 537.]

Hist. '13, c. 166, § 9, p. 537, reen. C. L. 221:9.

§ 5132. Annual certificate of authority. Each attorney by or through whom are issued any policies of or contracts for indemnity of the character referred to in this chapter shall procure from the department of commerce and industry annually a certificate of authority stating that all the requirements of this chapter have been complied with, and upon such compliance and the payment of the fee and taxes required by this chapter, the department of commerce and industry shall issue such certificate, which certificate shall expire annually upon the 31st day of March. In case of a breach of any of the conditions imposed by the provisions of this chapter, the department of commerce and industry may revoke the certificate of authority issued hereunder.

Hist. '13, c. 166, § 10, p. 537, reen. C. L. 221:10; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Authority of commissioner to accept service of process: § 5126.

§ 5133. License fees. Such attorney in fact shall pay to the department of commerce and industry with the filing of the annual report hereinbefore provided, an annual license fee of 1 per cent of the gross deposits received from subscribers upon risks situated in this state during the preceding calendar year, after deducting therefrom all amounts returned to such subscribers or credited to their accounts other than for losses, such payment to be in lieu of all other taxes, state, county and municipal, upon such deposits; and such attorney in fact shall also pay a fee of $5 for the certificate of authority provided for in this chapter.

Hist. '13, c. 166, § 11, p. 537, reen. C. L. 221:11; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5134. Same: Exemption. Any office or exchange located in this state which on the 1st day of January, 1913, was duly authorized to

exchange such contracts of indemnity and which does not pay its agent or attorney in fact executing such contracts any commission upon such contracts shall be exempt from paying the tax herein required, but shall pay the annual fee required for issuing certificate of authority. [C. L. 221:12.]

Hist. '13, c. 166, § 12, p. 538; compiled and reen. C. L. 221:12.

§ 5135. Application of insurance laws. Except as herein provided no insurance law of this state shall apply to the exchange of such indemnity contracts. ['13, c. 166, § 13, p. 538.]

Hist. '13, c. 166, § 13, p. 538, reen. C. L. 221:13.

CHAPTER 203.

FRATERNAL BENEFIT SOCIETIES.

Hist. The law herein embodied was preceded by '01, p. 165, c. 3, reen. R. C. §§ 2889-2904.

§ 5136. Fraternal benefit societies defined. Any corporation, society, order or voluntary association without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5140, and any mutual life association whose membership is limited to a secret fraternity, profession or guild and which elects its officers and directors by direct vote of its members, either in person or by proxy, is hereby declared to be a fraternal benefit society. ['17, c. 108, p. 387.]

Hist. '11, c. 225, § 1, p. 710; am. '17, c. 108, p. 387, reen. C. L. 222:1.

Cross ref. Express reference to this section: Application to accident benefit societies: § 5192.

§ 5137. Lodge system defined. Any society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members shall be elected, initiated and admitted in accordance with its constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such societies to hold regular or stated meetings at least once each month, shall be deemed to be operating on the lodge system. ['11, c. 225, § 2, p. 710.]

Hist. '11, c. 225, § 2, p. 710, reen. C. L. 222:2.

Cross ref. Express reference to this section: Application to accident benefit societies: § 5192.

§ 5138. Representative form of government defined. Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members, or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: *Provided,* That the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws: And, *Provided further,* That the meetings of the supreme or governing body, and the election of officers, representatives or delegates shall be held as often as once in four years. The members,

officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. ['11, c. 225, § 3, p. 710.]

Hist. '11, c. 225, § 3, p. 710, reen. C. L. 222:3.

Cross ref. Express reference to this section: Application to accident benefit societies: § 5192.

§ 5139. Exemptions. Except as herein provided, such societies shall be governed by this chapter and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. ['11, c. 225, § 4, p. 711.]

Hist. '11, c. 225, § 4, p. 711, reen. C. L. 222:4.

§ 5140. Benefits. Every society transacting business under this chapter shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary physical disability, either as the result of disease, accident or old age: *Provided,* The period of life at which the payment of benefits for disability on account of old age shall commence shall not be under 70 years, and may provide for monuments or tombstones to the memory of its deceased members and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of 70 years, all or such portion of the face value of his certificate as the laws of the society may provide: *Provided,* That nothing in this chapter contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than 4 per cent per annum: *Provided,* That this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates or contributions, and to contracts affected by such readjustment. ['11, c. 225, § 5, subd. 1, p. 711.]

Hist. '11, c. 225, § 5, subd. 1, p. 711, reen. C. L. 222:5.

Cross ref. Express reference to this section: Fraternal benefit society defined: § 5136.

Cross ref. Death benefits upon lives of children: c. 204.

§ 5141. Additional benefits. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American experience table, and 4 per cent interest, may grant to its members extended and paid up protection or such withdrawal equities as its constitution and laws may provide: *Provided,* That such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. ['11, c. 225, § 5, subd. 2, p. 711.]

Hist. '11, c. 225, § 5, subd. 2, p. 711, reen. C. L. 222:6.

Cross ref. Express reference to this section: Apportionment of funds not to individual members: § 5145.

§ 5142. Beneficiaries. The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree ascend-

ing or descending, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member: *Provided,* That if after the issuance of the original certificate, the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of said member: *Provided,* That any society may, by its laws, limit the scope of beneficiaries within the above classes. ['11, c. 225, § 6, p. 712.]

Hist. '11, c. 225, § 6, p. 712, reen. C. L. 222:7.

Cross ref. Beneficiaries of children's death benefits: § 5203.

§ 5143. Qualifications for membership. Any society may admit to beneficial membership any person not less than 16 and not more than 60 years of age who has been examined by a legally qualified physician and whose examination has been supervised and approved in accordance with the laws of the society: *Provided,* That any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. ['11, c. 225, § 7, p. 712.]

Hist. '11, c. 225, § 7, p. 712, reen. C. L. 222:8.

Cross ref. Qualifications of child members: §§ 5198, 5204.

§ 5144. Certificates. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. ['11, c. 225, § 8, p. 712.]

Hist. '11, c. 225, § 8, p. 712, reen. C. L. 222:9.

Cross ref. Children's benefit certificates: § 5199.

§ 5145. Funds: Minimum contributions. Any society may create, maintain, invest, disburse and apply an emergency, surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in section 5141. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed

shall be derived from periodical or other payments by the members of the society and accretions of said funds: *Provided*, That no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal table of mortality as adopted by the national fraternal congress August 23, 1899, or any higher standard with interest assumption not more than 4 per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than 4 per cent per annum. ['11, c. 225, § 9, subd. 1, p. 713.]

Hist. '11, c. 225, § 9, subd. 1, p. 713, reen. C. L. 222:10.

Cross ref. Contributions on children's certificates: § 5199.

§ 5146. Same: Computation of deferred liabilities. Deferred payments or instalments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or instalments are hereafter to be paid. Such liability shall be the present value of such future payments or instalments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. ['11, c. 225, § 9, subd. 2, p. 713.]

Hist. '11, c. 225, § 9, subd. 2, p. 713, reen. C. L. 222:11.

§ 5147. Investments. Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies: *Provided*, That any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated, shall be held to meet the requirements of this chapter for the investment of funds. ['11, c. 225, § 10, p. 713.]

Hist. '11, c. 225, § 10, p. 713, reen. C. L. 222:12.

§ 5148. Distribution of funds. Every provision of the laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same, and the proportion thereof which may be used for expense, and no part of the money collected for mortuary or disability purposes, or the net accretions of either or any of said funds, shall be used for expenses. ['11, c. 225, § 11, p. 714.]

Hist. '11, c. 225, § 11, p. 714, reen. C. L. 222:13.

§ 5149. Articles of incorporation. Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this chapter, may make and sign (giving their addresses), and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

1. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or to lead to confusion.

2. The purpose for which it is formed, which shall not include more liberal powers than are granted by this act: *Provided*, That any lawful

social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society, and the mode in which its corporate powers are to be exercised.

3. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate. ['11, c. 225, part of § 12, p. 714.]

Hist. '11, c. 225, part of § 12, p. 714, reen. C. L. 222:14.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5150. Filing of articles and bond: Preliminary certificate. Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations and copies of all proposed forms and benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of $5000, with sureties approved by the department of commerce and industry, conditioned upon the return of the advanced payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the department of commerce and industry, which may require such further information as it deems necessary, and if the purposes of the society conform to the requirement of this chapter and all provisions of law have been complied with, the department shall so certify and retain and record (or file) the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Hist. '11, c. 225, part of § 12, p. 714, reen. C. L. 222:15; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5151. Duration of preliminary certificate. No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the department of commerce and industry, upon cause shown, unless the 500 applicants herein required have been secured and the organization has been completed as herein provided, and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided.

Hist. '11, c. 225, part of § 12, p. 716, reen. C. L. 222:16; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5152. Completion of organization: Minimum membership and insurance. Upon receipt of said certificate from the department of commerce and industry, said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificates nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death bene-

fit certificates have been secured upon at least 500 lives for at least $1000 each, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society, nor until there shall be established 10 subordinate lodges or branches into which said 500 applicants have been initiated, nor until there has been submitted to the department of commerce and industry, under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions which shall be sufficient to provide for meeting the mortuary obligations contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress August 23, 1899, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than 4 per cent per annum, nor until it shall be shown to the department of commerce and industry by the sworn statement of the treasurer, or corresponding officer of such society, that at least 500 applicants have each paid in cash at least one regular monthly payment as hereinbefore provided per $1000 of indemnity to be affected, which payments, in the aggregate, shall amount to at least $2500, all of which shall be credited to the mortuary or disability fund on account of such applicants, and no part of which may be used for expenses.

Hist. '11, c. 225, part of § 12, p. 715, reen. C. L. 222:17; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177. Provisions not applicable to child members: § 5204.

§ 5153. Disposition of payments pending completion of organization. Said advanced payments shall, during the period of organization, be held in trust, and, if the organization is not completed within one year, as hereinafter provided, returned to said applicants. ['11, c. 225, part of § 12, p. 716.]

Hist. '11, c. 225, part of § 12, p. 716, reen. C. L. 222:18.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5154. Final certificate of authority. The department of commerce and industry may make such examination and require such further information as it deems advisable, and upon presentation of satisfactory evidence that the society has complied with all the provisions of law, the department shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The department shall cause a record of such certificate to be made and a certified copy of such record may be given in evidence with like effect as the original certificate.

Hist. '11, c. 225, part of § 12, p. 716, reen. C. L. 222:19; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5155. Constitution and by-laws. Every society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its mem-

bers from time to time; and it shall have the power to change, alter, add to or amend such constitution and by-laws, and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. ['11, c. 225, part of § 12, p. 716.]

Hist. '11, c. 225, part of § 12, p. 716, reen. C. L. 222:20.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5156. Forfeiture of charter. When any domestic society shall have discontinued business for the period of one year, or has less than 400 members, its charter shall become null and void. ['11, c. 225, part of § 12, p. 716.]

Hist. '11, c. 225, part of § 12, p. 716, reen. C. L. 222:21.

Cross ref. Express reference to this section: Application to societies showing increased deficiency: § 5177.

§ 5157. Prior corporations preserved: Amendments. Any incorporated society engaged in transacting business in this state on May 3, 1911, may exercise all of the rights conferred by this chapter, and all of the rights, powers and privileges theretofore exercised or possessed by it under its charter or articles of incorporation not inconsistent with this chapter. Any such society may amend its articles of incorporation from time to time in the manner provided therein or in its constitution and laws, and all such amendments shall be filed with the department of commerce and industry and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution or laws.

Hist. '11, c. 225, § 13, p. 716; compiled and reen. C. L. 222:22; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5158. Mergers and transfers. No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such transfer or merger, and filed with the department of commerce and industry of this state, together with a sworn statement of the financial condition of each of said societies by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of said contract, financial statements and certificates, the department of commerce and industry shall examine the same, and, if the department shall find such financial statements to be correct and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, it shall approve said merger or transfer, issue the certificate of the department to that effect and thereupon the said contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the department of commerce and industry.

Hist. '11, c. 225, § 14, p. 717, reen. C. L. 222:23; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5159. Annual license. The authority of societies must be renewed annually, but in all cases to terminate on the first day of the succeed-

ing April: *Provided, however,* That license shall continue in full force and effect until the new license be issued or specifically refused. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this chapter. [C. L. 222:24.]

Hist. '11, c. 225, § 15, p. 717; compiled and reen. C. L. 222:24.

§ 5160. Admission of foreign societies. No foreign society shall transact any business herein without a license from the department of commerce and industry. Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this chapter and have its assets invested as required by the laws of the state, territory, district, country or province where it is organized.

Any such society shall be entitled to a license to transact business within this state upon filing with the department a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the commissioner of commerce and industry as hereinafter provided; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the department, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the department of commerce and industry; a certificate from the proper official in its home state, province or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts, and upon furnishing the department such other information as it may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province or country where it is organized, the department shall issue a license to such society to do business in this state until the 1st day of the succeeding April and such license shall, upon compliance with the provisions of this chapter, be renewed annually, but in all cases to terminate on the 1st day of the succeeding April: *Provided, however,* That license shall continue in full force and effect until the new license be issued or specifically refused.

Hist. '11, c. 225, parts of § 16, p. 718; compiled and reen. C. L. 222:25; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Decision for revocation of license reviewable: § 5190.

§ 5161. Action of department subject to review. When the department of commerce and industry refuses to license any society, or revokes its authority to do business in this state, it shall reduce its ruling, order or decision to writing and file the same in the office of the department, and shall furnish a copy thereof, together with a statement of its reasons, to the officers of the society, upon request, and the action of the department shall be reviewable by proper proceedings in any court of competent jurisdiction within the state.

Hist. '11, c. 225, part of § 16, p. 718; compiled and reen. C. L. 222:26; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Decision for revocation of license reviewable: § 5190.

§ 5162. Obligation of contracts not affected. Nothing contained in this chapter shall be taken or construed as preventing any fraternal benefit society from continuing in good faith all contracts made in this

state during the time such society was legally authorized to transact business herein. [C. L. 222:27.]

Hist. '11, c. 225, proviso at end of § 16, p 719; compiled and reen. C. L. 222:27.

Cross ref: Express reference to this section: Decision for revocation of license reviewable: § 5190.

§ 5163. Appointment of commissioner as agent to accept service of process. Every society, whether domestic or foreign, hereafter applying for admission, shall, before being licensed, appoint in writing, the commissioner of commerce and industry and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment, certified by said commissioner, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the commissioner, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society: *Provided, however,* That no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than 30 days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said commissioner he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein.

Hist. '11, c. 225, § 17, p. 719; compiled and reen. C. L. 222:28; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5164. Place of meeting: Office. Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state. But its principal office shall be located in this state. ['11, c. 225, § 18, p. 719.]

Hist. '11, c. 225, § 18, p. 719, reen. C. L. 222:29.

§ 5165. No personal liability. Officers and members of the supreme, grand or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreement of such society, but the same shall be payable only out of the funds of such society and in the manner provided by its laws. ['11, c. 225, § 19, p. 720.]

Hist. '11, c. 225, § 19, p. 720, reen. C. L. 222:30.

§ 5166. By-laws may not be waiver. The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every mem-

ber thereof and on all beneficiaries of members. ['11, c. 225, § 20, p. 720.]

Hist. '11, c. 225, § 20, p. 720, reen. C. L. 222:31.

§ 5167. Benefits not attachable. No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment. ['11, c. 225, § 21, p. 720.]

Hist. R. C. § 2898; am. '11, c. 225, § 21, p. 720, reen. C. L. 222:32.

§ 5168. Amendment of constitution and laws. Every society transacting business under this chapter shall file with the department of commerce and industry a duly certified copy of all amendments of or additions to its constitution and laws within 90 days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof.

Hist. '11, c. 225, § 22, p. 720, reen. C. L. 222:33; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5169. Annual report. Every society transacting business in this state shall annually, on or before the 1st day of March, file with the department of commerce and industry, in such form as it may require, a statement, under oath, of its president and secretary or corresponding officers of its condition and standing on the 31st day of December next preceding, and of its transactions for the year ending on that date and also furnish such other information as the department may deem necessary to a proper exhibit of its business and plan of working. The department may at other times require any further statement it may deem necessary to be made relating to such society.

Hist. '11, c. 225, part of § 23, p. 720, reen. C. L. 222:34; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178. Financial statement under child membership law: § 5201.

§ 5170. Annual valuation report. In addition to the annual report herein required, each society shall annually report to the department of commerce and industry a valuation of its certificates in force on December 31, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year, in whole or in part, are used for current mortality and expenses.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the department within 90 days after the submission of the last preceding annual report.

Hist. '11, c. 225, parts of § 23, p. 720; compiled and reen. C. L. 222:35; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5171. Methods of computing valuation. Such report of valuation shall show, as contingent liabilities, the present midyear value of the promised benefits provided in the constitution and laws of such society

under certificates then subject to valuation; and, as contingent assets, the present midyear value of the future net contributions provided in the constitution and laws as the same are in practice actually collected.

At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress August 23, 1899, or, at the option of the society, any higher table, or, at its option, it may use a table based upon the society's own experience of at least 20 years and covering not less than 100,000 lives, with interest assumption not less than 4 per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation.

Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: *Provided,* That where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities. ['11, c. 225, part of § 23, p. 721.]

Hist. '11, c. 225, part of § 23, p. 721, reen. C. L. 222:36.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5172. Members to receive report. A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June 1 of each year, or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. [C. L. 222:37.]

Hist. '11, c. 225, part of § 23, p. 721; compiled and reen. C. L. 222:37.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5173. By-laws to provide extra assessments to cover deficiencies. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its laws, additional, increased or extra rates of contributions shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding 5 per centum per annum. ['11, c. 225, part of § 23, p. 720.]

Hist. '11, c. 225, part of § 23, p. 720, reen. C. L. 222:38.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5174. Standard of deficiency fixed as of December 31, 1917. If the valuation of the certificates, as hereinbefore provided, on December 31, 1917, showed that the present value of future net contributions, together with the admitted assets, was less than the present value of the promised benefits and accrued liabilities, such society shall hereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency as shown in the valuation as of December 31, 1917. [C. L. 222:39.]

Hist. '11, c. 225, part of § 23a, p. 722; am. '13, c. 184, § 1, p. 590; compiled and reen. C. L. 222:39.

Cross ref. Express reference to this section: Valuation on accumulation basis. § 5178.

§ 5175. Increased deficiency: Notice by department. If at any succeeding triennial valuation such society does not show at least the same condition, the department of commerce and industry shall direct that it thereafter comply with the requirements herein specified.

Hist. '11, c. 225, part of § 23a, p. 522; am. '13, c. 184, § 1, p. 590, reen. C. L. 222:40; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5176. Further increased deficiency: Society to be dissolved or suspended. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the department of commerce and industry may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of section 5186, or in case of a foreign society, its license may be cancelled in the manner provided in this chapter.

Hist. '11, c. 225, § 23a, p. 722; am. '13, c. 184, § 1, p. 590, reen. C. L. 222:41; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5177. Increased deficiency: Status of new members. Any such society shown by any triennial valuation subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, be subject, so far as stated rates of contributions are concerned, to the provisions of sections 5149, 5150, 5151, 5152, 5153, 5154, 5155, 5156, applicable in the organization of new societies: *Provided*, That the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class and their certificates valued as an independent society in respect to contributions and funds. ['13, c. 184, part of § 1, p. 590.]

Hist. '11, c. 225, part of § 23a, p. 722; am. '13, c. 184, § 1, p. 590, reen. C. L. 222:42.

Cross ref. Express reference to this section: Valuation on accumulation basis: § 5178.

§ 5178. Valuation on accumulation basis. In lieu of the requirements of sections 5169, 5170, 5171, 5172, 5173, 5174, 5175, 5176, 5177, any society accepting in its laws the provisions of this section may value its certificates on a basis, herein designated "accumulation basis," by crediting each member with the net amount contributed for each year and with interest at approximately the net rate earned and by charging him with his share of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the

actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member.

Except as specifically provided in its articles of law or contracts no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contribution and credit.

If, after the first valuation, any member's share of losses for any year exceeds his credit including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose. ['13, c. 184, § 3, part of subd. 23b, p. 591.]

Hist. '13, c. 184, § 3, part of subd. 23b, p. 591, reen. C. L. 222:43.

§ 5179. Valuation on tabular basis. Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this state shall be valued on such basis, herein designated the "tabular basis": *Provided,* That if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis. ['13, c. 184, § 3, parts of subds. 23b and 23c, pp. 591-2.]

Hist. '13, c. 184, § 3, part of subds. 23b and 23c, pp. 591-2, reen. C. L. 222:44.

§ 5180. Deficiencies: How met. Whenever in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after the setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Saving from a lower amount of death losses may be returned in like manner as may be specified in its laws. ['13, c. 184, § 3, part of subd. 23c, p. 592.]

Hist. '13, c. 184, § 3, part of subd. 23c, intended as part of 23b, p. 592, reen. C. L. 222:45.

§ 5181. Separate classes of membership authorized. Any fraternal society chartered or transacting business in this state is hereby authorized and empowered to establish or maintain separate classes of membership, each class having a separate form of contract of similar general plan and character in its purpose; the assets or mortuary collections secured from the members of each class respectively shall be carried and maintained separately for such class, and the required reserve of such accumulation of such class, if contract therefor provides for such a fund, shall be set apart and held specifically and separately for the use and benefit of such particular class, and shall not thereafter be mingled with the assets or mortuary collections of any other class of the society. ['19, c. 175, § 1, p. 550.]

Hist. '13, c. 184, § 3, part of subd. 23c, intended as part of 23b, p. 592, reen. C. L. 222:46; superseded by '19, c. 175, § 1, p. 550.

Cross ref. Separation of assets, funds and liabilities under child membership law: §§ 5200-1.

§ 5182. Statement of credits and amounts required for tabular reserve. A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this state and adopted by the society, shall be filed by the society with each annual report and also be furnished to each member before July 1 of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose, individual bookkeeping accounts for each member shall not be required and all calculations may be made by actuarial methods. ['13, c. 184, § 3, parts of subds. 23b and 23c, pp. 591-3.]

Hist. '13, c. 184, § 3, parts of subds. 23b and 23c, pp. 591, 593, reen. C. L. 222:47.

§ 5183. Surplus not prohibited. Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis as the society may provide by or pursuant to its laws, nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. ['13, c. 184, § 3, part of subd. 23b, p. 592.]

Hist. '13, c. 184, § 3, part of subd. 23b, p. 592, reen. C. L. 222:48.

§ 5184. Fees. The department of commerce and industry shall collect in advance from fraternal and benevolent societies the following licenses and fees:

For society's annual license	$ 5.00
For filing society's annual statement	25.00
For filing certified copy of society's articles of incorporation	10.00
For filing society's power of attorney for service of process	2.00
For receiving and forwarding certified copy of summons or other process served upon the commissioner, to be paid by the party requiring such service	2.00

Hist. '11, c. 225, § 23b, p. 723; am. '13, c. 184, § 23c, pp. 592-3; compiled and reen. C. L. 222:49; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5185. Examination of domestic societies. The department of commerce and industry shall have the power of visitation and examination into the affairs of any domestic society. The department may employ assistants for the purpose of such examination, and the department or any person it may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witness under oath and ex-

amine its officers, agents and employees or other persons in relation to the affairs, transactions and conditions of the society.

The expense of such examination shall be paid by the society examined, upon statement furnished by the department, and the examination shall be made at least once in three years.

Hist. '11, c. 225, part of § 24, p. 723, reen. C. L. 222:50; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5186. Proceedings to dissolve delinquent or insolvent society. Whenever, after examination, the department of commerce and industry is satisfied that any domestic society has failed to comply with any provisions of this chapter, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, or whenever any domestic society, after the existence of one year or more, shall have a membership of less than 400, or shall determine to discontinue business, the department may present the facts relating thereto to the attorney general, who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business, and some person shall be appointed receiver of such society, and shall proceed at once to take possession of the books, papers, moneys and other assets of the society and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney general against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced.

No application for injunction against, or proceedings for the dissolution of, or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney general.

Hist. '11, c. 225, part of § 24, and § 25, pp. 723-4, reen. C. L. 222:51; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Dissolution of society for increased deficiency: § 5176.

§ 5187. Examination of foreign societies. The department of commerce and industry may examine any foreign society transacting or applying for admission to transact business in this state. The said department may employ assistants and the department, or any person the department may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents and employees and other persons in relation to the affairs, transactions and conditions of the society. The department may, in its discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province or country where such society is organized. The actual expense of examiners making any such examination shall be paid by the society upon statement furnished by the department.

Hist. '11, c. 225, part of § 26, p. 724, reen. C. L. 222:52; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5188. Same: Penalty for refusal to submit to examination. If any such society or its officers refuse to submit to such examination or

to comply with the provisions of the section relating thereto, the authority of such society to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the department of commerce and industry relating to the condition of affairs of the society, and during such suspension the society shall not write new business in this state.

Hist. '11, c. 225, part of § 26, p. 724, reen. C. L. 222:53; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5189. Societies protected from adverse publicity without notice. Pending, during or after an examination or investigation of any such society, either domestic or foreign, the department of commerce and industry shall make public no financial statement, report or finding, nor shall the department of commerce and industry permit to become public any financial statement, report or finding affecting the status, standing or rights of any such society until a copy thereof shall have been served upon such society at its home office nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report or finding and to make such showing in connection therewith as it may desire.

Hist. '11, c. 225, § 27, p. 724, reen. C. L. 222:54; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5190. Revocation of license. When the department of commerce and industry, on investigation, is satisfied that any foreign society transacting business under this chapter has exceeded its powers, or has failed to comply with any provision of this chapter, or is conducting business fraudulently, or is not carrying out its contracts in good faith, the department shall notify the society of its findings, and state in writing the grounds of its dissatisfaction and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If on the date named in said notice such objections have not been removed to the satisfaction of the said department, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, it may revoke the authority of the society to continue business in this state. All decisions and findings of the department made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in sections 5160, 5161, 5162.

Hist. '11, c. 225, § 28, p. 725, reen. C. L. 222:55; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5191. Application of chapter: Exempt societies. Nothing contained in this chapter shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias, exclusive of the insurance department of the Supreme Lodge Knights of Pythias, and the Junior Order of United American Mechanics exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United American Mechanics, or societies which limit their membership to any one hazardous occupation, nor to similar societies which do not issue insurance certificates, nor to an association of local lodges of a society now doing business in this state which provides death benefits not exceeding $300 to any one person, or disability benefits not exceeding $300 in any one year to any one person, or both, nor to any contracts of reinsurance business on such

plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description, which do not provide for a death benefit of more than $100 or for disability benefits of more than $150 to any one person in any one year: *Provided always,* That any such domestic order or society which has more than 500 members and provides for death or disability benefits, and any domestic lodge, order or society which issues to any person a certificate providing for the payment of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this chapter. The department of commerce and industry may require from any society such information as will enable the department to determine whether such society is exempt from the provisions of this chapter.

No society which is exempt by the provisions of this section from the requirements of this chapter shall give or allow, or promise to give or allow, to any person any compensation for procuring new members.

Hist. (See R. C. § 2904) '11, c. 225, compiled upon authority '19, c. 8, § 28, part of § 29, p. 725, reen. C. L. 222:56; p. 56.

§ 5192. Same: Accident benefit societies. Any fraternal benefit society heretofore organized and incorporated and operating within the definition set forth in sections 5136, 5137 and 5138, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits may be licensed under the provisions of this chapter, and shall have all the privileges and shall be subject to all the provisions and regulations of this chapter, except that the provisions of this chapter requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits, shall not apply to such society. ['11, c. 225, part of § 29, p. 726.]

Hist. '11, c. 225, part of § 29, p. 726, reen. C. L. 222:57.

§ 5193. Tax exemption. Every fraternal benefit society organized or licensed under this chapter is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment. ['11, c. 225, § 30, p. 726.]

Hist. '11, c. 225, § 30, p. 726, reen. C. L. 222:58.

§ 5194. False statements by officers. Any person, officer, member or examining physician of any society authorized to do business under this chapter who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from, or benefit in, any society transacting business under this chapter, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500, or imprisonment in the county jail for not less than 30 days nor more than one year, or both, in the discretion of the court. ['01, p. 165, c. 3, part of § 12.]

Hist. '01, p. 165, c. 3, part of § 12, reen. R. C. § 2900, reen. '11, c. 225, § 31, p. 726, reen. C. L. 222:59.

§ 5195. False statements by applicants. Any person who shall wilfully make a false statement of any material fact or thing in a sworn

statement as to the death or disability of a certificate holder in any such society for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement in any verified report or declaration under oath, required or authorized by this chapter, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury. ['01, p. 165, c. 3, part of § 12.]

Hist. '01, p. 165, c. 3, part of § 12, reen. R. C. § 2900, reen. '11, c. 225, § 31, p. 726, reen. C. L. 222:60.

Cross ref. Punishment for perjury: § 6486.

§ 5196. Soliciting membership for unlicensed society. Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided to do business as herein defined in this state shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $200. ['11, c. 225, part of § 31, p. 727.]

Hist. '11, c. 225, part of § 31, p. 727, reen. C. L. 222:61.

§ 5197. General penalty. Any society or any officer, agent or employee thereof neglecting or refusing to comply with, or violating any of the provisions of this chapter, the penalty for which neglect, refusal or violation is not specified in this section, shall be fined not exceeding $200 upon conviction thereof. ['11, c. 225, part of § 31, p. 727.]

Hist. '11, c. 225, part of § 31, p. 727, reen. C. L. 222:62.

CHAPTER 204.

FRATERNAL BENEFIT SOCIETIES: DEATH BENEFITS OF CHILDREN.

Comp. leg. The law herein contained is practically a copy of the uniform law of the national fraternal congress, which law in January, 1919, was in effect in 23 states of the Union.

§ 5198. Death benefit of children. Any fraternal benefit society authorized to do business in this state and operating on the lodge plan, may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of 2 and 18 years at next birthday, for whose support and maintenance a member of such society is responsible. Any such society may at its option organize and operate branches for such children and membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively as follows: Two, $34; three, $40; four, $48; five, $58; six, $140; seven, $168; eight, $200; nine, $240; ten, $300; eleven, $380; twelve, $460; thirteen to fifteen, $520; and sixteen to eighteen years, where not authorized by law, $600. ['19, c. 175, § 2, p. 550.]

§ 5199. Benefit certificates: Contributions. No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the

laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least 500 such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the standard industrial mortality table or the English life table No. 6 and a rate of interest not greater than 4 per cent per annum, or upon a higher standard; provided that contributions may be waived or returns may be made from any surplus held in excess or reserve and other liabilities, as provided in the by-laws, and, provided further that extra contributions shall be made if the reserves hereafter provided for become impaired. ['19, c. 175, § 3, p. 551.]

Cross ref. Express reference to this section: Contributions to be kept as separate funds: § 5200. Separation of assets, funds and liabilities: § 5201.

§ 5200. Same: Surrender on children being admitted to benefit membership. Any society entering into such whole family insurance agreements, shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in section 5199, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized; provided, that a society may provide that when a child reaches the minimum age, for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society, provided that such surrender will not reduce the number of lives insured in the branch below 500, and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificates, nor the person who paid the contribution, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. ['19, c. 175, § 4, p. 551.]

§ 5201. Separation of assets and liabilities under law. An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the department of commerce and industry by any society availing itself of the provisions thereof. The separation of assets, funds and liabilities required hereby shall not be terminated, rescinded or modified, nor shall the funds be diverted for any use other than as specified in section 5199, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger or other change in the condition of the status of the society.

Hist. '19, c. 175, § 5, p. 552; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5202. Payments to general fund. Any society shall have the right to provide in its laws and the certificate issued hereunder for special payment on account of the expense or general fund, which payments shall, or shall not be mingled with the general fund of the

society as its constitution and by-laws may provide. ['19, c. 175, § 6, p. 552.]

§ 5203. Termination of membership of person taking out certificate. In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions. ['19, c. 175, § 7, p. 552.]

§ 5204. Certain provisions of law not applicable to child members. It is further provided that any of the provisions and requirements of chapter 203 specifying the qualification of membership to such societies, providing for the election, initiation and admission of members and the privilege or requirements of participating in the government and management of the parent society shall not apply to the provisions of this chapter regarding the admission of children to the benefits of such societies. ['19, c. 175, § 8, p. 552.]

TITLE XXXIX. BANKING.

CHAPTER 205.

DEPARTMENT OF COMMERCE AND INDUSTRY AS SUCCESSOR TO THE STATE BANK DEPARTMENT AND STATE BANK COMMISSIONER.

Hist. This law was first enacted in '01, p. 175, codified in R. C. §§ 189-94, 2968-3010. It was superseded though not expressly repealed by '11, c. 124, p. 386, which as subsequently amended was embodied in C. L. c. 223. The law provided for the organization of the state banking department and the appointment of a state bank commissioner and deputies.

'19, c. 8, § 51, p. 69, repealed C. L. 223:1-9; § 38 of the same act (§ 351 herein) abolished the banking department and the offices of the state bank commissioner and his deputies, and § 28 (§ 284 herein) vested their powers and duties in the department of commerce and industry.

The section notes "Compiled upon authority '19, c. 8," etc., indicate that the substitutions of offices and officials authorized by that act have been made accordingly; the text of preexisting law not being changed except in so far as necessary in making such substitutions.

Section 5211 relating to the board of appeal has been omitted on authority '19, c. 8, § 38 (§ 351 herein).

ARTICLE 1.

§ 5205. Records not public. The department of commerce and industry shall keep proper books and records of all acts, matters and things done by it under the provisions of this chapter as records of its office, but the same shall not be subject to public inspection, except as in this chapter otherwise provided.

Hist. '05, p. 175, part of § 42, reen. R. C. § 3008; am. '11, c. 124, § 9, pp. 386, 388; am. '15, c. 81, § 1, p. 195, reen. C. L. 223:10; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5206. Reports. The department of commerce and industry shall receive and place on file in the office of the department the reports to be made by the banks and trust companies under this chapter; prepare and furnish, on demand, to all the banks and trust companies required to re-

port blank forms for such statements or reports as may be by law required of them; make on or before the 31st day of December of each year a report to the governor of this state containing a copy of the published abstract of the last report furnished by each bank and trust company under jurisdiction of the department, and any other proceedings had or done by the department under this chapter, showing generally the condition of the banking business of this state, and such other matters in connection with such general banking business as, in its opinion, may be of interest to the public, with a detailed statement, verified by oath, of all moneys, fees, etc., received by it during the same period, and shall publish at least 250 copies of such report in pamphlet form for distribution.

Hist. '05, p. 175, § 34, reen. R. C. § 3000; am. '11, c. 124, § 8, p. 388; am. '17, c. 51, § 2, p. 112, reen. C. L. 223:11; compiled upon authority '19, c .8, § 28, p. 56.

Cited: (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652.

Cross ref. Reports of officers: § 411.

§ 5207. Penalty for disclosure of official confidential information. Neither the department of commerce and industry nor any of its deputies or clerks shall disclose to any person any fact or information obtained in the course of business of the department, except in the following cases:

1. When by the terms of this chapter it is made the duty of the department to make public records and publish the same.
2. When the department is required by law to take special action regarding the affairs of any bank or trust company.
3. When called as a witness in any criminal proceeding or trial in a court of justice.
4. When in the case of an insolvent bank it is necessary or advisable, in the discretion of the department, for the good of the public or of the depositors.
5. When, in the discretion of the department, it is advisable to disclose any such information to the United States comptroller of the currency or a national bank examiner.

Any violation of this section shall subject the offender to prosecution for felony in any court of competent jurisdiction, and upon conviction thereof, to punishment by a fine not exceeding $1000, with imprisonment in the county jail not exceeding one year, until such fine is paid, and such conviction shall subject the offender to a forfeiture of his office or employment.

Hist. (See '05, p. 175, part of § 42, reen. R. C. § 3008) '15, c. 81, § 2, p. 195, enacting § 9a, c. 124, '11, reen. C. L. 223:12; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5208. Daily deposits. The department of commerce and industry shall daily, or whenever the amount so received aggregates $100, deposit with the state treasurer all sums of money received as fees or from any other official source connected with the department.

Hist. (See '05, p. 175, § 41, reen. R. C. § 3007) '11, c. 124, § 81, p. 411, reen. C. L. 223:13; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5209. Rules and regulations. The department of commerce and industry, by and with the approval of the governor and attorney general, shall have power to make such rules and regulations for the government of the banks and trust companies of this state, doing business under this chapter, as may, in the judgment of the department, seem wise and expedient: *Provided,* That no rule or regulation shall in any way conflict with any of the laws made for the control of such banks and trust companies under this chapter.

Hist. '11, c. 124, § 55, p. 403, reen. C. L. 223:14; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5210. Duties of attorney general. The attorney general of the state shall have charge and control of the actions, suits or proceedings begun by the department of commerce and industry under authority of this chapter, but may, in his discretion, require any county attorney to conduct any litigation growing out of this chapter before the district court in any county.

Hist. (See '05, p. 175, § 48, reen. R. C. § 3010) '11, c. 124, § 88, p. 413, reen. C. L. 223:15; compiled upon authority '19, c. 8, § 28, p. 56.

ARTICLE 2.

ORGANIZATION OF BANKING CORPORATIONS.

§ 5212. Definition of banks and banking. Any person, firm, association, copartnership, company or corporation, domestic or foreign (except national banks), having a place of business within this state where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, and where money is advanced or loaned on stock, bonds, bullion, bills of exchange or promissory notes, or where stock, bonds, bullions, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or bankers and as doing a banking business under the provisions of this chapter. ['11, c. 124, § 10, p. 388.]

Hist. '05, p. 175, § 7, reen. R. C. § 2968; am. '11, c. 124, § 10, p. 388, reen. C. L. 223:17.

Cited: McTamany v. Day (1912) 23 I. 95, 128 P. 653.

§ 5213. How incorporated: Capital required. Banking corporations may be formed under the general corporation laws of this state for the purpose of conducting and carrying on a banking business and also to establish offices of loans and deposit to be known as savings banks, or to establish banks, having departments for both classes of business, upon the terms and conditions and subject to the liabilities prescribed in this chapter. No banking corporation shall have less than five directors, and every such corporation shall, before it transacts any banking business, file with the department of commerce and industry a certified copy of its articles of incorporation. It shall be unlawful for any corporation, partnership, firm or individual, except as herein provided, to transact a banking business, unless such corporation, partnership, firm or individual has property of cash value as follows: In cities, villages and communities having a population of less than 2000 inhabitants, $15,000; in cities, villages and communities having a population of less than 3000 and more than 2000, $20,000; in cities having a population of less than 5000 and more than 3000, $25,000; in cities having a population of less than 10,000 and more than 5000, $30,000; in cities having a population of 10,000 and less than 25,000, $50,000; in cities of over 25,000 population, $100,000. Such property shall be in money, well secured paper, bank furniture, fixtures or the necessary bank building, including the lot or lots on which the building is situated, which said lot or lots shall be unincumbered: *Provided,* Not less than 50 per cent of the paid in capital must be in actual cash: *Provided further,* That it shall be unlawful for any person subscribing for stock to give the bank his or her note in payment or part payment of said bank stock.

Hist. (See '05, p. 175, § 8, reen. R. C. § 2970) '11, c. 124, § 11, p. 389; compiled and reen. C. L. 223:18; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: When capital to be paid in: § 5218.

Cited: S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

§ 5214. Articles of incorporation: Blanks. Articles of incorporation must be prepared upon blanks furnished by the department of com-

merce and industry and must be approved by the department before the same are filed for record, as hereinafter in this chapter provided.

Hist. '11, c. 124, § 12, p. 389; am. '15, c. 81, § 3, p. 195, reen. C. L. 223:19; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5215. Same: How subscribed. Articles of incorporation must be subscribed by three or more persons, one of whom must be a bona fide resident of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property. ['11, c. 124, § 13, p. 389.]

Hist. '11, c. 124, § 13, p. 389, reen. C. L. 223:20.

§ 5216. Same: Filing. Articles of incorporation must be filed in the office of the county recorder of the county in which the principal business of the corporation is to be transacted, and a copy thereof certified by the county recorder shall be filed with the secretary of state. A like certified copy of said articles of incorporation shall also be filed with the department of commerce and industry.

Hist. '11, c. 124, § 14, p. 390, reen. C. L. 223:21; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5217. Same: Amendment. Every corporation or copartnership doing a banking business must, before filing any amendment to its articles of incorporation or copartnership, secure the approval of the department of commerce and industry thereto. Before such amendment shall take effect a certified copy thereof must be filed with the department.

Hist. '11, c. 124, § 61, p. 405; am. '15, c. 81, § 12, p. 198, reen. C. L. 223:22; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5218. Capital: When paid in. At least 50 per cent of the capital of every bank hereafter formed shall be paid in before such bank shall be authorized to commence business, and the remainder of the capital of such bank shall be paid in monthly instalments of at least 10 per cent each on the whole of the capital, payable at the end of each succeeding month from the time it shall be authorized to commence business, and the payment of each instalment shall be certified to the department of commerce and industry, under oath by the president, cashier or treasurer of each bank: *Provided*, That where an amount is paid in, equal to the requirements prescribed in section 5213, the subscription for the balance shall be subject to the direction of the stockholders and directors, and the payment of such subscription subject to the directors.

Hist. '05, p. 175, § 10, reen. R. C. § 2973, reen. '11, c. 124, § 15, p. 390, reen. C. L. 223:23; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5219. Delinquent stock. When any stockholder or his assignee shall fail to pay any instalment on his stock, when the same is required by the preceding section to be paid, the directors of such bank must sell the delinquent stock of such delinquent stockholder at public sale, having first given the delinquent stockholder 20 days' notice, personally or by mail, at his last known address. If no bidder can be found who will pay for such delinquent stock the amount due thereon, with costs incurred, the amount previously paid on such delinquent stock shall be forfeited to the bank and such stock shall be sold as the directors may order within six months from the time of such forfeiture, and if not sold, it shall be cancelled and held as unissued capital stock of the bank. If sold before cancellation, any surplus over the amount due on stock to said bank, less all costs incurred thereon, with interest for the time delinquent, shall be

returned to the original stockholder, his heirs or assigns. If such cancellation shall reduce the paid capital stock of the bank below the minimum required by law, the said capital shall, within 30 days thereafter, be increased to the required amount by the original subscription, in default of which the department of commerce and industry shall take charge of said bank and proceed as provided for under sections 5292 and 5293.

Hist. '05, p. 175, § 11, reen. R. C. § 2974; am. '11, c. 124, § 16, p. 390, reen. C. L. 223:24; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5220. Application of general corporation law. Unless otherwise provided herein, the general corporation laws of this state shall apply to all corporations organized and operating under this chapter. ['11, c. 124, § 89, p. 413.]

Hist. '11, c. 124, § 89, p. 413, reen. C. L. 223:25.

ARTICLE 3.

TRUST COMPANIES.

§ 5221. Incorporation. Trust company, whenever appearing in the following sections of this chapter, is intended to mean banking and trust company. Such corporation may be formed under the general corporation laws of this state for the purpose of establishing a banking and trust company and may be incorporated under any name or title designating such business. [C. L. 223:26.]

Hist. '11, c. 124, § 17, p. 391; compiled and reen. C. L. 223:26.

§ 5222. Articles of incorporation: Contents. Articles of incorporamust be prepared setting forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place where its principal business is to be transacted.
4. The term for which it is to exist, not exceeding 50 years.
5. The number of directors.
6. The amount of its capital stock and the number of shares into which it is divided.
7. The amount actually subscribed and by whom. ['11, c. 124, § 18, p. 391.]

Hist. '11, c. 124, § 18, p. 391, reen. C. L. 223:27.

§ 5223. Same: How subscribed. The articles of incorporation must be subscribed by three or more persons, one of whom must be a bona fide resident of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyance of real property. ['11, c. 124, § 19, p. 391.]

Hist. '11, c. 124, § 19, p. 391, reen. C. L. 223:28.

§ 5224. Purposes for which trust companies may incorporate. Such corporations may be created for the purpose of establishing a bank of deposit and discount, or both of deposit and discount, and any one or more of the following purposes:

1. To conduct a business of receiving money on deposit and allowing interest thereon, and of buying and selling exchange, gold and silver coins of all kinds; of loaning money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; also buying, selling and discounting negotiable paper of all kinds, as well as all kinds of commercial paper.

2. To act as fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money; to transfer, register and countersign certificates of stocks, bonds or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any lawful purpose.

3. To receive deposits or trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities.

4. To lease, hold, purchase and convey any and all real property necessary to the transaction of its business, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation by any of its debtors; which shall be alienated in good faith, within five years from the date of its acquisition.

5. To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and accept and execute any other municipal or corporate trust, not inconsistent with the laws of this state.

6. To accept trust from and execute trust for married women in respect to their separate property, and to be their agents in the management of such property, or to transact any business in relation thereto.

7. To act under order or appointment of any court of record as guardian, receiver or trustee of the estate of the minor, and as depository of any moneys paid into court, whether for benefit for any such minor or other person, corporation or party.

8. To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record or by any person, corporation, municipality or other authority; and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may accept.

9. To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation or other authority, by grant, assignment, transfer, device, bequest or otherwise, which may be intrusted or committed or transferred to it or vested in it by order of any court of record, and to receive, take and hold any property or estate, real or personal, which may be the subject of any such trust.

10. To purchase, invest in and sell stocks, bills of exchange, bonds, mortgages and other securities; and when moneys or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor.

11. To act as executor under the last will or administrator of the estate of any deceased person, or as guardian of any infant, insane person, idiot or habitual drunkard, or trustee for any convict in the penitentiary under appointment of any court of record having jurisdiction of the estate of such deceased person, infant, insane person, idiot, habitual drunkard or convict. ['13, c. 172, § 1, p. 544.]

Hist. '11, c. 124, § 20, p. 391; am. '13, c. 172, § 1, p. 544, reen. C. L. 223:29.

§ 5225. Capital stock. The amount of capital stock of any trust company shall not be less than $50,000, which capital must be fully paid up in lawful money of the United States. ['11, c. 124, part of § 21, p. 393.]

Hist. '11, c. 124, part of § 21, p. 393, reen. '13, c. 172, § 2, p. 546, reen. C. L. 223:30.

§ 5226. Directors. The property or business of the corporation shall be controlled and managed by a board of directors of not less than five in number, one of whom shall be a bona fide resident of this state. Every director of such corporation must be the owner, in his own right, of stock not hypothecated, therein to the amount of at least $500 par value. He shall take and subscribe an oath that he will faithfully and diligently perform the duties of such office, and will not knowingly violate or permit to be violated any provision of this chapter. Such oath shall be transmitted to the department of commerce and industry and filed in the office of the department.

Hist. (See R. C. §§ 2968, 2980) '11, c. 124, part of § 21, p. 393; am. '13, c. 172, § 2, p. 546, reen. C. L. 223:31; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Similar provision: § 5249.

ARTICLE 4.

SAVINGS BANKS.

§ 5227. Powers: Regulations. Any bank which shall designate its business as that of a savings bank existing under the laws of this state shall have power to carry on the business of banking, as prescribed and limited in this chapter, and may receive money on savings deposits, and such deposits shall be repaid to the depositors and their lawful representatives when required at such time or times and with such interest as the regulations of the bank from time to time prescribe. A pass book shall be issued to each depositor, containing the rules and regulations prescribed by the bank, governing such deposits, in which shall be entered each deposit made by, and each payment made to such depositor, and no payment made to such depositor and no payment or check against any such savings account shall be made unless accompanied by and entered in the pass book issued therefor, except for good cause and assurance satisfactory to the bank officers; but nothing in this section shall prevent savings banks from issuing time certificates of deposit or certificates of deposit specifically issued subject to the rules and regulations governing saving deposits.

Every savings bank, and any other bank or trust company with a savings department, may require from such depositors 60 days' notice on all withdrawals of $50 or over. ['11, c. 124, § 22, p. 393.]

Hist. '05, p. 175, § 23, reen. R. C. § 2991; am. '11, c. 124, § 22, p. 393, reen. C. L. 223:32.

§ 5228. Investment of savings deposits. It shall be lawful for any savings bank to invest its savings deposits only as follows and not otherwise:

1. In bonds or interest bearing notes or certificates of the United States, including bonds issued by federal farm loan banks.
2. In bonds or interest bearing evidence of indebtedness of this state.
3. In bonds or warrants or local improvement bonds or warrants of any city, town, county, school district or irrigation district of this state, issued pursuant to authority of law, but not exceeding 50 per cent of the capital and surplus of any savings bank, shall consist of bonds or warrants of any one city, town, county, school district or irrigation district.
4. In bonds or warrants of any state in the union or any city, town, county, school or irrigation district of any such state that has not for three years previous to such investment being made defaulted in payment of the interest on its legal funded debt, but not exceeding 50 per cent of the capital and surplus of any such bank shall be invested in the bonds of any one state or of any county or municipality outside of this state.
5. In notes or bonds secured by mortgage to such savings bank or by

mortgage or deed of trust to any trust company under the laws of this state upon unincumbered real estate worth at least double the amount loaned thereon. Whenever buildings are included in the valuation of any real estate upon which a loan shall be made by such savings bank they shall be insured by the borrower for the benefit of such savings bank in some reliable company, and such policy of insurance shall be assigned to such savings bank, and it shall be lawful for such savings bank to renew such policy of insurance from year to year, in case the borrower neglects to do so, and charge the same to him.

6. In real estate subject to the provisions of section 5251, except that no savings bank hereafter established shall have more than 50 per cent of its capital invested in the lot and building in which the business of such savings bank may be carried on.

7. In dealing in exchange by purchasing and selling sight and time drafts and notes.

8. While awaiting opportunity for the judicious investment of funds deposited with such savings bank to loan the moneys so deposited upon well secured commercial paper or upon the security of stocks and other securities not exceeding 80 per cent of the cash market value thereof. ['17, c. 34, § 1, p. 78.]

Hist. '05, p. 175, § 24, reen. R. C. § 2992; am. '11, c. 124, § 23, p. 393; am. '13, c. 172, § 3, p. 546; am. '17, c. 34, § 1, subd. 23, p. 78, reen. C. L. 223:33.

§ 5229. Interest on savings deposits. It shall be the duty of the board of directors of such savings bank, from time to time, to regulate the interest allowed depositors, and to pay the same at regular stated periods. ['05, p. 175, § 25.]

Hist. '05, p. 175, § 25, reen. R. C. § 2993, reen. '11, c. 124, § 24, p. 394, reen. C. L. 223:34.

ARTICLE 5.

SAVINGS BANK BONDS.

§ 5230. Bonds secured by mortgages. Every savings bank and trust company maintaining a savings department, having a paid up capital of not less than $100,000, may, in lieu of selling or negotiating the real estate mortgages in which its savings deposits have been invested, issue, sell, or otherwise turn to account, bonds or debentures of such denomination or denominations as it may deem proper, and secure the payment of the principal and interest thereof by such real estate mortgages, but it shall deposit such mortgages in trust, for the benefit of the purchasers and holders of such debentures and bonds, with the state treasurer of the state of Idaho, as trustee, and the aggregate amount of principal and interest, payable under such debentures or bonds, shall not exceed the aggregate of principal and interest payable under the mortgages deposited as security therefor, but the principal amount payable under any issue or series shall be not less than $20,000. ['13, c. 191, § 1, p. 633.]

Hist. '13, c. 191, § 1, p. 633, reen. C. L. 223:35.

§ 5231. Approval of mortgages: Exchange: Duty of department. The mortgages deposited as security for the payment of such debentures and bonds shall first have been approved for the investment of savings deposits by the department of commerce and industry, and such approval noted thereon. And the bank or trust company issuing such debentures or bonds may from time to time as the necessity therefor arises exchange or substitute for mortgages deposited with the state treasurer as herein provided, other real estate mortgages, approved as aforesaid: *Provided,*

however, That the aggregate principal and interest payable under such mortgages shall never be less than the aggregate principal and interest payable under such debentures or bonds.

Hist. '13, c. 191, part of § 2, p. 634, reen. C. L. 223:36; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5232. Duties of state treasurer. The state treasurer is authorized to execute all necessary instruments, assignments, releases and certificates to carry out the provisions of this article, and to make such rules and regulations in relation thereto as he may from time to time deem necessary: *Provided further,* That the state of Idaho shall in no event and under no circumstances be liable for either principal or interest of such debentures, bonds or mortgages, or for the safe keeping thereof, or for any other act hereby authorized to be done. But the state treasurer shall be liable under his official bond for the safe keeping of the notes and mortgages deposited with him under this article, and for the certification or authentication by him of bonds and debentures in excess of the amount hereby authorized to be issued or certified against the mortgages deposited as aforesaid, and for all moneys paid to him hereunder, as such trustee. ['13, c. 191, part of § 2, p. 634.]

Hist. '13, c. 191, part of § 2, p. 634, reen. C. L. 223:37.

§ 5233. Collection of pledged securities. The savings bank or trust company issuing such bonds or debentures shall not be liable thereunder or for the payment thereof, either principal or interest, but the same shall be paid out of the mortgages deposited as security therefor, anything in such bonds or debentures to the contrary notwithstanding; but the institution issuing the same shall use due diligence in collecting and enforcing the payment of the amount due under such mortgages, and shall be liable only for its negligence in so doing; and it shall faithfully account for and pay over to the holders of such debentures or bonds all moneys collected under such mortgages to the extent required to fully pay and discharge the principal and interest payable under such bonds or debentures; and the state treasurer, as trustee for the holders of such bonds or debentures, may, in his discretion and upon the necessary costs and expenses first being advanced, foreclose the mortgages, or any of them, upon which default has been made, according to the terms thereof, deposited as security for any such bonds or debentures; and pending such action or proceedings by the state treasurer the authority of the savings bank or trust company in the premises shall be suspended. ['13, c. 191, § 3, p. 634.]

Hist. '13, c. 191, § 3, p. 634, reen. C. L. 223:38.

§ 5234. Fees of state treasurer. The state treasurer shall be entitled to collect 20 cents for each debenture or bond authenticated or certified by him as having been issued under the provisions of this article, and one-fourth of 1 per cent of all interest, and one-eighth of 1 per cent of all principal paid through his office on such bonds or debentures: *Provided, however,* That the interest and principal of such bonds or debentures shall be payable at the place therein designated. ['13, c. 191, § 4, p. 635.]

Hist. '13, c. 191, § 4, p. 635, reen. C. L. 223:39.

ARTICLE 6.

SAVINGS DEPARTMENTS OF TRUST COMPANIES.

§ 5235. Application of article. A trust company organized prior to May 3, 1911, under chapter 194, and maintaining a savings department or

conducting a savings bank within the meaning of the state banking law on March 13, 1913, shall, in the management and maintenance of such savings department, be subject to all the provisions of the state banking law applicable to savings banks organized under such state banking law, except as the same may conflict with the provisions hereof: *Provided,* That such trust company did prior to May 7, 1913, file with the state bank commissioner a certified copy of its charter or articles of incorporation, with the amendments thereto, if any, and the affidavit of the treasurer, cashier or president thereof, showing its paid up capital in an amount not less than that required for savings banks organized under the state banking law, and such other information as was required by law to be embodied in the reports to the state bank commissioner by savings banks. No charter, other than that provided for by the law under which it was incorporated, or certificate or license from the state bank commissioner, shall be required of any such trust company. [C. L. 223:40.]

Hist. (See R. C. § 2969) Compiled from '13, c. 187, §§ 1, 2, pp. 619-20; compiled and reen. C. L. 223:40.

§ 5236. Investment of funds: Approved securities. It shall be lawful for such trust company to invest its savings deposits only as follows, and not otherwise:

1. In bonds or interest bearing notes or certificates of the United States, including bonds issued by federal farm loan banks.
2. In bonds or interest bearing evidences of indebtedness of this state.
3. In bonds or warrants or local improvement bonds or warrants of any city, town, county, school district or irrigation district in this state, issued pursuant to authority of law but not exceeding 40 per cent of the capital and surplus and not exceeding 20 per cent of the savings deposits of any such trust company shall consist of bonds or of warrants of any one city, town, county, school district or irrigation district.
4. In bonds or warrants of any state in the union or any city, town, county, school or irrigation district of any such state that has not for three years previous to such investment being made defaulted in payment of the interest on its legal funded debt, but not exceeding 40 per cent of the capital and surplus and not exceeding 20 per cent of the savings deposits of any such trust company shall be invested in the bonds of any one state or of any county or municipality outside of this state.
5. In notes or bonds secured by mortgage to such trust company or by mortgage or deed of trust to any trust company under the laws of this state upon unincumbered real estate worth at least double the amount loaned thereon. Whenever buildings are included in the valuation of any real estate upon which a loan shall be made by such trust company they shall be insured by the borrower for the benefit of such trust company in some reliable company and such policy of insurance shall be assigned to such trust company, and it shall be lawful for such trust company to renew such policy of insurance from year to year, in case the borrower neglects to do so, and charge the same to him.
6. In real estate subject to the provisions governing such investments by savings banks organized under the state banking law. But no such trust company or corporation shall have more than 50 per cent of its capital invested in the title plant, abstract books and lot and building in which the business of such trust company may be carried on.
7. While awaiting opportunity for the judicious investment of funds deposited with such trust company, to loan the moneys so deposited upon well secured commercial paper or upon the security of stocks and other

securities not exceeding 80 per cent of the cash market value thereof. ['17, c. 10, § 1, p. 12.]

Hist. '13, c. 187, § 3; am. '17, c. 10, § 1, p. 12, reen. C. L. 223:41.

§ 5237. Cash reserve. Every such trust company shall have on hand at all times, in actual cash in its vaults, not less than 5 per cent of its savings deposits. ['13, c. 187, § 4, p. 621.]

Hist. '13, c. 187, § 4, p. 621, reen. C. L. 223:42.

§ 5238. Investments impressed with trust. All loans and investments of savings and trust deposits shall be held solely for the repayment of savings and trust depositors, and shall not be liable for, pledged as security for, or used to pay any other obligation or liability of such trust company until after the payment in full of all such depositors. ['13, c. 187, § 5, p. 621.]

Hist. '13, c. 187, § 5, p. 621, reen. C. L. 223:43.

ARTICLE 7.
GENERAL REGULATIONS.

§ 5239. Authorization necessary to do business. No bank or trust company shall transact any business, except such as incidental or necessarily preliminary to its organization, until it has been regularly authorized by the department of commerce and industry to commence the business of banking.

Hist. (See R. C. §§ 2971, 2975) '11, c. 124, § 27, p. 395, reen. C. L. 223:44; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5240. Certificate of authority. Whenever articles of incorporation are filed with the department of commerce and industry, as herein provided, and the bank or trust company transmitting the same notifies the department that its capital stock has been duly paid in and whether such bank or trust company has complied with all the provisions of this chapter required before the bank or trust company shall be authorized to commence business, the department of commerce and industry shall, within 30 days, examine into the condition of such bank or trust company, ascertaining whether or not the capital has been paid in and whether such bank or trust company has complied with all the provisions of the law required to entitle it to engage in the business of banking. If, upon such examination, it appears that such bank or trust company is lawfully entitled to commence business, the department of commerce and industry shall forthwith give to such bank or trust company a certificate, under its official seal, that such bank or trust company is authorized to commence business. If the said department has reason to believe that the stockholders have formed the same for any other than the legitimate business contemplated by this chapter, it may withhold the certificate herein mentioned: *Provided,* That the department of commerce and industry may withhold the issuance of such certificate to a bank or trust company seeking to engage in business in a town which, in its judgment, does not justify or warrant a new or additional bank.

Hist. (See R. C. § 2975) '11, c. 124, § 28, p. 395; am. '17, c. 51, § 3, p. 112, reen. C. L. 223:45; compiled upon authority '19, c. 8, § 28, p. 56; proviso allowing appeal to board of appeal omitted as obsolete.

§ 5241. Fees for issuing charters. The department of commerce and industry shall collect from each bank and trust company a fee for

the issue of charter, which fee shall be regulated according to the authorized capital of such bank or trust company as follows:

For all banks and trust companies having an authorized capital of $15,000 and less than $25,000	$25.00
$ 25,000 and under $ 50,000	30.00
50,000 and under 100,000	35.00
100,000 and under 200,000	40.00
200,000 and under 350,000	45.00
350,000 and under 500,000	50.00
500,000 and upward	60.00

Hist. '11, c. 124, § 29, p. 396, reen. C. L. 223:46; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5242. Place of meetings. All meetings of the stockholders of every incorporated bank or trust company doing business under this chapter shall be held at the office of the corporation at its principal place of business within this state. Meetings of the board of directors of the corporation, or of its executive committee, shall be held at the principal place of business of the corporation in this state: *Provided,* That when so provided for in the articles of incorporation or amended articles of incorporation, or by-laws, or by resolution of the board of directors, meetings of the board of directors and of the executive committee may be held for the transaction of any business of the corporation at any place within this state, other than at its principal place of business. ['13, c. 172, § 4, p. 547.]

Hist. '11, c. 124, § 30, p. 396; am. '13, c. 172, § 4, p. 547, reen. C. L. 223:47.

§ 5243. By-laws. Every corporation formed under this chapter must, within one month after filing articles of incorporation, adopt a code of by-laws for its government, not inconsistent with the laws of congress and of this state. The assent of the stockholders representing a majority of all subscribed capital stock is necessary to adopt by-laws if they are adopted at a meeting called for that purpose; and if such meeting be called two weeks' notice of the same by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or if none be published therein, then a paper published in an adjoining county, must be given by order of the acting president. The written assent of the holders of two-thirds of the stock subscribed shall be effectual to adopt a code of by-laws without a meeting for that purpose. A copy of the by-laws and of any subsequent amendments thereto must be filed in the office of the department of commerce and industry within 30 days after the adoption thereof.

Hist. '11, c. 124, § 31, p. 396; am. '15, c. 81, § 4, p. 195, reen. C. L. 223:48; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5244. Branch banks prohibited. No banking corporation or trust company shall maintain any branch bank, receive deposits or pay checks, except over the counter of and in its own banking house. And, *Provided,* That nothing in this section shall prohibit ordinary clearing house transactions between banks.

Corporations created under the terms of this chapter shall not be authorized to engage in the business at more than one place, which shall be designated in their charters. ['11, c. 124, § 32, p. 397.]

Hist. '11, c. 124, § 32, p. 397, reen. C. L. 223:49.

§ 5245. Stock: Transfers. The shares of stock of such incorporated bank or trust company shall be deemed personal property, and shall be transferred on the books of the bank or trust company in such manner as the by-laws thereof shall direct. All transfers of stock shall be certified to the department of commerce and industry immediately; but no such bank or trust company shall accept, as collateral, or be the purchaser of its own capital stock, except in cases where the taking of such collateral, or such purchase, shall be necessary to prevent loss upon a debt previously contracted in good faith, and in such case such stock must be sold by the bank or trust company within six months from the time it was acquired. ['11, c. 124, § 33, p. 397.]

Hist. '05, p. 175, § 13, reen. R. C. § 2976; am. '11, c. 124, § 33, p. 397, reen. C. L. 223: 50; compiled upon authority '19, c. 8, § 28, p. 56.

Construed: This section does not impose any penalty or forfeiture for its violation, but if the bank violates it by taking its own capital stock as a pledge, the pledgor cannot, after the bank becomes insolvent, successfully plead the provisions of this section to defeat the foreclosure of his pledge. Meholin v. Carlson (1910) 17 I. 742, 107 P. 755, 134 A. S. R. 286.

§ 5246. Stock book. A book shall be provided and kept by every bank and trust company, in which shall be entered the names and residences of the stockholders thereof, the number of shares held by each, the time when such person became a stockholder, and also all transfers of stock, stating the time when made, the number of shares and by whom transferred. In all actions, suits and proceedings said book shall be prima facie evidence of the facts therein stated. ['11, c. 124, § 34, p. 397.]

Hist. '05, p. 175, § 14, reen. R. C. § 2977; am. '11, c. 124, § 34, p. 397, reen. C. L. 223:51.

§ 5247. Liability of stockholders. The stockholders of every incorporated bank or trust company doing a banking business shall be liable to the creditors of such bank or trust company to the amount of their stock at par value thereof, in addition to the stock held by them; but persons holding stock as administrators, executors, guardians or trustees, or as collateral security, or in pledge, shall not be personally liable as stockholders, but the assets and funds in the hands of such trustees constituting the trust shall be liable to the same extent as the testator or intestate, ward or person interested in such trust fund would be if living or competent to act, and the person pledging such stock shall be deemed a stockholder and liable under this section. Such liability may be enforced by an action at law or suit in equity by any such bank or trust company in process of liquidation, or by any receiver or other person winding up the affairs of such bank or trust company, or other person succeeding to the legal rights of such bank or trust company. ['11, c. 124, § 35, p. 397.]

Hist. '05, p. 175, § 15, reen. R. C. §2979; am. '11, c. 124, § 35, p. 397, reen. C. L. 223:52.

Cited: McTamany v. Day (1912) 23 I. 95, 128 P. 563.

Secret agreement limiting liability void: Any secret agreement between a bank and a purchaser of its stock, limiting the purchaser's liability on his unpaid subscriptions, is void as against corporate creditors. Meholin v. Carlson (1910) 17 I. 742, 754, 107 P. 755, 134 A. S. R. 286.

§ 5248. Right of examination by stockholders. No stockholder of any bank or trust company incorporated under the laws of this state who is not a director shall have the right to inspect the books and records of such bank or trust company showing its transactions with any of its customers, but any such stockholder shall have the right to inspect during business hours the general statement book showing the

general assets and liabilities of such bank or trust company. ['13, c. 172, § 10, p. 549.]

Hist. '11, c. 124, § 93; enacted by '13, c. 172, § 10, p. 549, reen. C. L. 223:53.

Cross ref. As to banks this section modifies § 8506.

§ 5249. Board of directors. The affairs and business of the bank or trust company shall be managed and controlled by a board of not less than five directors, who shall be elected by the stockholders at their regular stated annual meetings.

No person shall be eligible to serve as a director of any bank or trust company organized or existing under the laws of this state unless he shall [be] the owner in his own right of stock therein to the amount of at least $500, par value.

Any vacancy in the board of directors shall be filled by the board and any director so appointed shall hold office until the next election. The directors of every bank and trust company shall hold a regular meeting at least every three months and complete records of such meetings entered in the minute book and signed by both the chairman and secretary.

Any director, officer or other person who shall participate in any violation of the laws of this state relative to banks or banking shall be liable for all damages which said bank or trust company, its stockholders, depositors or creditors shall sustain in consequence of such violation. Every director shall take and subscribe an oath that he will diligently and honestly perform his duty in such office and will not knowingly violate or permit a violation of any provision of the banking law, and such oath of office shall be transmitted to the department of commerce and industry. The officers of the bank or trust company shall be elected by the board of directors and hold their offices for one year and until their successors are elected and qualified unless sooner removed by the board of directors.

The board shall require the cashier and any and all officers and employees having charge of funds of the bank or trust company to give a good and sufficient bond in some surety company authorized to do business in this state, to be approved and held by them in the minimum amount of $5000.

Hist. (See R. C. § 2980) '11, c. 124, § 36, p. 398; am. '17, c. 51, § 4, p. 113, reen. C. L. 223:54; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Similar provision as to trust companies: § 5226.

Liability of bank for officers: Bank is not liable for fraudulent acts of officer acting in his personal capacity, where the bank is not acting in privity with such officer. Smith v. Wallace Nat. Bk. (1915) 27 I. 441, 150 P. 21.

§ 5250. Examining committee. There shall be appointed by the board of directors of every incorporated bank or trust company doing business under this chapter a committee of not less than three members, whose duty it shall be to examine, every six months, into the affairs of their bank or trust company, count its cash, carefully look over all loans and discounts and securities and compare its assets and liabilities with the accounts of the ledgers, ascertain whether the accounts are carefully kept and if the condition of the bank or trust company corresponds therewith; and whether the bank or company is in a sound condition; the result of which examination shall be reported to the board of directors at the next regular meeting thereafter and said report made part of the bank's records, and a copy of the report transmitted to the department of commerce and industry within 10 days.

The board of directors as a whole may act as a committee above provided for.

Hist. '11, c. 124, § 37, p. 398, reen. C. L. 223:55; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5251. Real estate holdings. A bank or trust company may purchase, acquire, hold and convey real estate for the following purposes only:

1. Such as shall be necessary for the convenient transaction of its business, including with its banking offices other apartments to rent as a source of income: *Provided, however,* That no bank or trust company shall invest in a banking building and lot and furniture and fixtures an amount greater than 50 per cent of the capital and surplus of such bank or trust company.

2. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of business.

3. Such as it shall purchase at sale on judgments, decrees or mortgage foreclosure under securities held by it, but a bank or trust company shall not bid at such sale a larger amount than is necessary to satisfy its debts and costs.

4. No real estate acquired in the cases contemplated in the second and third subdivisions preceding shall be held for a longer time than five years, except extension is granted by the department of commerce and industry. Nothing in this section shall be construed to prevent a bank or trust company from loaning moneys upon real estate securities as provided by law or a trust company holding and conveying real estate in trust as herein provided. Real estate shall be conveyed under the corporation seal of the bank or company and the hand of the president or vice president and cashier or assistant cashier.

Hist. '05, p. 175, § 16; am. R. C. § 2978; am. '11, c. 124, § 38, p. 399; am. '17, c. 51, § 5, p. 114, reen. C. L. 223:56; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Investment of savings deposits: § 5228.

§ 5252. Reserve. Every bank or trust company doing business under this chapter shall have on hand at all times in available funds not less than 15 per cent of its aggregate deposits, one-fifth of which must be actual cash in its vaults; the remaining four-fifths may consist of balances due it from good, solvent banks. Cash items shall not be considered as a part of the reserve of any bank or trust company. ['17, c. 51, § 6, p. 114.]

Hist. '05, p. 175, § 32, reen. R. C. § 2998; am. '11, c. 124, § 39, p. 399; am. '13, c. 172, § 5, p. 548; am. '17, c. 51, § 6, p. 114, reen. C. L. 223:57.

Cited: S. v. Givens (1915) 28 I. 253, 152 P. 1054.

§ 5253. Diminution of reserve. Whenever the reserve of any bank or trust company falls below the amount herein required to be kept, such bank or trust company shall not increase its loans or discounts otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand; and the department of commerce and industry shall notify any bank or trust company whose reserve may be below the amount required herein to make good such reserve, and in case the bank or trust company fails for 30 days thereafter to make good such reserve, or continually allows its reserve to fall below the required amount, the department is hereby authorized to proceed as under section 5297.

Hist. '11, c. 124, § 40, p. 400, reen. C. L. 223:58; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5254. Investment of funds: Certain loans prohibited. No bank or trust company shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling goods, chattels, wares and merchandise, nor make any loans or discounts on security of the shares of its own capital stock nor to be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall within six months of the time of its purchase be sold or disposed of at public or private sale; after the expiration of six months any such stock shall not be considered as a part of the assets of any bank or trust company: *Provided,* That it may hold and sell all kinds of property which may come into its possession as collateral security for loans or any ordinary collection of debts, as prescribed by law: *Provided further,* That any goods or chattels coming into possession of any bank or trust company aforesaid shall be disposed of as soon as possible, and shall not be considered as a part of the bank's or company's assets after the expiration of one year from the date of acquiring same. ['11, c. 124, § 41, p. 400.]

Hist. '11, c. 124, § 41, p. 400, reen. C. L. 223:59.

§ 5255. Same: Federal reserve bank. Any bank in this state is authorized to subscribe to the stock of a federal reserve bank, as provided by the laws of the United States.

Any bank becoming a member of a federal reserve bank is authorized to comply with the laws of the United States, and the rules and regulations of the federal reserve board and the comptroller of the currency, anything in this chapter or in the laws of this state to the contrary notwithstanding. ['15, c. 81, § 5, p. 196.]

Hist. '11, c. 124, § 41a; enacted by '15, c. 81, § 5, p. 196, reen. C. L. 223:60.

Cross ref. Express reference to this section: Application to national banks: § 5270.

§ 5256. Stock in other banking corporations. Except as provided in the preceding section, it shall be unlawful for any bank or trust company doing business under this chapter to invest an amount greater than 10 per cent of its paid in capital in the shares of other banking corporations or trust companies doing a banking business: *Provided further,* That no such bank or trust company shall invest an amount greater than 5 per cent of its paid in capital in the shares of any one banking corporation or trust company doing a banking business. ['15, c. 81, § 6, p. 196.]

Hist. '11, c. 124, § 42, p. 400; am. '15, c. 81, § 6, p. 196, reen. C. L. 223:61.

§ 5257. Loans to partners prohibited. No partnership, firm or individual transacting a banking business in this state shall be permitted to carry any note or obligation of any such partnership or firm or individual, or any of the members of such partnership or firm, as a part of the assets of the bank. ['15, c. 81, § 7, p. 196.]

Hist. '05, p. 175, § 31, reen. R. C. § 2989; am. '11, c. 124, § 43, p. 401; am. '15, c. 81, § 7, p. 196, reen. C. L. 223:62.

§ 5258. Loans to officers. It is unlawful for a corporation transacting a banking business in this state to loan to a director, officer or employee thereof or for a director, officer or employee thereof to borrow from such corporation any of its funds, except subject to the following limitations:

1. The indebtedness of an officer, other than a director, or of an em-

ployee, shall not exceed 5 per cent of the paid up capital stock and surplus of the corporation.

2. The combined indebtedness of directors, officers and employees shall not exceed 50 per cent of the paid up capital stock and surplus of the corporation.

3. No such loan shall be made without first being approved by a majority of the board of directors at a meeting in the minutes of which such approval is recorded in detail.

And if the directors of any such corporation knowingly permit any of the directors, officers or employees thereof to borrow its funds in violation of this section or in an excessive amount or in a dishonest manner or in a manner incurring great risk of loss to such corporation, every director who participated in and assented to the same is liable personally for all damage which the corporation or its shareholders or any other person may sustain by reason of such loan. ['17, c. 51, § 7, p. 115.]

Hist. (See R. C. § 2989) '11, c. 124, § 43a, p. 401; enacted by '15, c. 81, § 8, p. 197; am. '17, c. 51, § 7, p. 115, reen. C. L. 223:63.

§ 5259. Loans to officials of department prohibited. It shall be unlawful for the department of commerce and industry, its commissioner, deputies or clerks or either of them to borrow money, directly or indirectly, from any bank or trust company doing business under the provisions of this chapter. Any violation of this section shall be punished according to section 5284.

Hist. '11, c. 124, § 86, p. 412; am. '17, c. 51, § 9, p. 116, reen. C. L. 223:64; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5260. Limitation on loans. The total liabilities to any bank or trust company, of any person or persons or of any company, corporation or firm, for money borrowed, including in the liabilities of the company or firm the liabilities of the several members thereof, shall at no time exceed 20 per cent of the aggregate paid in capital and surplus of such bank or trust company; but the discount of bills of exchange drawn in good faith against actual existing values, and the discount of commercial or business paper actually owned by the persons negotiating the same, shall not be considered as money borrowed: *Provided, however,* That the foregoing limitations shall not apply to loans made on warehouse receipts and bills of lading. ['13, c. 172, § 6, p. 548.]

Hist. '05, p. 175, § 21, reen. R. C. § 2987; am. '11, c. 124, § 44; am. '13, c. 172, § 6, p. 548, reen. C. L. 223:65.

§ 5261. Borrowing money: Method and accounting. In all cases where money is borrowed the bank or trust company shall issue its bills payable or rediscount some of its paper, and shall show the true amount of borrowed money on its books and in all reports and published statements under these heads. ['11, c. 124, § 45, p. 401.]

Hist. '11, c. 124, § 45, p. 401, reen. C. L. 223:66.

§ 5262. Overdrafts. Whenever the overdrafts of the depositors of any bank or trust company doing business under this chapter are, in the opinion or judgment of the department of commerce and industry, excessive or of long standing, the department may require such bank or trust company to either collect or materially reduce the same or secure notes in lieu thereof.

Hist. '11, c. 124, § 46, p. 402, reen. C. L. 223:67; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5263. Rediscounts. Banks or trust companies rediscounting or disposing of any notes or assets containing their indorsement or guarantee shall carry the same on their books, under liabilities, as rediscounts, until the same are actually paid by the makers, other than by renewal, or the borrowing bank or trust company itself takes up the paper.

It shall be unlawful for any bank or trust company to circulate or dispose of any paper containing its guarantee or indorsement, except when indorsed without recourse, without carrying the same on their books as a liability under the proper head. ['11, c. 124, § 47, p. 402.]

Hist. '11, c. 124, § 47, p. 402, reen. C. L. 223:68.

§ 5264. Certified checks. No owner, officer, agent, clerk or employee of the bank or trust company shall certify a check unless the amount thereof actually stands to the credit of the drawer on the books of the bank or company; and any person who shall wilfully violate this provision shall, on conviction thereof, be deemed guilty of a felony and be punished by a fine not exceeding $1000. Any such check so certified by a duly authorized person shall be a good and valid obligation of the bank or company in the hands of an innocent holder. ['11, c. 124, § 48, p. 402.]

Hist. '05, p. 175, § 22, reen. R. C. § 2988; am. '11, c. 124, § 48, p. 402, reen. C. L. 223:69.

Cited: Smith v. Field (1911) 19 I. 558, 114 P. 668, Ann. Cas. 1912C 354.

§ 5265. Accounts of persons under disability. Whenever any minor, married woman or other person under disability shall make or have credit for a deposit in any bank or trust company in his or her name, such bank or trust company may pay such money on the check or order of such depositor, the same as in cases of depositors not under disability, and such payment shall be in all respects valid in law. ['15, c. 81, § 9, p. 197.]

Hist. (See R. C. §§ 2986, 2994) '11, c. 124, § 49, p. 402; am. '15, c. 81, § 9, p. 197, reen. C. L. 223:70.

Cross ref. Express reference to this section: Application to national banks: § 5270.

§ 5266. Liability on forged checks. No bank or trust company which has paid and charged to the account of a depositor any money in a forged or raised check issued in the name of said depositor shall be liable to said depositor for the amount paid thereon unless either (1) within three months after notice to said depositor that the vouchers representing payments charged to the account of said depositor for the period during which such payment was made are ready for delivery, or (2) in case no such notice has been given, within three months after the return to said depositor of the voucher representing such payment, said depositor shall notify the bank or company that the check so paid is forged or raised. The notice referred to may be given by mail to said depositor at his last known address with postage prepaid. ['19, c. 178, p. 555.]

Hist. '11, c. 124, § 50, p. 402, reen. C. L. 223:71; am. '19, c. 178, p. 555.

Cross ref. Express reference to this section: Application to national banks: § 5270.

Liability for forged check: The relation existing between a bank and its depositor is that of debtor and creditor, and before the bank can charge the account of its depositor with a check drawn by someone else, it must show authority or ratification by the depositor. (Sullivan, J. dissents) Crab v. Citizens S. Bk. (1912) 22 I. 408, 126 P. 520.

§ 5267. Liability for nonpayment of checks. No bank or trust company shall be liable to a depositor because of the nonpayment through mistake or error and without malice of a check which should have been paid unless the depositor shall allege and prove actual damage by reason of

such nonpayment, and in such event the liability shall not exceed the amount of damage so proved. ['15, c. 81, § 10, p. 197.]

Hist. '11, c. 124, § 50a; enacted by '15, c. 81, § 10, p. 197, reen. C. L. 223:72.

Cross ref. Express reference to this section: Application to national banks: § 5270.

§ 5268. Deposits in trust: Payment. Whenever any deposit shall be made in any bank, savings bank or trust company, by any person in trust for another and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made, or to his legal representative. ['15, c. 81, § 10, p. 198.]

Hist. '11, c. 124, § 50b; enacted by '15, c. 81, § 10, p. 198, reen. C. L. 223:73.

Cross ref. Express reference to this section: Application to national banks: § 5270.

§ 5269. Deposits in two names. When a deposit has been made, or shall hereafter be made, in any bank, savings bank or trust company in the names of two persons, payable to either or payable to the survivor, such deposit or any part thereof, or interest or dividend thereon, if not then attached at law or in equity in a suit against either of said persons, may be paid to either of said persons, whether the other be living or not, and such payment shall discharge the bank, savings bank or trust company making such payment from its obligation, if any, to such other person or his legal representatives for or on account of such deposit. This section shall apply to husband and wife to all intents and purposes the same as to other persons. ['15, c. 81, § 10, p. 198.]

Hist. '11, c. 124, § 50c; enacted by '15, c. 81, § 10, p. 198, reen. C. L. 223:74.

Cross ref. Express reference to this section: Application to national banks: § 5270.

§ 5270. Application to national banks. The provisions of sections 5255, 5265, 5266, 5267, 5268 and 5269 also apply to national banks. ['15, c. 81, § 10, p. 198.]

Hist. '11, c. 124, § 50d; enacted by '15, c. 81, § 10, p. 198, reen. C. L. 223:75.

§ 5271. Surplus funds: Dividends. The board of directors of any bank or trust company may declare a dividend from so much of its net profits after providing for all expenses, losses, interest and taxes accrued or due from said bank or trust company as they shall deem expedient; but before any such dividend is declared not less than one-tenth of the net profits of the bank or trust company for the preceding half year, or for such period as covered by the dividend, shall be carried to a surplus fund, until such surplus fund shall amount to 20 per cent of the paid in capital stock. Any losses sustained by any bank or trust company in excess of its undivided profits may be charged to its surplus account: *Provided,* That its surplus fund shall thereafter be reimbursed from its earnings, and no dividend shall be declared or paid by any such bank or trust company until its surplus fund shall be fully restored to the amount required by the law. Interest unpaid, although due or accrued, on any debts owing to the bank or trust company shall not be included in the calculation of its profits previous to a dividend. ['11, c. 124, § 51, p. 402.]

Hist. '05, p. 175, § 18, reen. R. C. § 2981; am. '11, c. 124, § 51, p. 402, reen. C. L. 223:76.

Recovery of dividends illegally paid: It is the duty of the receiver of an insolvent bank to recover for the benefit of the creditors, dividends declared by the directors and paid contrary to this provision. McTamany v. Day (1912) 23 I. 95, 103, 128 P. 563.

§ 5272. Dividends: Record. All dividends shall be declared at a meeting of the board of directors. A full and complete record of the proceedings and business of all such meetings shall be spread upon the bank's

minute book; such record shall show the disposition of profits in detail, by indicating all poor or worthless items charged out and the amount of same, the amount of expenses charged out, the amount carried to surplus fund, if any, and the amount of dividend, and shall also indicate the amount of the net undivided profits remaining. Within 10 days after such meeting the president or cashier shall transmit to the department of commerce and industry a certified copy of such record.

Hist. '11, c. 124, § 52, p. 403, reen. C. L. 223:77; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5273. Books and accounts. Whenever it shall appear to the department of commerce and industry that any bank or trust company does not keep books and accounts in such a manner as to enable it to readily ascertain the true condition of such bank or company, or are not such as to eliminate the possibility, as far as possible, of any loss through dishonesty of its officers or employees, or otherwise, the department shall have power to require the officers of such bank or trust company or any of them, to open and keep such books or accounts as the department may, in its discretion, determine and prescribe for the purpose of keeping accurate and convenient records of the transactions and accounts of such bank or company.

Hist. '11, c. 124, § 53, p. 403, reen. C. L. 223:78; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5274. Removal of officers and employees. Any officer or employee of any bank or trust company found by the department of commerce and industry to be dishonest, reckless or incompetent, may be removed from office by the board of directors of the bank or company in which he is employed on the written order of the department.

Hist. '11, c. 124, § 54, p. 403, reen. C. L. 223:79; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5275. Past due and doubtful paper. Every bank or trust company carrying any bad debt, or a debt of doubtful value, as an asset, shall, upon the request or demand of the department of commerce and industry, collect the same, put it in good bankable condition or charge it out of its books. Any debt on which interest is past due and unpaid for a period of six months, unless the same is well secured and in process of collection, shall be considered a bad debt within the meaning of this section.

Hist. '11, c. 124, § 56, p. 404; am. '15, c. 81, § 11, p. 198, reen. C. L. 223:80; compiled upon authority '19, c. 8, § 28, p. 56.

ARTICLE 8.

MISCELLANEOUS PENAL PROVISIONS.

Cross ref. Other penal provisions of the chapter are: Loans to officials of banking department: § 5259. Certifying uncredited checks: § 5264. Receiving deposits when insolvent: § 5291. Closing bank with criminal intent: § 5298.

Other provisions concerning frauds in the management of corporations: § 8498 et seq.

§ 5276. False reports or entries. Any banker, officer, director or employee of any bank or trust company who shall wilfully and knowingly subscribe to, or make or cause to be made, any false statement or false entry on the books of any bank or trust company, or shall knowingly do or exhibit false papers, with the attempt to deceive any person or persons authorized to examine into the affairs of any such bank or trust company, or shall knowingly make, state or publish any false report or statement of any bank or trust company, shall be deemed guilty of a felony. ['11, c. 124, § 57, p. 404.]

Hist. '11, c. 124, § 57, p. 404, reen. C. L. 223:81.

Cross ref. Fraudulent reports by officers: § 9403.

Cited: For cases under § 7128 dealing with false reports, now repealed, see S. v. Paulsen (1912) 21 I. 686, 123 P. 588; S. v. Cutts (1913) 24 I. 329, 133 P. 115; S. v. O'Neil (1913) 24 I. 582, 135 P. 60.

Conviction for false report: In order to warrant the conviction of a defendant charged under this section with making a false report, it must be proved beyond a reasonable doubt that a false report of the financial condition of the bank was made, and that the defendant knew the report to be false at the time it was made. S. v. Givens (1915) 28 I. 253, 152 P. 1054.

§ 5277. Perjury. Every officer or employee of any bank or trust company, who shall wilfully swear or affirm falsely upon any material matter, shall be deemed guilty of perjury, and upon conviction thereof shall be punished as provided by the laws of this state for the punishment of perjury. ['11, c. 124, § 58, p. 404.]

Hist. (See R. C. § 3002) '11, c. 124, § 58, p. 404, reen. C. L. 223:82.

Cross ref. Punishment for perjury: § 8168.

§ 5278. Refusal to submit to examination. Whenever any officer of any bank or trust company shall refuse to submit the books, papers and concerns of such bank or trust company to the inspection of the department of commerce and industry, or refuse to be examined on oath, touching the concerns of the bank or company, the department is hereby authorized to take charge of such bank in his official capacity and proceed as provided for under section 5297.

Hist. '11, c. 124, § 59, p. 404, reen. C. L. 223:83; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5279. Embezzlement defined: Punishment. Every president, director, cashier, officer, teller, clerk or agent of any bank or trust company who embezzles, abstracts or wilfully misapplies any of the moneys, funds, credits or property of the bank or company when owned by it or held in trust, or who, without authority of the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or makes any false entries in any book, report or statement of the bank or company, with intent, in any case to injure or defraud the bank or any person or corporation, or to deceive any officer of the bank or company, or any other person, or any one appointed to examine the affairs of such bank or trust company, or any person who, with like intent, aids or abets any officer, clerk or employee in the violation of this section, upon conviction thereof shall be imprisoned in the state prison not to exceed 20 years. ['11, c. 124, § 60, p. 404.]

Hist. '11, c. 124, § 60, p. 404, reen. C. L. 223:84.

Cross ref. Somewhat similar provision: § 8453.

Definition of embezzle: "Embezzle" as used in this section is defined in § 8450. (On rehearing) S. v. Lottridge (1917) 29 I 822, 162 P. 672.

Subject of embezzlement: A credit in the nature of an overdraft may be the subject of embezzlement by an officer of a bank. S. v. Lottridge (1916) 29 I. 53, 155 P. 487; ib. (on rehearing) (1917) 29 I. 822, 162 P. 672.

Sentence: Sentence of one to 14 years, where statutory maximum is 20 years, surplusage, and does not vitiate sentence. (On rehearing) S. v. Lottridge (1917) 29 I. 822, 162 P. 672.

§ 5280. Unauthorized banking. It shall be unlawful for any individual, firm or corporation to receive money upon deposit or transact any other form of banking business except as authorized by this chapter. Any person violating any provision of this section, either individually or as an interested party in any corporation, shall be guilty of a misdemeanor and upon conviction thereof, shall be fined in the sum of not less than $300 nor more than $1000, or by imprisonment in the county jail not less than

30 days nor more than one year, or by both such fine and imprisonment. ['11, c. 124, § 62, p. 405.]

Hist. '11, c. 124, § 62, p. 405, reen. C. L. 223:85.

§ 5281. Advertising by unauthorized banker. Any person, firm or corporation, other than a national bank, not authorized to do a banking business under this chapter, that uses or advertises as a part of his or its firm or corporate name the word "bank," "banker," "trust company," "savings bank" or any other word or words of similar import, is guilty of a felony. ['15, c. 81, § 13, p. 199.]

Hist. '11, c. 124, § 62a; enacted by '15, c. 81, § 13, p. 199, reen. C. L. 223:86.

§ 5282. Advertising before issuance of charter. It shall be unlawful for any individual, firm or corporation to advertise, publish or otherwise promulgate that it is engaged in the banking business without first having obtained authority from the department of commerce and industry, as herein provided. Any such individual, or member of such firm, or officer of any such corporation so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by the laws of this state.

Hist. '11, c. 124, § 63, p. 405; compiled and reen. C. L. 223:87; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5283. Misleading advertising. No bank or trust company doing a banking business, or any officer thereof, shall advertise in any manner or publish any statement of the capital, authorized or subscribed unless it or he advertise and publish in connection therewith the amount of capital actually paid up. Any bank or trust company or any officer thereof, advertising in any manner or publishing any statement of such capital, authorized or subscribed, without a statement in connection therewith of the capital actually paid up, shall be guilty of a misdemeanor. ['11, c. 124, § 64, p. 405.]

Hist. '11, c. 124, § 64, p. 405, reen. C. L. 223:88.

§ 5284. General penalty clause. Any officer, manager, director, agent, clerk or employee who wilfully and knowingly violates any of the provisions of this chapter, for which a penalty is not expressly provided, shall be deemed guilty of a felony, and if found guilty, shall be fined not more than $1000 or be imprisoned for not more than three years or both. [C. L. 223:89.]

Hist. '11, c. 124, § 87, p. 412; compiled and reen. C. L. 223:89.

Cross ref. Express reference to this section: Loans to banking officials prohibited: § 5259.

ARTICLE 9.

INSOLVENT AND FAILING BANKS.

§ 5285. Depositors are preferred creditors. In the event of insolvency or bankruptcy of any person, firm, copartnership or corporation maintaining, operating or conducting a bank or a trust company doing a banking business, or doing business within the meaning of this chapter, depositors of such bank or trust company shall have the first and prior lien on all the assets of such bank or trust company, and in the distribution of such assets or the proceeds thereof, the same shall first be applied to satisfy the amount due such depositors. [C. L. 223:90.]

Hist. '05, p. 175, § 47, reen. R. C. § 2990; am. '11, c. 124, § 65, p. 405; compiled and reen. C. L. 223:90.

Cited: (In brief of counsel) Wilson v. Baker Clo. Co. (1913) 25 I. 378.

Secured creditors on same footing: A preference is given to depositors of an insolvent bank over all other creditors, and such depositors are to be classed on an equal footing. Under this statute distribution of assets to depositors must be made ratably, and depositor can be given any advantage by reason of collateral or other security which he may hold from the bank for his deposit. Blackman v. Pettengill (1913) 25 I. 307, 137 P. 182.

Trust funds: State has preferred lien against general assets of insolvent bank for its trust funds commingled therewith. Otherwise, if such funds are stolen or dissipated. S. v. Bruce (1909) 17 I. 1, 102 P. 831, 134 A. S. R. 245.

Where money is loaned by one bank to another upon false representations which amount to fraud upon the bank loaning the money, the contract of loan may be rescinded upon the ground of fraud, and such loan becomes a trust fund in the hands of the bank or its assignee, and like any other fund if it can be traced and if capable of identification it may be recovered from the assignee of the bank, and is a prior claim as against the general creditors. (Ailshie, J. dissents) Bellevue S. Bk. v. Coffin (1912) 22 I. 210, 125 P. 816.

Moneys deposited by a treasurer of an irrigation district, in a bank, become a trust fund, not part of the estate of the bank, and must be so treated in case of insolvency of the bank. Re Bk. of Nampa, Ltd. (1916) 29 I. 166, 157 P. 1117.

§ 5286. Creditors of private banks can not attach. No creditor or creditors of any individual banker or of individual members of any copartnership doing a banking business in this state shall be permitted to attach or seize under writ of attachment or execution or to hold liable for such individual indebtedness any of the assets of the bank until all the depositors and creditors of such bank have been fully paid. ['11, c. 124, § 66, p. 406.]

Hist. '11, c. 124, § 66, p. 406, reen. C. L. 223:91.

Cited: (See annotation to preceding section) Blackman v. Pettengill (1913) 25 I. 307, 137 P. 182.

§ 5287. Voluntary liquidation. Any bank or trust company organized under the provisions of this chapter may go into liquidation and be closed by a vote of its stockholders owning two-thirds of its capital. Whenever a vote is taken to go into liquidation, it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the bank or company, by its president, cashier or treasurer to the department of commerce and industry, and publication thereof, notifying creditors to present their claims against the bank or trust company for payment, shall be made once in each week for four successive weeks in a newspaper published in the city, village or county in which the bank or trust company is located, or if no newspaper is there published, then in the newspaper published at the nearest county seat.

Hist. '11, c. 124, § 67, p. 406, reen. C. L. 223:92; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5288. Reorganization as a national bank. Any bank doing business under this chapter may reorganize under the laws of the United States as a national bank. As soon as such bank shall have obtained the certificate from the comptroller of currency, authorizing it to commence business under the United States banking law, such reorganized bank shall take and hold all the assets of such state bank subject to all the liabilities existing against said state bank at the time of such reorganization; and shall immediately notify the department of commerce and industry of such reorganization and transfer.

Hist. '11, c. 124, § 68, p. 406, reen. C. L. 223:93; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5289. Consolidation. Any bank or trust company which is in good faith winding up its business for the purpose of consolidating with some other bank, may transfer its resources and liabilities to the bank with which it is in process of consolidation, but no consolidation shall be made without the consent of the department of commerce and industry, and

not then to defeat or defraud any of the creditors in the collection of their debts against such banks or trust companies, or either of them.

Hist. '11, c. 124, § 69, p. 406, reen. C. L. 223:94; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5290. Banks may place affairs in hands of department. Any incorporated bank or trust company doing business in this state under the laws cited in this chapter, may place its affairs and assets under the control of the department of commerce and industry by posting a notice on its front door as follows: "This institution in the hands of the department of commerce and industry." The posting of this notice or of a notice by the department that it has taken possession of any bank or trust company, shall be sufficient to place all its assets and property, of whatever nature, in the possession of the department, and shall operate as a bar to any attachment proceedings whatever.

Hist. '11, c. 124, § 70, p. 406, reen. C. L. 223:95; compiled upon authority '19, c. 8, § 28, p. 56.

Cited: Wilson v. Baker Clo. Co. (1913) 25 I. 378, 137 P. 896, 50 L. R. A. (N. S.) 238.

§ 5291. Receiving deposits when insolvent. The owners or officers of any bank or trust company who shall receive any deposits, knowing that such bank or trust company is insolvent, shall be deemed guilty of a felony and punished, upon conviction thereof, by a fine not exceeding $1000, or imprisonment in the state penitentiary not exceeding two years, or both such fine and imprisonment, at the discretion of the court. ['11, c. 124, § 71, p. 407.]

Hist. '05, p. 175, § 19, reen. R. C. § 2985; am. '11, c. 124, § 71, p. 407, reen. C. L. 223:96.

Cross ref. Officers receiving deposits when the bank is insolvent are guilty of misdemeanor: § 8503.

Cited: (In brief of counsel) Wilson v. Baker Clo. Co. (1913) 25 I. 378.

Purpose of section: This section was enacted for the special purpose of protecting those who place their money on deposit in banking institutions, and the legislature clearly intended in enacting said section to make all the officers who have knowledge of the condition of the bank responsible for the acts of employees thereof in receiving deposits. S. v. Cramer (1911) 20 I. 639, 119 P. 30.

Applied: Where the vice president and business manager of a bank, with full knowledge that his banking institution is insolvent and will not be able to meet its obligations and repay its depositors in the ordinary and due course of business, permits or consents to such banking institution continuing to receive deposits through its regular employees, he is criminally liable under the provisions of this section as a principal and not as an accessory. Ib.

"Insolvent" defined: The word "insolvent" as applied to banking institutions, means that a bank is insolvent when its assets and property are of such a character and value or in such a condition that it is unable to meet the demands made upon it in the usual and ordinary course of banking business. S. v. Cramer (1911) 20 I. 639, 119 P. 30.

§ 5292. Impairment of capital: Duty of directors. In any case where the capital of the bank or trust company shall have become impaired or reduced below the amount required by law or the articles of incorporation, the board of directors of such bank or trust company shall have the power to make a pro rata assessment upon all of the stock of said bank or trust company to make good such deficiency, and may provide that the amount of such deficiency shall be due and payable at a time to be fixed by such board of directors, which time shall not be more than 10 days after the notice of said assessment; and if any stockholder shall fail or neglect to pay the amount of the assessment against his stock for 10 days after the same shall have become so due and payable, the directors of such bank or trust company may offer said stock for sale, and sell the same at public sale upon 10 days' notice to be given by posting copies of such notice of sale in five public places in the town, village or city where such bank or trust company is located. Upon such sale, the purchaser shall forthwith pay the amount of the assessment against said stock. The amount re-

ceived from the sale of said stock, less the cost and expense of such sale, shall be paid to the original owner of the stock. ['11, c. 124, part of § 72, p. 407.]

Hist. '11, c. 124, part of § 72, p. 407, reen. C. L. 223:97.

Cross ref. Express reference to this section: Duty of commissioner in cases of insolvency: § 5295. When stock is delinquent: § 5219.

§ 5293. Impairment of capital: Duty of department. Whenever the department of commerce and industry shall become satisfied that the capital of any bank or trust company is impaired, or reduced below the amount required by law or the articles of incorporation, or below the amount certified to the department as paid in, it shall have the power to require such bank or trust company, under its seal of office, to make good such impairment or deficiency. If any bank or trust company shall refuse or fail for 30 days after written notice to make good such impairment of its capital, the department of commerce and industry is hereby authorized and empowered to take charge of its affairs and to wind up its business, under the direction of the court in the judicial district in which the bank or trust company is located.

Hist. '05, p. 175, § 38, reen. R. C. § 3004; am. '11, c. 124, § 72, p. 407, reen. C. L. 223:98; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Duty of commissioner in cases of insolvency: § 5295. When stock is delinquent: § 5219.

Constitutionality: These sections are not in conflict with Const. I, 13, or V, 2, 13, nor the 14th amendment of the federal constitution. S. v. Title Guaranty & Surety Co. (1915) 27 I. 752, 152 P. 189, aff. 240 U. S. 136, 60 L. ed. 566, 36 S. C. R. 345.

Mandatory: Where power is given by statute to public officers in permissive language it will be regarded as peremptory if the public interest or individual rights require that it should be so regarded. S. v. Title Guaranty & Surety Co. supra.

Impairment not insolvency: This section deals with conditions which the legislature evidently did not consider as reaching insolvency. S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

§ 5294. Insolvent bank: Procedure. On becoming satisfied that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms on which such deposits were received, or that any bank or trust company has become insolvent, the department of commerce and industry may forthwith take possession of the books, records and assets of every description of such bank or trust company and hold the same, and no action or proceeding shall be commenced or maintained for the recovery of the possession of said books, records and assets, or to require a lien thereon except in the proceedings of the district court having jurisdiction over the winding up of the affairs of said bank or trust company. The department of commerce and industry shall at once proceed to collect all debts, dues and claims, and to sell or compound all doubtful debts, and to sell all real and personal property, on such terms as the court shall direct. Said department shall pay over all money by it received under the order of the court.

Hist. '05, p. 175, § 39, reen. R. C. § 3005; am. '11, c. 124, § 73, p. 408, reen. C. L. 223:99; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Duty of commissioner in cases of insolvency: § 5295.

Cited: (In brief of counsel) Wilson v. Baker Clo. Co. (1913) 25 I. 378.

Constitutionality: The power conferred upon the bank commissioner by this statute to close a state bank, if on examination it is found insolvent, without awaiting judicial proceedings is constitutional. S. v. Title Guaranty etc. Co. (1915) 27 I. 752, 152 P. 189, aff. Title Guaranty etc. Co. v. State of Idaho (1916) 240 U. S. 136, 36 S. C. R. 345, 60 L. ed. 566.

Mandatory: If bank commissioner becomes satisfied that a bank has unlawfully refused to pay depositors or is insolvent, it becomes his mandatory duty to close the bank, and for failure to do so he is liable on his bond to depositors who lose money as a direct result of his neglect. S. v. Title Guaranty etc. Co. (1915) 27 I. 752, 152 P. 189, aff. 240 U. S. 136, 60 L. ed. 566, 36 S. C. R. 345.

Insolvency: This section deals with a condition of insolvency. S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

Payment of dividends: The entire procedure of the payment of dividends by the receiver of an insolvent bank is left to the order of the court, bound by the requirements of law as generally applied and administered in such cases. Blackman v. Pettengill (1913) 25 I. 307, 137 P. 182.

§ 5295. Same: Duty of department. To carry out the provisions of sections 5292, 5293 and 5294, the commissioner of commerce and industry is hereby authorized, and it is made his duty, to take charge of such bank or trust company personally or by his deputy, or by a special deputy appointed by the department for that specific purpose; and the person so taking charge of the affairs of any such bank or trust company shall give a good and sufficient bond to be approved by the court. All expenses incident to such duties as are hereby imposed, including a per diem not to exceed $10, shall be paid under the order of the court out of the assets of the bank or trust company whose affairs are being administered, and the moneys so received shall, after providing for the compensation of a special deputy and all incidental expenses, be turned in to the state treasury. The compensation of a special deputy, as herein provided for, shall not exceed that allowed regularly appointed deputies connected with the department.

Hist. (See R. C. § 3006) '11, c. 124, § 74, p. 408, reen. C. L. 223:100; compiled upon authority '19, c. 8, § 28, p. 56.

Cited: (In brief of counsel) Wilson v. Baker Clo. Co. (1913) 25 I. 378; S. v. Title Guaranty etc. Co. (1915) 27 I. 752, 152 P. 189.

§ 5296. Banks temporarily embarrassed may resume. If the department of commerce and industry, upon taking charge of a bank or trust company as hereinbefore provided, shall discover that said bank or company is only temporarily embarrassed for want of available funds, and, that in its opinion, the bank or trust company assets are sufficient to pay its liabilties other than its surplus and undivided profits, leaving its capital unimpaired, or if the officers and stockholders of said bank or trust company will arrange to make good its capital, if impaired, it may permit the officers and directors of said bank or trust company to arrange with its depositors and creditors for extensions of time for payment of said depositors and creditors, and the resumption of business by said bank or trust company. And when said department shall be satisfied that the capital of said bank or trust company has been made good and that it is solvent, and has sufficient funds on hand to meet the demands to be made upon it in the ordinary way, and that it has arranged with its depositors and creditors for such extensions of time as will enable the bank or trust company to realize on its assets to meet such obligations, the department may at any time within 60 days after taking charge, permit said bank or trust company to resume business, and in such case shall issue a proper certificate to said bank or trust company for such purpose: *Provided, however,* That said bank or trust company shall pay all the expenses of the department of commerce and industry and its employees in so taking charge of and looking after the affairs of said bank and trust company during the time it has been under its control, including a per diem of $10, and the money so received by the department shall be turned in to the state treasury.

Hist. '11, c. 124, § 75, p. 408, reen. C. L. 223:101; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5297. Forfeiture of charter. If the board of directors or a quorum thereof, of any bank or trust company knowingly violate, or knowingly permit any of the officers, agents or employees of the bank or trust company to violate any of the provisions of this chapter, and, after warning from the department of commerce and industry, shall fail to make good all loss and damage resulting from such acts or omissions, or con-

tinue such conduct, such conduct shall constitute a ground for a forfeiture of the charter and privileges of said bank or trust company, and it shall be the duty of the department, with the assent of the attorney general, to institute proceedings to enforce such forfeiture and to secure a dissolution and a winding up of the affairs of such bank or trust company.

Any bank or trust company which neglects and fails to open for business within one year from the date from which its charter was issued shall be deemed to have forfeited the charter and have no further legal existence.

Hist. '11, c. 124, § 76, p. 409, reen. C. L. 223:102; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref: Express reference to this section: Refusal of bank officer to submit to examination: § 5278. Diminution of reserve: § 5253.

§ 5298. Penalty for closing bank with criminal intent. If any commissioner of commerce and industry or official in the department of commerce and industry shall, as a result of malice or for personal gain, declare any bank or trust company insolvent, he shall, upon conviction thereof, be subject to punishment by fine not exceeding $1000, or imprisonment in the county jail not exceeding one year, or both, within the discretion of the court.

Hist. (See R. C. § 3005) '11, c. 124, § 91; enacted by '13, c. 172, § 8, p. 548, reen. C. L. 223:103; compiled upon authority '19, c. 8, § 28, p. 56.

Commissioner's liability: A bank commissioner in the exercise of discretionary duties is not responsible to anyone receiving an injury through a breach of his official duty, unless he acts maliciously and wilfully wrong, or clearly abuses his discretion to the extent of acting unfaithfully and in bad faith. S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

ARTICLE 10.

EXAMINATION BY DEPARTMENT.

§ 5299. Examination. Every bank and trust company doing business under this chapter shall be subject to the inspection and supervision of the department of commerce and industry, as provided in this chapter.

It shall be the duty of the department of commerce and industry, and it shall have power, to examine twice each year, or whenever it shall deem it necessary, without previous notice, the cash, bills, collateral or securities, books of accounts, condition and affairs of each bank or trust company under the law. For this purpose, the department shall have authority to demand and inspect all books, papers, moneys, notes, bonds or evidences of debt of such bank or trust company and may examine on oath any of the officers, agents, clerks, customers or depositors of such bank or trust company, touching the affairs and business of such bank or trust company. Any wilful false swearing in any examination shall be deemed perjury. The department shall also ascertain whether each bank and trust company is conducting its business in the manner prescribed by law. In examination, the officers and clerks shall give any assistance required by the department.

Hist. (See R. C. §§ 3001-2) '11, c. 124, § 78, p. 410, reen. C. L. 223:104; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Refusal to submit to examination: § 5278. Similar provision as to false swearing: § 5277.

Beneficiaries: The legislature in enacting this section, making it the duty of the bank commissioner to make an examination of state banks, imposed such duty for the benefit and protection of the depositors as well as the public. S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

§ 5300. Fees for examinations. The department of commerce and industry shall collect from each bank and trust company, for each

complete examination of its condition, an amount regulated according to the capital, surplus, undivided profits and assets of said bank or trust company, divided as to capital, surplus and undivided profits, and as to total assets, according to the following schedule, to wit:

For all banks and trust companies having a capital, surplus and undivided profits amounting to:

$ 10,000 and less than $25,000	$12.50
25,000 and under 50,000	16.00
50,000 and under 75,000	22.50
75,000 and under 100,000	32.50
100,000 and under 150,000	35.00
150,000 and under 200,000	37.50
200,000 and under 250,000	40.00
250,000 and under 500,000	42.50
500,000 and upwards	45.00

Together with the following additional charge according to the total assets of each bank or trust company as shown at the time of examination:

Under $50,000	$12.50
$ 50,000 and under $ 100,000	16.00
100,000 and under 150,000	22.50
150,000 and under 250,000	27.50
250,000 and under 350,000	30.00
350,000 and under 500,000	35.00
500,000 and under 750,000	37.50
750,000 and under 1,000,000	40.00
1,000,000 and under 1,500,000	45.00
1,500,000 and under 2,000,000	50.00
2,000,000 and under 3,000,000	55.00
And all banks with total assets of over $3,000,000	60.00

Provided, however, That no bank or trust company shall be required to pay for more than two regular examinations during any one year.

The department shall collect from each bank and trust company for each special examination of its condition which in its opinion is necessary, an amount sufficient to reimburse the department for the actual expenses incurred in connection therewith.

Hist. '05, p. 175, § 37, reen. R. C. § 3003; am. '11, c. 124, § 79, p. 410; am. '15, c. 81, § 14, p. 199; compiled and reen. C. L. 223:105; compiled upon authority '19, c. 8, § 28, p. 56.

Cited: (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652.

§ 5301. Directors to be advised of condition. The department of commerce and industry shall, after each examination, address a letter to the president or chairman of the board of directors, calling attention to the condition of the bank or company at the time of examination. Such letter from the department shall be read at the first meeting of the board of directors following its receipt and the bank or company's minute book shall show the receipt of such letter.

Hist. '11, c. 124, § 80, p. 411, reen. C. L. 223:106; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5302. Reports of banks. Every bank and trust company shall make to the department of commerce and industry not less than four reports during each calendar year, at the times that reports are called for from national banks by the comptroller of the currency, according

to the forms which he shall prescribe. Such reports shall be signed and verified by the oath or affirmation of one of the officers of such bank or trust company, and attested by at least two of the directors. Such reports shall exhibit in detail and under proper heads the resources and liabilities of the bank or trust company, at the close of the business at any past day by the department specified, within 10 days after the receipt of the request therefor from him. Such report shall be published in a newspaper in the village or city or county in which said bank or trust company is located, or in a paper published nearest to such town, and in the same form as made to the department. Proof of publication shall be furnished to said department within 30 days after receipt of the aforesaid call.

The department of commerce and industry shall also have the power to call for special reports from any bank or trust company whenever in its judgment the same is necessary to inform the department fully of the condition of such bank or trust company. It shall not be necessary for such bank or trust company to publish in a newspaper such special report.

Hist. (See R. C. § 2999) '11, c. 124, § 82, p. 411, reen. C. L. 223:107; compiled upon authority '19, c. 8, § 28, p. 56.

Cited S. v. Givens (1915) 28 I. 253, 152 P. 1054.

§ 5303. Failure to transmit reports. Every bank or trust company failing to make and transmit to the department of commerce and industry any of the reports or proofs of publication as required by this chapter, shall, at the discretion of the department, be subject to a forfeiture of $10 for each day after the time required for making such reports. Whenever any bank or trust company fails or refuses to pay the forfeiture herein imposed for a failure to make and transmit such report, the department is hereby authorized to institute proceedings for the recovery of such forfeiture.

Hist. '11, c. 124, § 83, p. 412. reen. C. L. 223:108; compiled upon authority '19, c. 8, § 28, p. 56.

ARTICLE 11.

INTERPRETATION.

§ 5304. Application to private banks and previously existing corporations. The provisions of this chapter shall, as far as applicable, govern all private banks, and shall govern all incorporated state banks and trust companies, doing a banking business. The powers, privileges, duties and restrictions heretofore conferred and imposed upon any bank or trust company existing and doing business under the laws of this state, are hereby abridged, enlarged or modified as each particular case may require, to conform with the provisions of this chapter. [C. L. 223:109.]

Hist. (See R. C. § 3009) '11, c. 124, § 77, p. 409; compiled and reen. C. L. 223:109.

CHAPTER 206.

REGULATION OF INVESTMENT COMPANIES.

(Blue Sky Law.)

Hist. '19, c. 8, § 38 (§ 351 herein) abolished the banking department and the offices of the state bank commissioner and his deputies, and § 28 of the same act (§ 284 herein) vested their powers and duties in the department of commerce and industry. The section notes "Compiled upon authority '19, c. 8," etc., indicate that the substitutions of offices and officials authorized by that act have been made accordingly; the text of pre-existing law not being changed except in so far as necessary in making such substitutions.

Cross ref. Department of commerce and industry to exercise powers of bank commissioner and mine inspector: § 284.

Comp. leg. This act is identical with Kan. '11, c. 133, with the exception of the provisions relating especially to mining corporations which were added by the Idaho statute. Kan. '11, c. 133, was later amended by '13, c. 144; and in '15, c. 164, both the '11 and '13 acts were repealed and a new law enacted.

The Blue Sky laws of Ohio ('13, Gen. Code 6373-1 to 6373-24) Michigan ('15, Act 46) and South Dakota ('15, c. 275) are similar to the Idaho statutes and were severally declared constitutional in Hall v. Geiger-Jones Co. 242 U. S. 539, 37 S. C. R. 217; Merrick v. Halsey & Co. 242 U. S. 568, 37 S. C. R. 227; and Caldwell v. Sioux Falls Stock Yards Co. 242 U. S. 559, 37 S. C. R. 224.

§ 5305. Definition of investment companies. Every corporation, every copartnership or company, and every association (other than state and national banks, trust companies, real estate mortgage companies dealing exclusively in real estate mortgage notes, and corporations not organized for profit), organized or which shall be organized in this state, whether incorporated or unincorporated, which shall sell or negotiate for the sale of any stocks, bonds or other securities of any kind or character other than bonds of the United States, the state of Idaho, or of some municipality of the state of Idaho, and notes secured by mortgages on real estate located in the state of Idaho, to any person or persons in the state of Idaho, other than those specifically exempted herein, shall be known for the purpose of this chapter as a domestic investment company. Every such investment company organized in any other state, territory or government, or organized under the laws of any other state, territory or government, shall be known for the purpose of this chapter as a foreign investment company. ['13, c. 117, § 1, p. 454.]

Hist. '13, c. 117, § 1, p. 454, reen. C. L. 224:1.

§ 5306. Documents to be filed: Fee. Before offering or attempting to sell any stocks, bonds or other securities of any kind or character other than those specifically exempted in section 5305, to any person or persons, or transacting any business whatever in this state, excepting that of preparing the documents hereinafter required, every such investment company, domestic or foreign, shall file in the office of the department of commerce and industry, together with a filing fee of $2.50, the following documents, to wit:

A statement showing in full detail the plan upon which it proposes to transact business. A copy of all contracts, bonds, or other instruments which it proposes to make with or sell to its contributors. A statement which shall show the name and location of the investment company, and an itemized account of its actual financial condition, and the amount of its property and liabilities, and such other information, touching its affairs as said department of commerce and industry may require.

If such investment company shall be a copartnership or an unincorporated association, it shall also file with the department of commerce and industry a copy of its articles of copartnership or association, and all other papers pertaining to its organization, and if it be a corpora-

tion organized under the laws of Idaho it shall also file with the department a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization.

If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the said department a copy of the laws of such state, territory or government under which it exists or is incorporated, and also a copy of its charter, articles of incorporation, constitution and by-laws and all amendments thereof which have been made and all other papers pertaining to its organization.

Hist. '13, c. 117, § 2, p. 454, reen. C. L. 224:2; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Filing requisite for transaction of business: § 5310. Penalty: § 5317.

§ 5307. Papers verified. All of the above described papers shall be verified by the oath of a member of a copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified to by the officer of whose records or archives they form a part, as being correct copies of such records or archives. ['13, c. 117, § 3, p. 455.]

Hist. '13, c. 117, § 3, p. 455, reen. C. L. 224:3.

§ 5308. Consent of foreign investment company to be sued. Every foreign investment company shall also file its written consent, irrevocable, that actions may be commenced against it, in the proper court of any county in this state in which a cause of action may arise, by the service of process on the secretary of state, and stipulating and agreeing that such service of process on the secretary of state shall be taken and held, in all courts, to be as valid and binding as if due service had been made upon the company itself, according to the laws of this or any other state, and such instrument shall be authenticated by the seal of said foreign investment company and by the signature of a member of the copartnership or company, if it be a copartnership or company, or by the signatures of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation authorizing the said secretary and president to execute the same. ['13, c. 117, § 4, p. 455.]

Hist. '13, c. 117, § 4, p. 455, reen. C. L. 224:4.

§ 5309. Duties of department of commerce and industry: Favorable and unfavorable reports. It shall be the duty of the department of commerce and industry to examine the statements and documents so filed, and if said department shall deem it advisable it shall make or have made a detailed examination of such investment company's affairs, which examination shall be at the expense of such investment company, as hereinafter provided.

If the department finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract contain and provide for a fair, just and equitable plan for the transaction of business, and in its judgment promise a fair return on the stock, bonds and other securities by it offered for sale, the department shall issue to such investment company a statement reciting that such company has

complied with the provisions of this chapter, that detailed information in regard to the company and its securities is on file in the office of the department of commerce and industry for public inspection and information, that such investment company is permitted to do business in this state, and such statement shall also recite in bold type that the department in no wise guarantees the securities to be offered for sale by such investment company.

But if said department finds that such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that it is unfair, unjust, inequitable or oppressive to any class of contributors, or if the department decides from its examination of its affairs that said investment company is not solvent and does not intend to do a fair and honest business, and in the department's judgment does not promise a fair return on the stocks, bonds or other securities by it offered for sale, then the department shall notify such investment company in writing of its findings, and it shall be unlawful for such company to do any further business in this state until it shall so change its constitution and by-laws, articles of incorporation or association, its proposed plan of business and proposed contract and its general financial condition in such manner as to satisfy the department of commerce and industry that it is solvent, and its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract provide for a fair, just and equitable plan for the transaction of business, and do, in the judgment of the department, promise a fair return on the stocks, bonds and other securities by it offered for sale.

Provided that all expenses paid or incurred and all fees or charges received or collected for any examination made under the provisions of this section shall be reported in detail by the department of commerce and industry and a full report and record thereof made in detail.

Hist. '13, c. 117, § 5, p. 455; compiled and reen. C. L. 224:5; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5310. Filing documents requisite for transaction of business: Amendments. It shall not be lawful for any investment company, either as principal or agent, to transact any business, in form or character similar to that set forth in section 5305, except as is provided in section 5306, until it shall have filed the papers and documents above provided for. No amendment of the charter, articles of incorporation, constitution and by-laws of any such investment company shall become operative until a copy of the same has been filed with the department of commerce and industry as provided in regard to the original filing of charters, articles of incorporation, constitution and by-laws, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed by section 5306, or to make any contracts other than that shown in the copy of the proposed contract required to be filed by section 5306, until a written statement showing in full detail the proposed new plan of transacting business and a copy of the proposed new contract shall have been filed with the department, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the department obtained as to making such proposed new plan of transacting business and proposed new contract.

Hist. '13, c. 117, § 6, p. 456, reen. C. L. 224:6; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5311. Agents. Any investment company may appoint one or more agents, but no such agent shall do any business for said investment company in this state until he shall first register with the department of commerce and industry as agent for such investment company, and for each of said registrations there shall be paid to the department of commerce and industry the sum of $1. Such registration shall entitle such agent to represent said investment company as its agent until the 1st day of March following, unless said authority is sooner revoked by the department; and such authority shall be subject to revocation at any time by the department for cause appearing to it sufficient.

Hist. '13, c. 117, § 7, p. 457, reen. C. L. 224:7; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5312. Reports of investment companies. Every investment company, domestic or foreign, shall file at the close of business on December 31 and June 30 of each year, and at such other times as required by the department of commerce and industry, a statement verified by the oath of the copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association, setting forth in such form as may be prescribed by the said bank commissioner, its financial condition and the amount of its assets and liabilities, and furnishing such other information concerning its affairs as said department may require. Each regular statement of December 31 and June 30 shall be accompanied by a filing fee of $2.50. Any investment company failing to file its report at the close of business December 31 or June 30 of each year within 10 days of that date, or failing to file any other or special report herein required within 30 days after receipt of request or requisition therefor, shall forfeit its right to do business in this state.

Hist. '13, c. 117, § 8, p. 457, reen. C. L. 224:8; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5313. Accounts: How kept: Open for inspection. The general accounts of every investment company, domestic or foreign, doing business in this state, shall be kept by double entry, and such company, its copartners or managing officers, shall at least once in each month make a trial balance of such accounts, which shall be recorded in a book provided for that purpose; such trial balances and all other books and accounts of such company shall at all times during business hours, except on Sundays and legal holidays, be open to the inspection of stockholders and investors in said company or investors in the stocks, bonds or other securities by it offered for sale, and to the department of commerce and industry.

Hist. '13, c. 117, § 9, p. 458, reen. C. L. 224:9; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5314. Examination by department. The department of commerce and industry shall have general supervision and control, as provided in this chapter, over any and all investment companies, domestic and foreign doing business in this state and all such investment companies shall be subject to examination by the department of commerce and industry at any time the department may deem it advisable and in the same manner as is now provided for the examination of state banks. The rights, powers, and privileges of the department in connection with such examinations shall be the same as are now provided with reference to examination of state banks; and such investment

company shall pay a fee for each examination of not to exceed $5 for each day or fraction thereof, plus the actual traveling and hotel expenses of the examiner that he is absent from the capitol building for the purpose of making such examination, and the failure or refusal of any investment company to pay such fees upon the demand of the department while making such examination shall work a forfeiture of its right to do business in this state: *Provided,* That not more than two such examinations shall be charged for in any year: *Provided further,* That where examinations of more than one investment company in the same community shall be made the same week the actual traveling expenses of the examiner shall be pro rated between such companies.

Hist. '13, c. 117, § 10, p. 458, reen. C. L. 224:10; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5315. Appointment of receiver. Wherever it shall appear to the department of commerce and industry that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, or is jeopardizing the interest of its stockholders or investors in stocks, bonds or other securities by it offered for sale, or whenever any investment company shall fail or refuse to file any papers, statements or documents required by this chapter, without giving satisfactory reasons therefor, said department shall at once communicate such facts to the attorney general who shall thereupon apply to the supreme court or to the district court where such company is located or is doing business, or to a judge of either of said courts for the appointment of a receiver to take charge of and wind up the business of such investment company, and if such fact or facts be made to appear it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require.

Hist. '13, c. 117, § 11, p. 458, reen. C. L. 224:11; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5316. Penalty for false entry or statement. Any person who shall knowingly or wilfully subscribe to or make or cause to be made any false statement or false entry in any book of such investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of such investment company, or shall make or publish any false statement of the financial condition of such investment company, or the stocks, bonds or other securities by it offered for sale, shall be deemed guilty of a felony, and upon conviction thereof shall be fined not less than $200 nor more than $10,000, and shall be imprisoned for not less than one year nor more than 10 years in the state penitentiary. ['13, c. 117, § 12, p. 459.]

Hist. (See R. C. § 7128) '13, c. 117, § 12, p. 459, reen. C. L. 224:12.

§ 5317. Penalty for selling stock without compliance to act. Any person or persons, agent or agents, who shall sell or attempt to sell the stock, bonds or other securities of any investment company, domestic or foreign, or the stock, bonds or other securities by it offered for sale, who have not complied with the provisions of this chapter, or any investment company, domestic or foreign, which shall do any business, or offer or attempt to do any business, except as provided in section 5306, which shall not have complied with the provisions of this chap-

ter, or any agent or agents who shall do or attempt to do any business for any investment company, domestic or foreign, in this state, which agent is not at the time duly registered and has fully complied with the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than $100 nor more than $5000, or by imprisonment in the county jail for not more than 90 days, or both such fine and imprisonment, at the discretion of the court. ['13, c. 117, § 13, p. 459.]

Hist. '13, c. 117, § 13, p. 459, reen. C. L. 224:13.

§ 5318. Fees to be paid into state treasury: Deputies. All fees herein provided for shall be collected by the department of commerce and industry and turned into the state treasury, and all fees so turned into the state treasury are hereby reappropriated to the department for the purpose of paying all salaries and expenses necessary for the carrying this chapter into effect; the department of commerce and industry is hereby authorized to appoint such clerks and deputies as are actually and absolutely necessary to carry this chapter into full force and effect, none of whom shall be related by blood or marriage to the commissioner of commerce and industry or to any deputies of the department.

All money actually and necessarily paid out by the department to any clerk or deputy appointed under this chapter, as salaries, or any money actually and necessarily paid out by the department, or by any clerk or deputy appointed under this chapter, for traveling or incidental expenses, shall be paid by the state treasurer out of such fees upon the state auditor's warrants, to be issued upon sworn vouchers containing an itemized account of such salaries or expenses.

Hist. '13, c. 117, part of § 14, p. 460; compiled and reen. C. L. 224:14; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Nepotism law: §§ 416-7.

§ 5319. Application to mining corporations. The provisions of this chapter shall not apply to any person, corporation, or association engaged in actual mining operations developing mining property within the state except as hereinafter provided and not otherwise. ['13, c. 117, proviso of § 14, p. 460.]

Hist. '13, c. 117, proviso of § 14, p. 460, reen. C. L. 224:15.

§ 5320. Report of mining corporations to department of commerce and industry. All corporations, domestic or foreign, and associations engaged in mining operations within the state, shall during the month of June each year after the passage and approval of this chapter file with the department of commerce and industry a report which shall be made under oath and shall contain names of each mining claim and the total number of such claims, owned, leased, or otherwise held, forming the basis for the issue of stock certificates, and the number being worked and developed, and the mining district and county in which such property is located; the nature of the title thereof, or interest therein, whether lease holder or otherwise, the character, value and general description of all buildings, works, machinery and other improvements; the total amount and description of all development work done by such corporation or association; the total sum of money or other valuable consideration given or paid out therefor; the total number of shares or certificates that such corporation or association is by law authorized to issue, and the different classes and the par value thereof; total number of shares of stock certificates set aside by such

corporation or association in its treasury to sell or otherwise dispose of for the purpose of working, developing or otherwise improving the property of such corporation or association; the total number of shares of stock or certificates sold and the total sum of money or other consideration received therefor and the number of shares or certificates remaining unsold. All corporations, domestic or foreign, and associations who are not now engaged in mining operations within this state, who desire to engage in mining and mining operations within this state, shall, before engaging in mining and mining operations within this state, make, execute and file such report as is above provided, and such report shall be made and filed by corporations, domestic or foreign, and associations who shall be engaged in mining and mining operations within this state at the time of taking effect of this chapter.

Hist. '13, c. 117, § 15, p. 460; compiled and reen. C. L. 224:16; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Penalty: § 5322.

§ 5321. Copy of report from department. Any person or persons may receive a copy of any such report upon the application to the department of commerce and industry therefor, by paying the fees in such cases made and provided by law.

Hist. '13, c. 117, § 16, p. 461, reen. C. L. 224:17; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5322. Penalty for not filing mining report. It shall be unlawful for any corporation or association to refuse, fail or neglect to make, execute, and file the report provided for in section 5320, and upon conviction thereof such corporation or association shall be deemed guilty of a misdemeanor and punished accordingly. [C. L. 224:18.]

Hist. '13, c. 117, § 17, p. 461; compiled and reen. C. L. 224:18.

§ 5323. Penalty of false report or statement of mining corporations. Any person, corporation, or association, who knowingly makes a false report to the department of commerce and industry as provided by this chapter of or concerning any mining property in this state, or any person, corporation, association, or individual whomsoever, who knowingly makes or publishes in any way whatever, or permits to be so made or published, any book, prospectus, notice, report, statement, exhibit, or other publication of or concerning the affairs, financial condition or property of any corporation, association, joint stock association, copartnership, or individual, which said book, prospectus, notice, report, statement, exhibit, or other publication, shall contain any statement which is false, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned for not more than 10 years or fined not more than $10,000, or shall suffer both such fine and imprisonment.

Hist. '13, c. 117, § 18, p. 461, reen. C. L. 224:19; compiled upon authority '19, c. 8, § 28, p. 56.

§ 5324. Unconstitutional provisions. Should the courts declare any section of this chapter unconstitutional or unauthorized by law, or in conflict with any other section or provision of this chapter, then such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of this chapter. ['13, c. 117, § 19, p. 461.]

Hist. '13, c. 117, § 19, p. 461, reen. C. L. 224:20.

TITLE XL.

CHAPTER 207.

PROPERTY AND OWNERSHIP.

ARTICLE 1.

GENERAL PROVISIONS.

§ 5325. [3056] **Real property defined.** Real property or real estate consists of:

1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer.
2. That which is affixed to land.
3. That which is appurtenant to land. [R. S. § 2825.]

Hist. R. S. § 2825, reen. R. C. § 3056, reen. C. L. ib.

Cross ref. Real property defined: §§ 3101, 9456.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 658; Kerr's C. ib. See Cramer v. Walker (1913) 23 I. 495, 130 P. 1002.

Cited: Welch v. Garrett (1897) 5 I. 639, 51 P. 405; Hall v. Blackman (1902) 8 I. 272, 68 P. 19; Johnson v. Hurst (1904) 10 I. 308, 77 P. 784; Boise Irr. etc. Co. v. Stewart (1904) 10 I. 38, 77 P. 25, 321; (erroneously as § 3656 in dis. op.) Basinger v. Taylor (1917) 30 I. 289, 164 P. 522.

Buildings: A hotel building affixed to land and held and conveyed as real estate, with the land upon which it stands, is real estate within the meaning of this section, and its character as such cannot be changed by the attempted execution of a chattel mortgage purporting to cover the building apart from the land. Beeler v. C. C. Merc. Co. (1902) 8 I. 644, 70 P. 943, 60 L. R. A. 283, 1 Ann. Cas. 310.

Canal systems: Ditches and water rights are real estate under the provisions of this section. Ada County Farmers' Irr. Co. v. Farmers' Canal Co. (1898) 5 I. 793, 51 P. 990, 40 L. R. A. 485; Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 I. 5, 93 P. 789; Brunzell v Stevenson (1917) 30 I. 202, 164 P. 89.

Water rights: A water right is real estate. Knowles v. New Sweden Irr. Dist. (1909) 16 I. 217, 225, 101 P. 81; Neilson v. Parker (1911) 19 I. 727, 115 P. 488; Nampa etc. Irr. Dist. v. Briggs (1915) 27 I. 84, 96, 147 P. 75; Bennett v. Twin Falls etc. Co. (1915) 27 I. 643, 150 P. 336.

And an appurtenance to the land irrigated by the use of such water. Taylor v. Hulett (1908) 15 I. 265, 97 P. 37, 19 L. R. A. (N. S.) 535; Paddock v. Clark (1912) 22 I. 498, 126 P. 1053.

Water permits: A permit to appropriate water is not real property. It is not an appropriation of the public waters of the state but merely the consent given by the state to construct and acquire real property. Speer v. Stephenson (1909) 16 I. 707, 102 P. 365; Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208; Tobey v. Bridgewood (1912) 22 I. 566, 127 P. 172; Basinger v. Taylor (1917) 30 I. 289, 164 P. 522.

A water right is real estate and must be conveyed as real estate, and where one has a valid water permit issued to him by the state engineer he cannot convey the water right secured thereby by simply handing the permit to a would-be purchaser. Gard v. Thompson (1912) 21 I. 485, 123 P. 497.

Shares in mutual irrigation company: While shares in irrigation company have been held to be personal property, ownership of shares in mutual irrigation company not organized for profit is but incidental to ownership of water right. Ireton v. Idaho Irr. Co. (1917) 30 I. 310, 164 P. 687.

§ 5326. [3057] **Personal property defined.** Every kind of property that is not real is personal. [R. S. § 2826.]

Hist. R. S. § 2826, reen. R. C. § 3057, reen. C. L. ib.

Cross ref. Personal property defined in revenue law: § 3102.

Comp. leg.—Cal. Same: Civ. C. 1872, § 663; Kerr's C. ib.

§ 5327. [3058] **Who may own property.** Any person, whether citizen or alien, may take, hold and dispose of property, real or personal. [R. S. § 2827.]

Hist. R. S. § 2827, reen. R. C. § 3058, reen. C. L. ib.

Cross ref. Inheritance by aliens: § 7805.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 671; same but "within this state" added: Kerr's C. ib.

§ 5328. [3059] **Interests in common.** Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, or unless acquired as community property. [R. S. § 2828.]

Hist. R. S. § 2828, reen. R. C. § 3059, reen. C. L. ib.

Cross ref. Community property defined: § 4660. Cointerests deemed to be in common: § 5372.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 686; Kerr's C. ib.

Tenancy in common: Under this section and § 5372 the common law rule of joint tenancy has been abrogated, and every interest in real estate granted or devised to two or more persons, other than executors or trustees, constitutes a tenancy in common, unless expressly declared to the contrary. Powell v. Powell (1912) 22 I. 531, 126 P. 1058.

Incidents of cotenancy: A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and assert it against his companions in interest. The legal title acquired by him is held in trust for the others if they choose within a reasonable time to claim the benefit of the purchase by contributing or offering to contribute their proportion of the purchase money. Wilson v. Linder (1912) 21 I. 576, 123 P. 487, Ann. Cas. 1913E 148, 42 L. R. A. (N. S.) 242.

A tenant in common is entitled to contribution for expenditures absolutely necessary for the benefit and preservation of the common property and to charge the cotenants with their proportion of the reasonable expenses incurred fairly and in good faith for the benefit of the common property. Keyser v. Morehead (1913) 23 I. 501, 130 P. 992.

§ 5329. [3061] **Future interests: When vested.** A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest. [R. S. § 2830.]

Hist. R. S. § 2830, reen. R. C. § 3061, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 694; Kerr's C. ib.

Vesting of future estate: Where a will devises property to the testator's widow for life, with remainder to the testator's son, the title to the property vests immediately in the son upon the death of the testator. Coats v. Harris (1904) 9 I. 458, 75 P. 243.

§ 5330. [3062] **Contingent interests.** A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain. [R. S. § 2831.]

Hist. R. S. § 2831, reen. R. C. § 3062, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 695; Kerr's C. ib.

Cited: Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

§ 5331. [3063] **Alternative future interests.** Two or more future interests may be created to take effect in the alternative; so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly. [R. S. § 2832.]

Hist. R. S. § 2832, reen. R. C. § 3063, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 696; Kerr's C. ib.

§ 5332. [3064] **Inheritance by posthumous children.** When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent. [R. S. § 2833.]

Hist. R. S. § 2833, reen. R. C. § 3064, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 698; Kerr's C. ib.

Cross ref. Unborn child as existing person: § 4584.

§ 5333. [3065] **Transfer and devolution of future interests.** Future interests pass by succession, will and transfer in the same manner as present interests. [R. S. § 2834.]

Hist. R. S. § 2834, reen. R. C. § 3065, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 699; Kerr's C. ib.

§ 5334. [3066] **Possibilities.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind. [R. S. § 2835.]

Hist. R. S. § 2835, reen. R. C. § 3066, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 700; Kerr's C. ib.

Cross ref. Transfer of possibilities: § 5365.

§ 5335. [3067] **Suspension of power of alienation.** The absolute power of alienation can not be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, except in the single case of contingent remainder in fee authorized in section 5340. [R. S. § 2836.]

Hist. R. S. § 2836, reen. R. C. § 3067, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 715; Kerr's C. ib.

§ 5336. [3068] **Future interests defeated.** A future interest, depending on the contingency of the death of any person without successors, heirs, issue or children, is defeated by the birth of a posthumous child of such person capable of taking by succession. [R. S. § 2837.]

Hist. R. S. § 2837, reen. R. C. § 3068, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 739; Kerr's C. ib.

§ 5337. [3069] **Same: Not defeated.** No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise. [R. S. § 2838.]

Hist. R. S. § 2838, reen. R. C. § 3069, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 741; Kerr's C. ib.

§ 5338. [3700] **Same: Premature determination of precedent estate.** No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterward happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period. [R. S. § 2839.]

Hist. R. S. § 2839, reen. R. C. § 3070, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 742; Kerr's C. ib.

ARTICLE 2.

ESTATES IN REAL PROPERTY.

§ 5339. [3071] **Limitation of future estates.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time. [R. S. § 2850.]

Hist. R. S. § 2850, reen. R. C. § 3071, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 767; Kerr's C. ib.

§ 5340. [3072] **Successive remainders in fee.** A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of 21 years, or upon any other contingency by which the estate of such persons may be determined before they attain majority. [R. S. § 2851.]

Hist. R. S. § 2851, reen. R. C. § 3072, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 772; Kerr's C. ib.

Cross ref. Express reference to this section: Suspension of power of alienation: § 5335.

Cited: Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

§ 5341. [3073] **Limitation of successive life estates.** Successive estates for life can not be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created. [R. S. § 2852.]

Hist. R. S. § 2852, reen. R. C. § 3073, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 774; same as amended: Kerr's C. ib.

§ 5342. [3074] **Remainders upon successive life estates.** No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder created upon such estate in a term for years, unless it is for the whole residue of such term. [R. S. § 2853.]

Hist. R. S. § 2853, reen. R. C. § 3074, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 775; same as amended: Kerr's C. ib.

§ 5343. [3075] **Contingent remainder.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation. [R. S. § 2854.]

Hist. R. S. § 2854, reen. R. C. § 3075, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 778; Kerr's C. ib.

Cited: Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

§ 5344. [3076] **Rule in Shelley's case abolished.** When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder, so limited to them, and not as mere successors of the owner for life. [R. S. § 2855.]

Hist. R. S. § 2855, reen. R. C. § 3076, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 779; Kerr's C. ib. See Wilson v. Linder (1910) 18 I. 445, 110 P. 274, 138 A. S. R. 213.

Applied: Under the provisions of this section the common-law rule, generally known as the rule in Shelley's case, has been abrogated, and the term "heirs" has been changed from a word of limitation to one of purchase. Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

§ 5345. [3077] **Power of appointment.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed. [R. S. § 2856.]

Hist. R. S. § 2856, reen. R. C. § 3077, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 781; Kerr's C. ib.

§ 5346. [3078] **Termination of tenancy at will.** A tenancy or other estate at will, however created, may be terminated by the landlord giving notice in writing to the tenant, in the manner prescribed by the Code of Civil Procedure, to remove from the premises within a period of not less than one month, to be specified in the notice. [R. S. § 2857.]

Hist. R. S. § 2857, reen. R. C. § 3078, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 789; Kerr's C. ib.

Cross ref. Service of notice on tenant: § 7323.

§ 5347. [3079] **Same: Rights of landlord.** After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may reenter, or proceed according to law to recover possession. [R. S. § 2858.]

Hist. R. S. § 2858, reen. R. C. § 3079, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 790; Kerr's C. ib.

Cross ref. Proceedings for recovery of possession: §§ 7320-7338.

§ 5348. [3080] **Right of reentry.** Whenever the right of reentry is given to a grantor or a lessor in any grant or lease, or otherwise, such reentry may be made at any time after the right has accrued, upon three days' notice, as provided in the Code of Civil Procedure. [R. S. § 2859.]

Hist. R. S. § 2859, reen. R. C. § 3080, reen. C. L. ib. **Comp. leg.—Cal.** Similar: Civ. C. 1872, § 791; Kerr's C. ib.

Cross ref. Service of notice: § 7323.

§ 5349. [3081] **Summary proceedings: Where provided for.** Summary proceedings for obtaining possession of real property forcibly entered, or forcibly and unlawfully detained, are provided for in the Code of Civil Procedure. [R. S. § 2860.]

Hist. R. S. § 2860, reen. R. C. § 3081, reen. C. L. ib. **Comp. leg.—Cal.** Similar: Civ. C. 1872, § 792; Kerr's C. ib.

Cross ref. Summary proceedings: §§ 7320-7338.

§ 5350. [3082] **Action for real property: Notice unnecessary.** An action for the possession of real property, leased or granted, with a right of reentry, may be maintained at any time, in the district court, after the right to reenter has accrued, without notice. [R. S. § 2861.]

Hist. R. S. § 2861, reen. R. C. § 3082, reen. C. L. ib. **Comp. leg.—Cal.** Similar: Civ. C. 1872, § 793; Kerr's C. ib.

ARTICLE 3.

RIGHTS AND OBLIGATIONS OF OWNERS.

§ 5351. [3083] **Rights of grantees against grantor's tenants.** A person to whom any real property is transferred or devised, upon which rent has been reserved or to whom such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had. [R. S. § 2875.]

Hist. R. S. § 2875, reen. R. C. § 3083, reen. C. L. ib. **Comp. leg.—Cal.** Similar: Civ. C. 1872, § 821; Kerr's C. ib.

§ 5352. [3084] **Remedies of lessor against lessee's assignee.** Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises. [R. S. § 2876.]

Hist. R. S. § 2876, reen. R. C. § 3084, reen. C. L. ib. **Comp. leg.—Cal.** Similar: Civ. C. 1872, § 822; Kerr's C. ib.

§ 5353. [3085] **Remedies of lessee against lessor's assignee.** Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incumbrances or relating to the title or possession of the premises. [R. S. § 2877.]

Hist. R. S. § 2877, reen. R. C. § 3085, reen. C. L. ib. **Comp. leg.—Cal.** Same: Civ. C. 1872, § 823; Kerr's C. ib.

§ 5354. [3086] **Recovery of rent on lease for life.** Rent due upon a lease for life may be recovered in the same manner as upon a lease for years. [R. S. § 2878.]

Hist. R. S. § 2878, reen. R. C. § 3086, reen. C. L. ib. **Comp. leg.—Cal.** Same: Civ. C. 1872, § 824; Kerr's C. ib.

§ 5355. [3087] **Same: Recovery after death.** Rent dependent on the life of a person may be recovered after as well as before his death. [R. S. § 2879.]

Hist. R. S. § 2879, reen. R. C. § 3087, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 825; Kerr's C. ib.

§ 5356. [3088] **Action by reversioners.** A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action. [R. S. § 2880.]

Hist. R. S. § 2880, reen. R. C. § 3088, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 826; Kerr's C. ib.

§ 5357. [3089] **Change in terms of lease.** In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least 15 days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month. [R. S. § 2881.]

Hist. R. S. § 2881, reen. R. C. § 3089, reen. C. L. ib.

Comp. leg.—Cal. Same: Kerr's C. § 827.

§ 5358. [3090] **Removal of fixtures by tenant.** A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for the purposes of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises. [R. S. § 2882.]

Hist. R. S. § 2882, reen. R. C. § 3090, reen. C. L. ib.

What constitutes fixtures: Property consisting of a front and back bar, ice chest, etc., placed in a saloon building by a tenant and fastened to the wall and floor, constitute trade fixtures and may be removed by the tenant during the continuance of his term. Bush v. Havird (1906) 12 I. 352, 86 P. 529.

Time for removal: Trade fixtures must be removed by the tenant during the continuance of his term; the right to remove them is lost after a surrender of possession by the tenant, or eviction by the landlord by summary proceedings. Ib.

§ 5359. [3091] **Ownership of street by abutter.** An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown. [R. S. § 2883.]

Hist. R. S. § 2883, reen. R. C. § 3091, reen. C. L. ib.

Cross ref. Reversion of vacated street in municipality: § 3963; other disposition: § 3979.

Comp. leg.—Cal. Same: Civ. C. 1872, § 831; Kerr's C. ib.

Cited: Shaw v. Johnston (1910) 17 I. 676, 107 P. 399; (in brief of counsel) Smith v. Stanfield (1916) 29 I. 190, 193 (see p. 200).

§ 5360. [3092] **Right to lateral and subjacent support.** Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjacent land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavation. [R. S. § 2884.]

Hist. R. S. § 2884, reen. R. C. § 3092, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 832; similar: Kerr's C. ib.

Want of care: Excavation by an owner on his own land, causing damage to a building on an adjoining owner's land, without the knowledge of, or previous notice to, such adjoining owner, is evidence of want of care in doing the work. Zilka v. Graham (1914) 26 I. 163, 141 P. 639.

§ 5361. [3093] **Duties of tenant for life.** The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance. [R. S. § 2885.]

Hist. R. S. § 2885, reen. R. C. § 3093, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 840; Kerr's C. ib.

§ 5362. [3094] **Monuments and fences.** Coterminus owners are mutually bound equally to maintain:

1. The boundaries and monuments between them.
2. The fences between them, unless one of them chooses to let his land lie without fencing, in which case, if he afterward incloses it, he must refund to the other the just proportion of the value, at that time, of any division fence made by the latter. [R. S. § 2886.]

Hist. R. S. § 2886, reen. R. C. § 3094, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 841; Kerr's C. ib.

Cross ref. Erection, maintenance and repair of partition fences: §§ 1956-1967.

ARTICLE 4.

PERSONAL PROPERTY.

§ 5363. [3095] **Conflict of laws.** If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner and is governed by the law of his domicile. [R. S. § 2890.]

Hist. R. S. § 2890, reen. R. C. § 3095, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 946; Kerr's C. ib.

Devolution of personal property: Shares of stock in a corporation are personal property and descend according to the laws of the state which was the domicile of the owner at the time of his death, and the certificates of shares of corporate stock, which constitute evidence of ownership, are transferred according to the laws of the state wherein the corporation was organized. S. v. Dunlap (1916) 28 I. 784, 156 P. 1141.

This section governs devolution of community personal property, modifying § 7803. Vansickle v. Hazeltine (1916) 29 I. 228, 158 P. 326.

§ 5364. [3096] **Transfer and devolution of things in action.** A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office. [R. S. § 2891.]

Hist. R. S. § 2891, reen. R. C. § 3096, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 954; Kerr's C. ib.

TITLE XLI.

CHAPTER 208.

TRANSFERS.

Cross ref. Transfers by succession are provided for in §§ 7791-7807 of the Code of Civil Procedure and transfers by will in §§ 7808-7841 of that code.

ARTICLE 1.

TRANSFERS IN GENERAL.

§ 5365. [3097] **Transfer of possibilities.** A mere possibility not coupled with an interest can not be transferred. [R. S. § 2900.]

Hist. R. S. § 2900, reen. R. C. § 3097, reen. C. L. ib.

Cross ref. Possibilities defined: § 5334.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1045; Kerr's C. ib.

Cited: (In brief of counsel) S. v. Hoover (1911) 19 I. 299.

§ 5366. [3098] **Right of reentry is transferable.** A right of reentry or of repossession for breach of condition subsequent can be transferred. [R. S. § 2901.]

Hist. R. S. § 2901, reen. R. C. § 3098, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1046; Kerr's C. ib.

§ 5367. [3099] **Transfer by disseizee.** Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession. [R. S. § 2902.]

Hist. (See '64, p. 528, § 33) R. S. § 2902, reen. R. C. 3099, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1047; Kerr's C. ib.

§ 5368. [3100] **Oral transfers.** A transfer may be made without writing, in every case in which a writing is not expressly required by statute. [R. S. § 2903.]

Hist. R. S. § 2903, reen. R. C. § 3100, reen. C. L. ib.

Cross ref. Transfers required to be in writing: §§ 7974-5.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1052; Kerr's C. ib.

§ 5369. [3101] **Transfer in writing: How designated.** A transfer in writing is called a grant, or conveyance, or bill of sale. [R. S. § 2904.]

Hist. R. S. § 2904, reen. R. C. § 3101, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1053; additional provision as amended: Kerr's C. ib.

§ 5370. [3102] **Words of inheritance not required.** Words of inheritance or succession are not requisite to transfer a fee in real property. [R. S. § 2905.]

Hist. (See '64, p. 528, § 43) R. S. § 2905, reen. R. C. § 3102, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1072; Kerr's C. ib.

§ 5371. [3103] **Grant effective on death without heirs.** Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor. [R. S. § 2906.]

Hist. (See '64, p. 528, § 44) R. S. § 2906, reen. R. C. § 3103, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1071; Kerr's C. ib.

§ 5372. [3104] **Cointerests deemed to be in common.** Every interest in real estate granted or devised to two or more persons, other than

executors or trustees, as such constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise. [R. S. § 2907.]

Hist. (See '64, p. 528, § 42) R. S. § 2907, reen. R. C. § 3104, reen. C. L. ib.

Tenancy in common: Under this section and § 5328 the common-law rule of joint tenancy has been abrogated, and every interest in real estate granted or devised to two or more persons, other than executors or trustees, constitutes a tenancy in common, unless expressly declared to the contrary. Powell v. Powell (1912) 22 I. 531, 126 P. 1058.

ARTICLE 2.

TRANSFER OF REAL PROPERTY.

§ 5373. [3105] **Conveyance: How made.** A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. [R. S. § 2920.]

Hist. (See '64, p. 528, § 1) R. S. § 2920, reen. R. C. § 3105, reen. C. L. ib.

Cross ref. Transfers of real property must be in writing: §§ 7974-5.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1091; Kerr's C. ib.

Cited: First Nat. Bk. of Lewiston v. Williams (1890) 2 I. 670, 23 P. 552.

§ 5374. [3110] **Conveyance by attorney in fact.** When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact. [R. S. § 2925.]

Hist. R. S. § 2925, reen. R. C. § 3110, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1095; Kerr's C. ib.

§ 5375. [3111] **Easements pass with property.** A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. [R. S. § 2926.]

Hist. R. S. § 2926, reen. R. C. § 3111, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1104; Kerr's C. ib. Russell v. Irish (1911) 20 I. 194, 200, 118 P. 501.

Applied: By a transfer of a tract of land on which the waters obtained by water right have been used by the person whose estate is transferred, the purchaser acquires the right to continue the use and enjoyment of such water right as the same had been previously used and enjoyed by the owner. Russell v. Irish (1911) 20 I. 194, 118 P. 501.

§ 5376. [3112] **Fee presumed to pass.** A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended. [R. S. § 2927.]

Hist. (See '64, p. 528, § 43) R. S. § 2927, reen. R. C. § 3112, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1105; Kerr's C. ib.

Easements: In a dedication of streets and alleys to the use of the public it will not be presumed that the owner granted a greater estate than that which the public requires; it will not be presumed that he intended to convey to the city, in fee, the title to the streets. Shaw v. Johnson (1910) 17 I. 676, 107 P. 399.

§ 5377. [3113] **Acquisition of subsequent title by grantor.** Where a person purports by proper instrument to convey or grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors. [R. S. § 2928.]

Hist. (See '64, p. 528, § 32) R. S. § 2928, reen. R. C. § 3113, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1106; Kerr's C. ib.

§ 5378. [3114] **Conclusiveness of conveyance: Bona fide purchasers.** Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for

a valuable consideration, acquires a title or lien by an instrument that is first duly recorded. [R. S. § 2929.]

Hist. R. S. § 2929, reen. R. C. § 3114, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1107; Kerr's C. ib.

§ 5379. [3115] **Unauthorized grant by life tenant.** A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer. [R. S. § 2930.]

Hist. R. S. § 2930, reen. R. C. § 3115, reen. C. L. ib.

Comp. leg.—Cal. Civ. C. 1872, § 1108; Kerr's C. ib.

§ 5380. [3116] **Defeat of grant on condition subsequent.** Where a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged for record. [R. S. § 2931.]

Hist. R. S. § 2931, reen. R. C. § 3116, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1109; Kerr's C. ib.

§ 5381. [3117] **Grant on condition precedent.** An instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property. Upon compliance with the condition, the grantee is entitled to a grant or conveyance, from the grantor or his successors, for the property, duly acknowledged for record. [R. S. § 2932.]

Hist. R. S. § 2392, reen. R. C. § 3117, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1110; different as amended: Kerr's C. ib.

§ 5382. [3118] **Grant of rents, reversions or remainders.** Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, has paid rent to the grantor, must suffer any damage thereby. [R. S. § 2933.]

Hist. (See '64, p. 528, § 47) R. S. § 2933, reen. R. C. § 3118, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1111; Kerr's C. ib.

§ 5383. [3119] **Grant of land bounded by highway.** A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front, to the center thereof, unless a different intent appears from the grant. [R. S. § 2934.]

Hist. R. S. § 2934, reen. R. C. § 3119, reen. C. L. ib.

Cited: (In brief of counsel) Johnson v. Johnson (1908) 14 I. 561.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1112; same as amended: Kerr's C. ib.

§ 5384. [3120] **Covenants implied from grant.** From the use of the word "grant" in any conveyance by which an estate of inheritance, possessory right, or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance. [R. S. § 2935.]

Hist. (See '64, p. 528, § 50) R. S. § 2935, reen. R. C. § 3120, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1113; Kerr's C. ib.

Construed: The word "grant" covenants that prior to the instant conveyance the grantor has not conveyed to any other, and that the property is free from encumbrance made or suffered by the grantor or any one claiming under him.

"Suffered" as used in this section implies reasonable control and it cannot be held to apply to an encumbrance not caused by the act of the party nor within his power to prevent.

An encumbrance is not contemplated by this section unless the grantor was under personal obligation to pay it.

Unless a grantee agrees to pay taxes levied prior to his acquisition of title same are not encumbrances herein.

Implied and express covenants should be construed together, unless it clearly appears that the express covenant was intended to restrict the implied. Polak v. Mattson (1912) 22 I. 727, 128 P. 89.

Implied covenants: The word "grant" in a conveyance is a covenant that the estate so conveyed is, at the time of the execution thereof, free from encumbrances done, made or suffered by the grantor or any person claiming under him, but is not a warranty of title or a covenant of quiet enjoyment against encumbrances. Warren v. Stoddart (1899) 6 I. 692, 59 P. 540; Moore v. Pooley (1909) 17 I. 57, 61, 104 P. 898.

Notice of encumbrance: Grantor not liable on warranties of title, where grantee knew of existing liens, charges against the land, but not against grantor personally. (Morgan, J. dissents) Urich v. McPherson (1915) 27 I. 319, 149 P. 295.

By the word "grant" the grantor agrees to hold the grantee harmless from any liens existing against the property at the time of the transfer, if filed and enforced. (Dis. op.) Urich v. McPherson, supra.

§ 5385. [3121] **Incumbrances defined.** The term "incumbrances" includes taxes, assessments, and all liens upon real property. [R. S. § 2936.]

Hist. R. S. § 2936, reen. R. C. § 3121, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1114; same as amended: Kerr's C. ib.

Held to be encumbrances: Private roadway. Newmyer v. Roush (1912) 21 I. 106, 120 P. 464, Ann. Cas. 1913D 433. Mechanics' liens. (Dis. op.) Urich v. McPherson (1915) 27 I. 319, 149 P. 295.

Held not to be encumbrances: Canal rights of way. Schurger v. Moorman (1911) 20 I. 97, 117 P. 122, Ann. Cas. 1912D 1114, 36 L. R. A. (N. S.) 313. Public highway. Newmyer v. Roush (1912) 21 I. 106, 120 P. 464, Ann. Cas. 1913D 433. Taxes prior to ownership. Polak v. Mattson (1912) 22 I. 727, 128 P. 89.

§ 5386. [3122] **Lineal and collateral warranties abolished.** Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law . [R. S. § 2937.]

Hist. (See '64, p. 528, § 49) R. S. § 2937, reen. R. C. § 3122, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1115; Kerr's C. ib.

ARTICLE 3.

ACKNOWLEDGMENTS.

Cross ref. Express reference to this article: Acknowledgments necessary to authorize record: § 5417.

§ 5387. [3123] **By whom taken.** The proof or acknowledgment of an instrument may be made at any place within this state, before a justice or clerk of the supreme court. [R. S. § 2950.]

Hist. (See '64, p. 528, § 4) R. S. § 2950, reen. R. C. § 3123, reen. C. L. ib.

Cross ref. Judicial officers may take acknowledgments: § 6505.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1180; "or a judge of a superior court" added as amended: Kerr's C. ib.

Cited: Bunnell & Eno etc. Co. v. Curtis (1897) 5 I. 652, 51 P. 767.

§ 5388. [3124] **Same: Continued.** The proof or acknowledgment of an instrument may be made in this state within the city, county or district for which the officer was elected or appointed, before either:

1. A judge or clerk of a court of record; or,
2. A county recorder; or,
3. A notary public; or,
4. A justice of the peace. [R. S. § 2951.]

Hist. (See '64, p. 528, § 4) R. S. § 2951, reen. R. C. § 3124, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1181; amended: Kerr's C. ib.

Cross ref. Officers who may take acknowledgments: Notaries: § 211; judicial officers: § 6505.

§ 5389. [3125] **Same: Outside of state.** The proof or acknowledgment of an instrument may be made without this state, but within the United States, and within the jurisdiction of the officer, before either:

1. A justice, judge or clerk of any court of record of the United States; or,
2. A justice, judge or clerk of any court of record of any state or territory; or,
3. A commissioner appointed by the governor of this state for that purpose; or,
4. A notary public, or,
5. Any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment. [R. S. § 2952.]

Hist. (See '64, p. 528, § 4) R. S. § 2952, reen. R. C. § 3125, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1182; Kerr's C. ib.

Cross ref. Commissioners of deeds may take acknowledgments: § 220.

§ 5390. [3126] **Same: Outside United States.** The proof of acknowledgment of an instrument may be made without the United States, before either:

1. A minister, commissioner or charge d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,
2. A consul or vice consul of the United States resident in the country where the proof or acknowledgment is made; or,
3. A judge of a court of record of the country where the proof or acknowledgment is made; or,
4. Commissioners appointed for such purposes by the governor of the state pursuant to statute; or,
5. A notary public. [R. S. § 2953.]

Hist. (See '64, p. 528, § 4) R. S. § 2953, reen. R. C. § 3126, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1183; similar as amended: Kerr's C. ib.

§ 5391. [3127] **Acknowledgments before deputies.** When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal. [R. S. § 2954.]

Hist. R. S. § 2954, reen. R. C. § 3127, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1184; Kerr's C. ib.

§ 5392. [3128] **Requisites for acknowledgment.** The acknowledgment of an instrument must not be taken, unless the officer taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in, and who executed, the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation. [R. S. § 2955.]

Hist. (See '64, p. 528, § 6) R. S. § 2955, reen. R. C. § 3128, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1185; similar as amended: Kerr's C. ib.

Duty of officer: An officer taking an acknowledgment is not required to see the person sign the instrument nor to witness the instrument, but is required to ascertain whether or not the party acknowledges the instrument as his or her obligation or contract, and as having been executed by him or her. First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

§ 5393. [3129] **Acknowledgment by married woman.** The acknowledgment of a married woman to any instrument in writing shall be taken and certified to in the same manner and form as that of a single person, and must be substantially in the form prescribed by section 5395. ['07, p. 5, § 1.]

Hist. '07, p. 5, § 1, reen. R. C. § 3129, reen. C. L. ib.

Repeal: This section repealed R. S. §§ 2956 and 2960. The repealed sections provided that "the acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken, unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution," and prescribed a corresponding form of certificate.

Decisions construing the repealed sections are as follows:

R. S. § 2956: Cited: Christenson v. Holnligsworth (1898) 6 I. 87, 53 P. 211.

Conveyance of husband: A conveyance of common property occupied by husband and wife is invalid where none of the requirements of this section are complied with by the officer taking the acknowledgment. Wilson v. Wilson (1899) 6 I. 597, 57 P. 708.

Sufficiency of acknowledgment: A certificate of acknowledgment which shows that the acknowledgment of the husband was taken separate and apart from the wife, and that the wife's acknowledgment was not taken separate and apart from the husband, is void. Co-op. Sav. & Loan Assn. v. Green (1897) 5 I. 661, 51 P. 770.

Where the contents of an instrument are explained to a married woman and she states that it is all right with her if it is with her husband, and that whatever he does or says is all right, the notary is justified in attaching his certificate of acknowledgment thereto. First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

Validity of certificate: Where a certificate of acknowledgment is regular in form, its validity will be sustained in the absence of clear and convincing proof that the provisions of this section were not complied with. Gray v. Law (1899) 6 I. 559, 57 P. 435.

R. S. § 2960: Cited: Co-op. etc. Assn. v. Green (1897) 5 I. 660, 51 P. 770; Gray v. Law (1899) 6 I. 559, 57 P. 435; First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623; Booth Merc. Co. v. Murphy (1908) 14 I. 212, 93 P. 777.

Substantial compliance sufficient: The certificate of acknowledgment need not follow the exact words of the statute, but it is sufficient if it substantially complies therewith. Christensen v. Hollingsworth, supra; N. W. & Pac. Hypotheek Bk. v. Rauch (1898) 5 I. 752, 51 P. 764; Curtis v. Bunnell etc. Co. (1898) 6 I. 298, 55 P. 659.

A certificate stating that the notary apprised the wife of the contents of the instrument, of her rights, and of the effect of signing the same, and that she did then freely and voluntarily, separate and apart from her husband, sign and acknowledge said instrument, is sufficient. N. W. & Pac. Hypotheek Bk. v. Rauch, supra.

§ 5394. [3130] **Certificate of acknowledgment.** An officer taking the acknowledgment of an instrument must indorse thereon a certificate substantially in the forms hereinafter prescribed. [R. S. § 2957.]

Hist. (See '64, p. 528, § 5) R. S. § 2957, reen. R. C. § 3130, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1188; similar as amended: Kerr's C. ib.

Impeachment of certificate: A notary may not testify to any fact tending to impeach a certificate of acknowledgment made by him. First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

§ 5395. [3131] **Same: Form.** The certificate of acknowledgment, unless it is otherwise in this chapter provided, must be substantially in the following form:

State of Idaho, county of....., ss.

On this.....day of....., in the year of....., before me (here insert the name and quality of the officer), personally appeared....., known to me (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same. [R. S. § 2958.]

Hist. (See '64, p. 528, § 8) R. S. § 2958, reen. R. C. § 3131, reen. C. L. ib.

Cross ref. Express reference to this section: Acknowledgment by married woman: § 5393.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1189; additional provision as amended: Kerr's C. ib.

§ 5396. [3132] **Same: Acknowledgment by corporation.** The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of Idaho, county of....., ss.
On this.....day of....., in the year....., before me (here insert the name and quality of the officer), personally appeared....., known to me (or proved to me on the oath of.....), to be the president (or secretary) of the corporation that executed the instrument and acknowledged to me that such corporation executed the same. [R. S. § 2959.]

Hist. R. S. § 2959, reen. R. C. § 3132, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1190; similar with additional provision: Kerr's C. ib.

§ 5397. [3133] **Same: Acknowledgment by attorney.** The certificate of acknowledgment by an attorney in fact must be substantially in the following form:

State of Idaho, county of....., ss.
On this.....day of....., in the year....., before me (here insert the name and quality of the officer), personally appeared....., known to me (or proved to me on the oath of.....) to be the person whose name is subscribed to the within instrument as the attorney in fact of....., and acknowledged to me that he subscribed the name of..... thereto as principal, and his own name as attorney in fact. [R. S. § 2961.]

Hist. R. S. § 2961, reen. R. C. § 3133, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1192; Kerr's C. ib.

Cross ref. Power must be recorded before conveyance by attorney: § 5418.

§ 5398. [3134] **Authentication of certificate.** Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also their seals of office, if by the laws of the territory, state or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals. [R. S. § 2962.]

Hist. (See '64, p. 528, § 5) R. S. § 2962, reen. R. C. § 3134, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1193; Kerr's C. ib.

§ 5399. [3135] **Certificate by justice: Authentication.** The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the recorder of the county in which the justice resides, setting forth that such justice, at the time of taking such proof or acknowledgment, was authorized to take the same, and that the recorder is acquainted with his handwriting, and believes that the signature to the original certificate is genuine. [R. S. § 2963.]

Hist. R. S. § 2963, reen. R. C. § 3135, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1194; Kerr's C. ib.

§ 5400. [3136] **Proof of execution.** Proof of the execution of an instrument, when not acknowledged, may be made either:

1. By the parties executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses in the cases hereinafter mentioned. [R. S. § 2964.]

Hist. (See '64, p. 528, § 10) R. S. § 2964, reen. R. C. § 3136, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1195; Kerr's C. ib.

§ 5401. [3137] **Identity of witness must be known or proven.** If by a subscribing witness such witness must be personally known to the officer taking the proof, to be the person whose name is subscribed to the instrument, as a witness, or must be proved to be such by the oath of a credible witness. [R. S. § 2965.]

Hist. (See '64, p. 528, § 11) R. S. § 2965, reen. R. C. § 3137, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1196; Kerr's C. ib.

§ 5402. [3138] **Proof of identity of grantor.** The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness. [R. S. § 2966.]

Hist. (See '64, p. 528, § 12) R. S. § 2966, reen. R. C. § 3138, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1197; Kerr's C. ib.

§ 5403. [3139] **Proof of instrument by handwriting.** The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are nonresidents of the state; or,
3. When the place of their residence is unknown to the party desiring the proof, and can not be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself or can not be found by the officer, by the exercise of due diligence, in attempting to serve the subpoena or attachment; or,
5. In case of the continued failure or refusal of the witness to testify for the space of one hour, after his appearance. [R. S. § 2967.]

Hist. (See '64, p. 528, § 14) R. S. § 2967, reen. R. C. § 3139, reen. C. L. ib.

Cited: Bell v. Shields (1910) 18 I. 649, 111 P. 1076.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1198; Kerr's C. ib.

§ 5404. [3140] **Same: What evidence must prove.** The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,
2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,
3. That the witness testifying personally knew the person who subscribed the instrument as a witness; and is well acquainted with his signature, and that it is genuine; and,
4. The place of residence of the witness. [R. S. § 2968.]

Hist. (See '64, p. 528, § 15) R. S. § 2968, reen. R. C. § 3140, reen. C. L. ib.

Cited:. Bell v. Shields (1910) 18 I. 649, 111 P. 1076.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1199; same as amended: Kerr's C. ib.

§ 5405. [3141] **Certificate of proof.** An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony. [R. S. § 2969.]

Hist. R. S. § 2969, reen. R. C. § 3141, reen. C. L. ib.

Cited:. Bell v. Shields (1910) 18 I. 649, 111 P. 1076.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1200; Kerr's C. ib.

§ 5406. [3142] **Authority of officers taking proof.** Officers authorized to take proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations as prescribed in the Code of Civil Procedure.
2. To employ and swear interpreters.
3. To issue subpoenas, as prescribed in the Code of Civil Procedure.
4. To punish for contempt as prescribed in the Code of Civil Procedure.

The civil damages and forfeiture to the party aggrieved are prescribed in the Code of Civil Procedure for a witness disobeying a subpoena. [R. S. § 2970.]

Hist. (See '64, p. 528, §§ 16, 17) R. S. § 2970, reen. R. C. § 3142, reen. C. L. ib.

Cross ref. Issuance of subpoena: § 7982. Civil damages and forfeiture for disobedience: § 7988. Punishment for contempt: §§ 7383-7396.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1201; Kerr's C. ib.

Cited: Bell v. Shields (1910) 18 I. 649, 111 P. 1076.

§ 5407. [3143] **Correction of defective certificate.** When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate. [R. S. § 2971.]

Hist. R. S. § 2971, reen. R. C. § 3143, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1202; "superior" for "district" court as amended: Kerr's C. ib.

Cited: Booth Merc. Co. v. Murphy (1908) 14 I. 212, 93 P. 777.

Application: This section refers to all defective certificates of acknowledgment, whether made by a married or single person. Bunnell & Eno Inv. Co. v. Curtis (1897) 5 I. 652, 51 P. 767.

Time for correction: Where a certificate of acknowledgment or a declaration of homestead is fatally defective, the homestead claimant can have the same reformed after a sale of the homestead on execution, so as to preserve the homestead for the claimant as against the execution purchaser. Burbank v. Kirby (1898) 6 I. 210, 55 P. 295.

§ 5408. [3144] **Action to prove instrument.** Any person interested under an instrument entitled to be proved for record may institute an action in the district court against the proper parties to obtain a judgment proving such instrument. [R. S. § 2972.]

Hist. R. S. § 2972, reen. R. C. § 3144, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1203; "superior" for "district" court as amended: Kerr's C. ib.

§ 5409. [3145] **Judgment entitles instrument to record.** A certified copy of the judgment in a proceeding instituted under either of the two preceding sections, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with like effect as if acknowledged. [R. S. § 2973.]

Hist. R. S. § 2973, reen. R. C. § 3145, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1204; Kerr's C. ib.

§ 5410. [3146] **Prior instruments not affected.** The legality of the execution, acknowledgment, proof, form or record of any conveyance or other instrument made before this code goes into effect, executed, acknowledged, proved or recorded, is not affected by anything contained in this chapter, but depends for its validity and legality upon the laws in force when the act was performed. [R. S. § 2974.]

Hist. (See '64, p. 528, § 41) R. S. § 2974, reen. R. C. § 3146, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1205; Kerr's C. ib.

§ 5411. [3147] **Same: Record of such instruments.** All conveyances of real property made before this code goes into effect, and acknowledged or proved, according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be

recorded in the same manner and with like effect, as conveyances executed and acknowledged in pursuance of this chapter. [R. S. § 2975.]

Hist. (See '64, p. 528, § 40) R. S. § 2975, reen. R. C. § 3147, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1206; Kerr's C. ib.

§ 5412. Same: Record as notice. Any instrument affecting the title to real property which heretofore or on or before 60 days after the adjournment of the legislature of the state of Idaho for 1919, is copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and incumbrancers, notwithstanding any defect, omission or informality in the execution of the instrument, or in the certificate of acknowledgment thereof; but nothing herein affects the rights of previous purchasers or incumbrancers. Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded, provided it be first shown that the original instrument was genuine. [C. L. § 3148.]

Hist. R. S. § 2976; am. '07, p. 28, § 1; am. R. C. § 3148; compiled and reen. C. L. § 3148.

Cross ref. Record as notice: § 5423.

Comp. leg.—Cal. Similar as amended: Kerr's C. § 1207.

Cited: Bunnell & Eno Inv. Co. v. Curtis (1897) 5 I. 652, 51 P. 767.

ARTICLE 4.

RECORDING TRANSFERS.

Cross ref. For books of record, manner of recording, and indexes, see §§ 3633-3651. Fees of recorder: § 3706.

§ 5413. [3149] **What may be recorded.** Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter. [R. S. § 2990.]

Hist. R. S. § 2990, reen. R. C. § 3149, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1158; Kerr's C. ib.

Cited: Smith v. Kessler (1912) 22 I. 589, 127 P 172.

§ 5414. [3150] **Recording judgments.** Judgments affecting the title to or possession of real property, authenticated by the certificate of the clerk of the court in which such judgments were rendered, may be recorded without acknowledgment or further proof. [R. S. § 2991.]

Hist. R. S. § 2991, reen. R. C. § 3150, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1159; additional provision as amended: Kerr's C. ib.

Cited: Sheffield v. Cleland (1911) 19 I. 612, 115 P. 20.

Effect of unrecorded judgment: A judgment entered in a court of competent jurisdiction has the same actual and constructive notice to the parties and privies to the suit and serves the same purpose as is provided by the recording statute. Smith v. Kessler (1912) 22 I. 589, 127 P. 172.

§ 5415. [3151] **United States patents.** Letters patent from the United States executed and authenticated pursuant to existing law may be recorded without further proof. [R. S. § 2992.]

Hist. R. S. § 2992, reen. R. C. § 3151, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1160; as amended: Kerr's C. ib.

§ 5416. [3152] **Notices of location.** Certificates and notices of location authorized by law, with the affidavits attached, may be recorded without acknowledgment or further proof. [R. S. § 2993.]

Hist. R. S. § 2993, reen. R. C. § 3152, reen. C. L. ib.

Comp. leg. — Cal. See Kerr's Civ. C. § 1159.

§ 5417. [3153] **Acknowledgment necessary to authorize record.** Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or proved, and the acknowledgment or proof, certified in the manner prescribed by article

3 of this chapter: *Provided,* That if such instrument shall have been executed and acknowledged in any other state or territory of the United States, or in any foreign country, according to the laws of the state, territory or country wherein such acknowledgment was taken, the same shall be entitled to record, and a certificate of acknowledgment indorsed upon or attached to any such instrument purporting to have been made in any such state, territory or foreign country, shall be prima facie sufficient to entitle the same to such record. ['07, p. 6, § 1.]

Hist. R. S. § 2994; am. '07, p. 6, § 1, reen. R. C. § 3153, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 1161; as amended: Kerr's C. ib.

Cited: Bell v. Shields (1910) 18 I. 649, 653, 111 P. 1076; Harris v. Reed (1912) 21 I. 364, 121 P. 780; Keane v. Kibble (1915) 28 I. 274, 154 P. 972.

§ 5418. [3154] **Power must be recorded before conveyance by attorney.** An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office. [R. S. § 2995.]

Hist. R. S. § 2995, reen. R. C. § 3154, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1163; repealed 1874.

§ 5419. [3155] **Recorder's fee to be indorsed.** The recorder must in all cases indorse the amount of his fee on the instrument recorded, and on the record thereof. [R. S. § 2996.]

Hist. R. S. § 2996, reen. R. C. § 3155, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 1172; Kerr's C. ib.

§ 5420. [3156] **Place of record.** Instruments entitled to be recorded must be recorded by the county recorder of the county in which the real property affected thereby is situated. [R. S. § 2997.]

Hist. (See '64, p. 528, § 23) R. S. § 2997, reen. R. C. § 3156, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1169; Kerr's C. ib.

§ 5421. [3157] **When deemed recorded.** An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the recorder's office with the proper officer for record. [R. S. § 2998.]

Hist. R. S. § 2998, reen. R. C. § 3157, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1170; amended: Kerr's C. ib.

When recorded: Paper is recorded when deposited with proper custodian and fee tendered. The failure of officer to place thereon proper filing marks does not destroy filing. O'Connor v. Comrs. of Bear Lake Co. (1909) 17 I. 346, 350, 105 P. 560.

§ 5422. [3158] **Books of record.** Grants and conveyances absolute in terms, are to be recorded in one set of books and mortgages in another. [R. S. § 2999.]

Hist. R. S. § 2999, reen. R. C. § 3158, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1171; Kerr's C. ib.

§ 5423. [3159] **Record as notice.** Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. [R. S. § 3000.]

Hist. (See '64, p. 528, § 24) R. S. § 3000, reen. R. C. § 3159, reen. C. L. ib.

Cross ref. Record as notice: § 5412.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1213; additional provision as amended: Kerr's C. ib.

Cited: Smith v. Kessler (1912) 22 I. 589, 127 P. 172; Ewald v. Hufton, 31 I. 373, 173 P. 247.

Conveyances by strangers: The conveyance of real property which this section provides shall constitute constructive notice to "subsequent purchasers and mortgagees" is a conveyance made by the person from whom such "subsequent purchaser or mortgagee" is compelled to deraign his title, and has no reference to and does not include conveyances made by strangers to the record title. Harris v. Reed (1912) 21 I. 364, 121 P. 780.

Conveyance not acknowledged: Under the provisions of this section a recorded conveyance of real property which has not been acknowledged or proved and certified as required by law, does not impart constructive notice of its contents to subsequent purchasers and mortgagees. Harris v. Reed, supra.

§ 5424. [3160] **Unrecorded conveyance void.** Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded. [R. S. § 3001.]

Hist. (See '64, p. 528, § 25) R. S. § 3001, reen. R. C. § 3160, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1214; similar as amended: Kerr's C. ib.

Cited: Harris v. Reed (1912) 21 I. 364, 121 P. 780; Smith v. Kessler (1912) 22 I. 589, 127 P. 172.

Applied: Unrecorded deed of ditch invalid against purchaser. Swank v. Sweetwater Irr. Co. (1908) 15 I. 353, 98 P. 297. Mortgage upheld as against prior deed; fraud also involved. Blucher v. Shaw (1914) 26 I. 497, 144 P. 342. Mortgage upheld as lien even upon unrecorded contract making water appurtenant to land. Ireton v. Ida. Irr. Co. (1917) 30 I. 310, 164 P. 687.

Bona fide purchasers: One who has notice or knowledge of a previous sale of real property, or who has notice or knowledge of such facts and circumstances as would lead a reasonably prudent man to discover that a previous sale had been made, is not a purchaser in good faith within the meaning of this section; but one who purchases vacant property and procures an abstract of title which fails to show a previous conveyance, because the same was not recorded, and pays the purchase price without any knowledge of such previous conveyance, is a purchaser in good faith, and is entitled to the property as against the holder of the prior unrecorded deed. Froman v. Madden (1907) 13 I. 138, 88 P. 894.

§ 5425. [3161] **Conveyance defined.** The term "conveyance" as used in this chapter, embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills. [R. S. § 3002.]

Hist. (See '64, p. 528, § 35) R. S. § 3002, reen. R. C. § 3161, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1215; Kerr's C. ib.

Cited: Harris v. Reed (1912) 21 I. 364, 121 P. 780; Smith v. Kessler (1912) 22 I. 589, 127 P. 172; Ireton v. Idaho Irr. Co. (1917) 30 I. 310, 164 P. 687.

Effect of recording laws: It is possible for a subsequent purchaser to acquire a paramount title through the medium of the recording laws, relegating a prior purchaser to an action for damages against the vendor. Madden v. Caldwell Land Co. (1909) 16 I. 59, 100 P. 358, 21 L. R. A. (N. S.) 332.

The protection afforded by the recording acts is purely statutory and is not to be extended beyond their reasonable import. They do not apply where a title vests by virtue of law and not through a conveyance. Ewald v. Hufton, 31 I. 373, 173 P. 247.

§ 5426. [3162] **Revocation of power to be recorded.** No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded. [R. S. § 3003.]

Hist. (See '64, p. 528, § 27) R. S. § 3003, reen. R. C. § 3162, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1216; Kerr's C. ib.

§ 5427. [3163] **Unrecorded instruments valid between parties.** An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. [R. S. § 3004.]

Hist. (See '64, p. 528, § 23) R. S. § 3004, reen. R. C. § 3163, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1217; Kerr's C. ib.

Cited: (In brief of counsel) Madden v. Caldwell Land Co. (1909) 16 I. 59; Keane v. Kibble (1915) 28 I. 274, 154 P. 972.

ARTICLE 5.

UNLAWFUL TRANSFERS.

Cross ref. Restrictions on sales of goods in bulk: §§ 5752-5756.

§ 5428. [3164] **Fraudulent conveyances of land.** Every instrument, other than a will, affecting an estate in real property, including every

charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or incumbrancers thereon, is void as against every purchaser or incumbrancer, for value, of the same property, or the rents or profits thereof. [R. S. § 3015.]

Hist. (See '64, p. 540, § 1) R. S. § 3015, reen. R. C. § 3164, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1227; Kerr's C. ib.

§ 5429. [3165] **Grantee must be privy to fraud.** No instrument is to be avoided under the last section, in favor of a subsequent purchaser or incumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended. [R. S. § 3016.]

Hist. (See '64, p. 540, § 2) R. S. § 3016, reen. R. C. § 3165, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1228; Kerr's C. ib.

§ 5430. [3166] **Power of revocation: When deemed executed.** Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estate, by the person having the power of revocation, in favor of a purchaser or incumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or incumbrancer. [R. S. § 3017.]

Hist. (See '64, p. 540, § 4) R. S. § 3017, reen. R. C. § 3166, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1229; Kerr's C. ib.

§ 5431. [3167] **Same:** Where a person having the power of revocation within the provisions of the last section is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the power is deemed to be executed as soon as he is entitled to execute it. [R. S. § 3018.]

Hist. (See '64, p. 540, § 5) R. S. § 3018, reen. R. C. § 3167, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1230; Kerr's C. ib.

§ 5432. [3168] **Fraudulent transfers of personalty.** All deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, are void as against the creditors, existing or subsequent, of such person. [R. S. § 3019.]

Hist. (See '64, p. 540, § 11) R. S. § 3019, reen. R. C. § 3168, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 1231; Kerr's C. ib.

Scope: This section relates to personal property only. Capital L. Co. v. Saunders (1914) 26 I. 408, 143 P. 1178.

Void transfers: An assignment in trust to secure a certain creditor by permitting him to keep sufficient proceeds to pay his debts, accompanied by a contemporaneous parol agreement, that any excess of such proceeds above the amount sufficient to pay the creditor shall belong to the grantor, is void as against creditors of the grantor. Johnson v. Sage (1896) 4 I. 758, 44 P. 641.

Valid transfers: A conveyance made by a decedent to his daughter, without intent to defraud and not in trust, does not come under the provisions of this section. Brown v. Perrault (1898) 5 I. 728, 51 P. 752.

§ 5433. [3169] **Transfers in fraud of creditors.** Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. [R. S. § 3020.]

Hist. (See '64, p. 540, § 18) R. S. § 3020, reen. R. C. § 3169, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3439; Kerr's C. ib.

Cited: Boise Assn. of Credit Men v. Ellis (1914) 26 I. 438, 144 P. 6, L. R. A. (N. S.) 1915E 917.

Construed: This section substantially puts into our statutory law the long established rule of the common law upon the

same subject. Capital L. Co. v. Saunders (1914) 26 I. 408, 143 P. 1178.

This section is intended to protect creditors against a debtor conveying his property away to any person, including his wife. Bk. of Orofino v. Wellman (1914) 26 I. 425, 143 P. 1169.

Void transfers: An assignment of property made partly for the reason that the assignor feels that his creditors may levy on the proceeds of the property, is void as against creditors of the assignor. Johnson v. Sage (1896) 4 I. 758, 44 P. 641. If a transfer is made with intent to evade payment of debts and such intent is known to the transferee, such transfer is void. Sears v. Lydon (1897) 5 I. 358, 49 P. 122.

Same: Evidence: Under this section a great latitude of inquiry on the issue of fraud is permissible, and any facts which tend to prove an intent to delay or defraud any creditor are pertinent and proper. Harkness v. Smith (1891) 3 I. 221, 28 P. 423.

Same: Pleading: In a suit to cancel a deed, as being made in fraud of creditors, the complaint is not sufficient if it alleges fraud and notice, in respect to the transaction, only as conclusions of law. Kerns v. Wash. W. Power Co. (1913) 24 I. 525, 135 P. 70.

§ 5434. [3170] **Same: Delivery and change of possession.** Every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer. [R. S. § 3021.]

Hist. (See '64, p. 540, § 15) R. S. § 3021, reen. R. C. § 3170, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3440; additional provisions as amended: Kerr's C. ib.

Cited: Brown v. Perrault (1898) 5 I. 728, 51 P. 752; Re Lane Lbr. Co. (1913) 210 F. 82.

Application: Where the property is not at the time of the sale in the possession or under the control of the vendor, this section has no application. Cornwall v. Mix (1893) 3 I. 687, 34 P. 893.

Held not to apply to sale of timber which had been cut into logs by purchaser but left on land of seller. In re McCarty (1914) 218 F. 717.

Where A purchases at execution sale stock belonging to B and leaves it in B's possession paying him to care for it, this section does not apply, and B's judgment creditors obtain no right against A in respect to stock. Sweeten v. Ezell (1917) 30 I. 154, 163 P. 612.

Scope of inquiry: The sole inquiry in this case is whether there has been an immediate delivery followed by actual and continued change of possession. No question of intent, bona fides or notice is relevant. Harkness v. Smith (1891) 3 I. 221, 28 P. 423.

Sufficiency of delivery: No fixed rule can be established as a test for determining what the "immediate delivery" or "actual possession" required by the statute mean, but the questions are matters of fact to be determined by the jury from the evidence in each particular case. Simons v. Daly (1903) 9 I. 87, 72 P. 507. The statute does not refer to the place where the goods are situated, but to actual and continual change of possession, and does not require the goods sold to be removed in all cases from the place where situated when sold. Hazard v. Cole (1869) 1 I. 276.

Where the property is at the time of sale in the custody of a third person and the sale is made in good faith, notice to the third person is sufficient to constitute a delivery. Lufkins v. Collins (1886) 2 I. 150, 7 P. 95.

Where horses pledged to secure a debt are at the time of the pledge in the possession of a third person who was to range the same for the winter, and the pledger tells such third person in the presence of all parties, to hold them for the pledgee, and such person takes the horses to the range and delivers them to the pledgee in the spring, the latter paying for their care during the winter, there is a sufficient delivery and change of possession to satisfy the statute. Murphy v. Braase (1893) 3 I. 544, 32 P. 208.

A worked on the ranch for B and had a room in B's house in town. B gave A a cream separator in settlement of a debt. A removed the separator from the ranch to his room in B's house. Held, that there was sufficient delivery and change of possession. Rapple v. Hughes (1904) 10 I. 338, 77 P. 722.

Where a retail dealer sells a wagon to a purchaser and receives the purchase price and thereupon writes a card containing the words "Sold to C. H. Trousdale," and places this notice on the wagon, and thereupon the wagon is left in the possession of the retailer, and before it is taken away by the purchaser a receiver takes charge of the property of the retailer, there is sufficient change of possession to meet the requirements of this section. Trousdale v. Winona Wagon Co. (1913) 25 I. 130, 136 P. 372.

Effect of retaking: Where there is an actual sale and delivery with change of possession, the subsequent act of the prior owner in wrongfully taking possession of the property does not defeat the purchaser's title as against a subsequent pur-

chaser. Couch v. Montgomery (1899) 6 I. 669, 59 P. 16. But where property, without legal excuse, is replaced in the same apparent relation to the vendor after delivery, and there is no manifest and continued change of possession, the transfer is void. Harkness v. Smith (1891) 3 I. 221, 28 P. 423.

Insufficient delivery: Where the assignor retains the property under the same control and management the assignment is void as against creditors. Johnson v. Sage (1896) 4 I. 758, 44 P. 641.

L sold a quantity of wheat to H and M; before delivery or change of possession thereof, and 20 days after the sale, the wheat was levied upon under an execution issued in an action against L. Held, that the sale to H and M was void as to creditors. Hallett v. Parrish (1897) 5 I. 496, 51 P. 109.

Where a tenant holds personal property on the demised premises for his landlord and the latter assigns the same to a third person, who leaves it on the demised premises for the tenant to hold until a certain day, and the property is seized upon an execution before that day, there is, at the time of the execution, no such delivery and change of possession as to vest title in the third person. Coombs v. Collins (1899) 6 I. 536, 57 P. 310.

Seizure under attachment: An officer sued for wrongfully seizing property under an invalid writ of attachment, may protect himself from being mulcted in exemplary damages by showing that the goods seized under the writ were recently in the possession of the defendant, and that there was no such change of possession as is required by this section. Sears v. Lydon (1897) 5 I. 358, 49 P. 122.

Nondelivery: Effect: An alleged sale of personal property, not accompanied by an immediate delivery and followed by an actual and continued change of possession, is conclusively presumed to be fraudulent and void as against creditors of and purchasers from the vendor. Ahlstrom v. Tage, 31 I. 459, 174 P. 605.

§ 5435. [3171] **Fraud is a question of fact.** In all cases arising under the provisions of this title, except as otherwise provided in the last section, the question of fraudulent intent is one of fact, and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. [R. S. § 3022.]

Hist. (See '64, p. 540, § 20) R. S. § 3022, reen. R. C. § 3171, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3442; additional provisions as amended: Kerr's C. ib.

Cited: Brown v. Perrault (1898) 5 I. 728, 51 P. 752; Capital L. Co. v. Saunders (1914) 26 I. 408, 143 P. 1178.

Question of fact: The determination of what constitutes immediate change of possession and delivery is purely a question of fact to be determined by the jury, or the court in case a jury is waived, from all the evidence in the particular case. Rapple v. Hughes (1904) 10 I. 338, 77 P. 722.

The intent with which a transfer in fraud of creditors is made is not established so much by attempting to ascertain the actual intent in the mind of the debtor, but rather by the facts and circumstances under which the transfer was made and from which the law imputes a fraudulent motive. California etc. Min. Co. v. Manley (1905) 10 I. 786, 81 P. 50.

Voluntary transfers: A conveyance made for a mere nominal consideration, when attacked as fraudulent, will be subjected to the rules applicable to voluntary transfers. Ib.

§ 5436. [3172] **Title of purchaser not impaired.** The provisions of this chapter do not in any manner affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. [R. S. § 3023.]

Hist. (See '64, p. 540, § 21) R. S. § 3023, reen. R. C. § 3172, reen. C. L. ib.

Bona fide transfers: The transfer of stock by a married woman, as authorized by R. S. § 2612, although procured by duress and coercion on the part of her husband, is good where the transferee is a bona fide holder for value, without notice or knowledge of such duress or coercion. Bryan v. Montandon (1898) 6 I. 352, 55 P. 650.

TITLE XLII.

CHAPTER 209.

HOMESTEADS.

Rule of construction: Homestead and exemption laws are construed liberally, as a protection of the unfortunate. Coughanour v. Hoffman's Estate (1887) 2 I. 290, 13 P. 231.

ARTICLE 1.

GENERAL PROVISIONS.

Cross ref. Proceedings in probate court for setting aside homestead: §§ 7564-7577. Assignment of homestead on dissolution of marriage: § 4650.

§ 5437. [3173] **Definition of homestead.** The word homestead as used in this title includes within its meaning: The dwelling house in which the claimant resides, and the land on which the same is situated and located as in this title provided; also the proceeds thereof in the event of a voluntary sale, and also the insurance thereon, if any, in the event of a loss. ['97, p. 10, § 1.]

Hist. '97, p. 10, § 1, reen. '99, p. 293, § 1, reen. R. C. § 3173, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 1237; similar: Kerr's C. ib.

Exemption in hotel: The fact that the homestead is occupied in whole or in part as a hotel, does not deprive it of any of the immunities prescribed by the statute, so long as it is used and occupied by the owner as a home and residence of himself and family, and it is within the limitations of the statute as to value. Kiesel v. Clemens (1899) 6 I. 444, 56 P. 84, 96 A. S. R. 278.

§ 5438. [3174] **From what property selected.** If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family, the homestead may be selected from any of his or her property. [R. S. § 3036.]

Hist. R. S. § 3036, reen. R. C. § 3174, reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. C. 1872, § 1238; similar: Kerr's C. ib.

§ 5439. [3175] **Same: From separate property of wife.** The homestead can not be selected from the separate property of the wife without her consent, shown by her making the declaration of homestead. [R. S. § 3037.]

Hist. R. S. § 3037, reen. R. C. § 3175, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1239; similar: Kerr's C. ib.

§ 5440. [3176] **Exemption from execution.** The homestead is exempt from execution or forced sale, except as in this title provided. [R. S. § 3038.]

Hist. (See '64, p. 575, § 1) R. S. § 3038, reen. R. C. § 3176, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1240; Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232, 28 P. 430.

§ 5441. [3177] **Same: To what judgments subject.** The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration.

2. On debts secured by mechanic, laborer or vendor's liens upon the premises.

3. On debts secured by mortgages upon the premises, executed and acknowledged by the husband and wife or by an unmarried claimant.

4. On debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record. [R. S. § 3039.]

Hist. (See '64, p. 575, § 2) R. S. § 3039, reen. R. C. § 3177, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1241; as amended: Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232, 28 P. 430.

Lien against homestead: A judgment lien is not divested by the act of the defendant or his wife in subsequently filing a declaration of homestead on the premises subject to the lien. Smith v. Richards (1889) 2 I. 498, 21 P. 419.

Where a homestead is sold and the proceeds invested in another home, an attachment levied on the new home prior to filing declaration of homestead covering the new home is effectual to create a lien thereon. Wright v. Westheimer, supra.

A mortgage lien cannot be defeated by a declaration of homestead made after the lien attaches. Law v. Spence (1897) 5 I. 244, 48 P. 282.

§ 5442. [3178] **Conveyance of homestead.** The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife. [R. S. § 3040.]

Hist. (See '64, p. 575, § 2) R. S. § 3040, reen. R. C. § 3178, reen. C. L. ib.

Cross ref. Acknowledgment by married woman: § 5393.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1242; Kerr's C. ib.

Rule of evidence: This and the following sections are in the nature of rules of evidence and are subject to the same principles as the statute of frauds, and the rules of equitable estoppel and waiver apply to oral sales of the homestead. Grice v. Woodworth (1904) 10 I. 459, 80 P. 912, 69 L. R. A. 584.

§ 5443. [3179] **Abandonment of homestead.** A homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged:

1. By the husband and wife, if the claimant is married.
2. By the claimant, if unmarried. [R. S. § 3041.]

Hist. (See '64, p. 575, § 2) R. S. § 3041, reen. R. C. § 3179, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1243; Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232, 28 P. 430; Bedal v. Sake (1904) 10 I. 270, 77 P. 638; Grice v. Woodworth (1904) 10 I. 459, 80 P. 912, 69 L. R. A. 584.

Ineffectual conveyance: An attempted conveyance of a homestead made by one spouse without the other joining therein is ineffectual to constitute abandonment. Mellen v. McMannis (1904) 9 I. 418, 75 P. 98.

§ 5444. [3180] **Same: When effectual.** A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded. [R. S. § 3042.]

Hist. R. S. § 3042, reen. R. C. § 3180, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1244; Kerr's C. ib.

ARTICLE 2.

SALE OF THE HOMESTEAD ON EXECUTION.

§ 5445. [3181] **Execution against homestead.** When an execution for the enforcement of a judgment, obtained in a case not within the classes before enumerated, is levied upon the homestead, the judgment creditor may apply to the probate judge of the county in which the homestead is situated for the appointment of persons to appraise the value thereof. [R. S. § 3043.]

Hist. (See '64, p. 575, § 3) R. S. § 3043, reen. R. C. § 3181, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1245; similar as amended: Kerr's C. ib.

Cited: Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

§ 5446. [3182] **Application for appraisement.** The application must be made upon a verified petition, showing:

1. The fact that an execution has been levied upon the homestead.

2. The name of the claimant.

3. That the value of the homestead exceeds the amount of the homestead exemption. [R. S. § 3044.]

Hist. (See '64, p. 575, § 3) R. S. § 3044, reen. R. C. § 3182, reen. C. L. ib.

Cited: Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1246; Kerr's C. ib.

§ 5447. [3183] **Filing of application.** The petition must be filed with the clerk of the probate court. [R. S. § 3045.]

Hist. R. S. § 3045, reen. R. C. § 3183, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1247; "superior court" as amended: Kerr's C. ib.

§ 5448. [3184] **Notice of hearing.** A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant at least two days before the hearing. [R. S. § 3046.]

Hist. R. S. § 3046, reen. R. C. § 3184, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1248; Kerr's C. ib.

§ 5449. [3185] **Appointment of appraisers.** At the hearing the judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead. [R. S. § 3047.]

Hist. (See '64, p. 575, § 3) R. S. § 3047, reen. R. C. § 3185, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1249; Kerr's C. ib.

§ 5450. [3186] **Oath of appraisers.** The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same. [R. S. § 3048.]

Hist. R. S. § 3048, reen. R. C. § 3186, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1250; Kerr's C. ib.

§ 5451. [3187] **Appraisal.** They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption, they must determine whether the land claimed can be divided without material injury. [R. S. § 3049.]

Hist. (See '64, p. 575, § 3) R. S. § 3049, reen. R. C. § 3187, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1251; Kerr's C. ib.

§ 5452. [3188] **Report of appraisers.** Within 10 days after their appointment they must make to the judge a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed. [R. S. § 3050.]

Hist. (See '64, p. 575, § 3) R. S. § 3050, reen. R. C. § 3188, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1252; Kerr's C. ib.

§ 5453. [3189] **Order setting aside exempt portion.** If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land. [R. S. § 3051.]

Hist. (See '64, p. 575, § 3) R. S. § 3051, reen. R. C. § 3189, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1253; Kerr's C. ib.

§ 5454. [3190] **Order for sale of premises.** If, from the report, it appear to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it can not be divided, he must make an order directing its sale under the execution. [R. S. § 3052.]

Hist. (See '64, p. 575, § 3) R. S. § 3052, reen. R. C. § 3190, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1254; Kerr's C. ib.

Jurisdiction of bankruptcy court: Where bankruptcy proceedings were begun before sale of homestead, the bankruptcy court acquired jurisdiction to determine the time and manner of setting aside the homestead. Bk of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

§ 5455. [3191] **Bid must exceed exemption.** At such sale no bid must be received unless it exceeds the amount of the homestead exemption. [R. S. § 3053.]

Hist. (See '64, p. 575, § 3) R. S. § 3053, reen. R. C. § 3191, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872. § 1255; Kerr's C. ib.

§ 5456. [3192] **Disposal of proceeds of sale.** If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant, and the balance applied to the satisfaction of the execution. [R. S. § 3054.]

Hist. (See '64, p. 575, § 3) R. S. § 3054, reen. R. C. § 3192, reen. C. L. ib.

Cited: See Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1256; Kerr's C. ib.

§ 5457. [3193] **Same: Exemption of proceeds.** The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead. [R. S. § 3055.]

Hist. (See '64, p. 575, § 3) R. S. § 3055, reen. R. C. § 3193, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1257; same as amended: Kerr's C. ib.

§ 5458. [3194] **Compensation of appraisers.** The court must fix the compensation of the appraisers, not to exceed $5 per day each for the time actually engaged. [R. S. § 3056.]

Hist. R. S. § 3056, reen. R. C. § 3194, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1258; Kerr's C. ib.

§ 5459. [3195] **Costs of proceedings.** The execution creditor must pay the costs of these proceedings in the first instance; but if the appraised value exceeds the homestead exemption the amount so paid must be added as costs on execution, and collected accordingly. [R. S. § 3057.]

Hist. R. S. § 3057, reen. R. C. § 3195, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1259; Kerr's C. ib.

ARTICLE 3.

HOMESTEADS OF THE HEADS OF FAMILIES.

§ 5460. [3196] **Value of homestead.** Homesteads may be selected and claimed:

1. Of not exceeding $5000 in value by any head of a family.
2. Of not exceeding $1000 in value by any other person. [R. S. § 3058.]

Hist. (See '64, p. 575, § 1) R. S. § 3058, reen. R. C. § 3196, reen. C. L. ib.

Cited: Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1260; Kerr's C. ib.

§ 5461. [3197] **Head of family defined.** The phrase "head of a family" as used in this title includes within its meaning:

1. The husband or wife when the claimant is a married person.
2. Every person who has residing on the premises with him or her and under his or her care and maintenance either:

a. His or her minor child, or the minor child of his or her deceased wife or husband.

b. A minor brother or sister, or the minor child of a deceased brother or sister.

c. A father, mother, grandfather or grandmother.

d. The father, mother, grandfather or grandmother of a deceased husband or wife.

e. An unmarried sister, or any other of the relatives mentioned in this section who have attained the age of majority, and are unable to take care of or support themselves. [R. S. § 3059.]

Hist. (See '64, p. 575, § 4) R. S. § 3059, reen. R. C. § 3197, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1261; amended: Kerr's C. ib.

Cited: Mellen v. McMannis (1904) 9 I. 418, 75 P. 98.

§ 5462. [3198] **Mode of selection.** In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a conveyance of real property is acknowledged, a declaration of homestead, and file the same for record. [R. S. § 3070.]

Hist. (See '64, p. 575, § 1) R. S. § 3070, reen. R. C. § 3198, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1262; same as amended: Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232, 28 P. 430; Law v. Spence (1897) 5 I. 244, 48 P. 282; Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545; Wits-Keets-Poo v. Rowton (1915) 28 I. 193, 152 P. 1064.

Selection by widow: A widow having children dependent on her for support, may exercise her homestead right after the death of her husband, during the course of administration of his estate. Coughanour v. Hoffman's Estate (1887) 2 I. 290, 13 P. 231.

Insufficient declaration: A declaration of homestead which is not acknowledged and certified as required by statute, does not create a homestead right in the property. Burbank v. Kirby (1898) 6 I. 210, 55 P. 295, 96 A. S. R. 260.

§ 5463. [3199] **Contents of declaration.** The declaration of homestead must contain:

1. A statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit.
2. A statement that the person making it is residing on the premises, and claims them as a homestead.
3. A description of the premises.
4. An estimate of their actual cash value. [R. S. § 3071.]

Hist. (See '64, p. 575, § 1) R. S. § 3071, reen. R. C. § 3199, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1263; similar as amended: Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232; 28 P. 430; Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545; Wits-Keets-Poo v. Rowton (1915) 28 I. 193, 152 P. 1064.

Sufficiency of declaration: It is requisite that a declaration of homestead should contain substantially the statements set forth in section 3071 of the Revised Statutes, and where the declaration is made by the wife, the husband living, it should state that the husband "has not made such declaration, and that she therefore makes the declaration for their joint benefit." Wilcox v. Deere (1897) 5 I. 545, 51 P. 98.

A declaration of homestead which describes certain town lots, and also 160 acres of farm land, alleging that "on a portion of which the claimant with family is residing," is void for indefiniteness. Ib.

A declaration of homestead which states that the declarant is married and that he actually resides on the premises therein described with his family, which consists of a wife and two children, is sufficient, although it does not expressly state that the declarant is the head of a family. Mellen v. McMannis (1904) 9 I. 418, 75 P. 98.

§ 5464. [3200] **Declaration must be recorded.** The declaration must be recorded in the office of the recorder of the county in which the land is situated. [R. S. § 3072.]

Hist. (See '64, p. 575, § 1) R. S. § 3072, reen. R. C. § 3200, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1264; Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232, 28 P. 430; Burbank v. Kirby (1898) 6 I. 210, 55 P. 295, 96 A. S. R. 260; Wits-Keets-Poo v. Rowton (1915) 28 I. 193, 152 P. 1064.

§ 5465. [3201] **Devolution after death.** From and after the time the declaration is filed for record the premises therein described consti-

tute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the probate court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title. [R. S. § 3073.]

Hist. (See '64, p. 575, § 1) R. S. § 3073, reen. R. C. § 3201, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1265; same as amended: Kerr's C. ib.

Cited: Wright v. Westheimer (1891) 3 I. 232, 28 P. 430; Burbank v. Kirby (1898) 6 I. 210, 55 P. 295; Bank of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545; Wits-Keets-Poo v. Rowton (1915) 28 I. 193, 152 P. 1064.

Selection by widow: The probate court may set apart a homestead out of the property of the husband after his death, on the application of the widow. Coughanour v. Hoffman's Estate (1887) 2 I. 290, 13 P. 231.

ARTICLE 4.

HOMESTEADS OF OTHER PERSONS.

§ 5466. [3202] **Mode of selection.** Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a conveyance of real property is acknowledged, a declaration of homestead. [R. S. § 3085.]

Hist. R. S. § 3085, reen. R. C. § 3202, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1266; Kerr's C. ib.

§ 5467. [3203] **Declaration of homestead.** The declaration must contain everything required by the second, third and fourth subdivisions of the section prescribing the declaration of a head of a family. [R. S. § 3086.]

Hist. R. S. § 3086, reen. R. C. § 3203, reen. C. L. ib.

Comp. leg.—Cal. Civ. C. 1872, § 1267; Kerr's C. ib.

§ 5468. [3204] **Declaration to be recorded.** The declaration must be recorded in the office of the county recorder of the county in which the land is situated. [R. S. § 3087.]

Hist. R. S. § 3087, reen. R. C. § 3204, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1268; Kerr's C. ib.

§ 5469. [3205] **Effect of filing declaration.** From and after the time the declaration is filed for record the land described therein is a homestead. [R. S. § 3088.]

Hist. R. S. § 3088, reen. R. C. § 3205, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1269; Kerr's C. ib.

Cited: Law v. Spence (1897) 5 I. 244, 48 P. 282.

TITLE XLIII. MINES AND MINING.

CHAPTER 210.

INSPECTOR OF MINES.

Comp. leg.. This chapter follows in a general way the Montana law. See Montana Codes, 1895. Pol. C. §§ 580-590.

§ 5470. Election, term and salary. The office of inspector of mines for the state of Idaho is hereby created, the same to be filled biennially at the general election, by the qualified electors of the state, as other offices. The inspector of mines shall hold his office for the term of two years and until his successor is elected and qualified. Before entering upon the discharge of his duties as such inspector of mines he shall file an official bond in the sum of $5000, conditioned for the faithful performance of his office, in form and manner as other official bonds of state officers. The inspector of mines shall receive as full compensation for his services a salary of $2400 per annum and his actual and necessary traveling expenses when traveling in the discharge of his official duties, not to exceed $1500 per annum. He shall also be provided with a stenographer, who shall receive a salary of not to exceed $900 per annum, and all necessary expenses for postage, stationery, printing and the compensation of deputies and other office expenses, not to exceed $1500 per annum, and such salaries, compensation and expenses shall be paid as the salaries and expenses of other state officers and employees are paid. ['11, c. 199, p. 663.]

Hist. '95, p. 160, §§ 1, 2, 13, reen. '99, p. 221, §§ 1, 2, 13; § 2 was amended by an act of the ninth session of the state legislature (H. B. 230) which, through some oversight, was omitted from the 1907 session laws; compiled and reen. R. C. § 199; am. '11, c. 199, p. 663, reen. C. L. 228:1.

§ 5471. Disqualifications: Oath of inspector. The inspector of mines shall not, at the time of his appointment or any time during his term of office, be an officer, director or employee in or of any mining corporation in this state, or in or of any milling corporation in the state engaged in the business of smelting or reducing ores. Such inspector shall devote his whole time to the duties of his office and shall take and subscribe to the following oath:

State of Idaho, county of....., ss.

I, of.....county, do solemnly swear that I will perform each and every duty required of me as inspector of mines for the state of Idaho; that I will, at all times while acting in my official capacity, fulfil the duties of such office according to law, and to the best of my skill and understanding; that I will never at any time while holding the office of inspector of mines disclose to any one, directly or indirectly, under any circumstances, any information relative to ore bodies, chutes, or deposits of ore, or the location, course or character of underground workings, or give my opinion founded on any examination made in the performance of my official duties relative to the value of any mine or mining property, unless by permission of the person or persons in charge of the same; to all of which I pledge my sacred honor. So help me God.

Nothing in said oath, however, shall be construed to prevent such mining inspector from making full and complete statistical reports as required by law. ['95, p. 160, § 2.]

Hist. '93, p. 152, § 2; am. '95, p. 160, § 2, reen. '99, p. 221, § 3, reen. R. C. § 200, reen. C. L. 228:2.

§ 5472. Duties in general. It shall be the duty of the inspector of mines, at least once each year, to visit in person each mining county in the state of Idaho and examine all such mines therein as, in his judgment, may require examination for the purpose of determining the condition of such mines as to safety, and to collect information and statistics relative to mines and mining and the mineral resources of the state, and to collect, arrange and classify mineral and geological specimens found in this state and to forward the same to the state school of mines. ['95, p. 160, § 3.]

Hist. '93, p. 152, § 4; am. '95, p. 160, § 3, reen. '99, p. 221, § 4, reen. R. C. § 201, reen. C. L. 228:3.

§ 5473. Examination of mines. Said inspector shall have full power and authority, at all reasonable hours, to enter and examine any and all mines in this state, and shall have the right to enter into any and all mine stopes, levels, winzes, tunnels, shafts, drifts, crosscuts, workings and machinery, for the purpose of such examination; and the owner, lessor, lessee, agent, manager or other person in charge of such mine or mines, shall render the inspector such assistance as may be required by the inspector to enable him to make a full, thorough and complete examination of each and every part of such mine or mines, and whenever, as the result of the examination of any mine (whether such examination is made in consequence of a complaint, as hereinafter provided, or otherwise) the inspector shall find the same to be in an unsafe condition, he shall at once serve, or cause to be served, a written notice upon the owner, lessor, lessee, agent, manager or other person in charge of such mine, stating in detail in what particular or particulars the mine is dangerous or insecure, and shall require all necessary changes to be made, without delay, for the purpose of making said mine safe for the employees therein. Upon the neglect or refusal of any owner, lessor, lessee, agent, manager or other person in charge so notified to comply with the requirements stated in such notice so served, such owner, lessor, lessee, agent, manager or other person in charge of such mine, shall be deemed guilty of a misdemeanor, and is punishable by a fine of not more than $500, and each day's continuance of such neglect or refusal shall be a separate offense, and in case of any criminal or civil proceedings at law against the party or parties so notified, on account of the loss of life, or bodily injury sustained by any employee subsequent to the service of such notice, and in consequence of a neglect or refusal to obey the inspector's requirement, a certified copy of the notice served by the inspector shall be prima facie evidence of the culpable negligence of the party or parties so notified. ['95, p. 160, § 4.]

Hist. '93, p. 152, § 5; am. '95, p. 160, § 4, reen. '99, p. 221, § 5, reen. R. C. § 202, reen. C. L. 228:4.

Cross ref. Express reference to this section: Action for recovery of penalty: § 5476.

§ 5474. Office: Records: Reports to inspector. The inspector of mines shall be provided with a properly furnished office at the state house in Boise City, Idaho, in which he shall carefully keep a complete record of all mines examined, showing the date of examination,

the condition in which the mines were found, the manner and method of working, the extent to which the laws are obeyed, and what recommendations, if any, were ordered by the inspector.

It is hereby made the duty of the owner, lessor, lessee, agent, manager or other person in charge of each and every mine, of whatever kind or character, within the state, to forward to the inspector of mines at his office, not later than the 1st day of June in each year, a detailed report showing the character of the mine, the number of men then employed and the estimated maximum number of men to be employed therein during the ensuing year, the method of working such mine and the general condition thereof, and such owner, lessor, lessee, agent, manager or other person in charge of any mine within the state, must furnish whatever information relative to such mine as the inspector of mines may, from time to time, require for his guidance in the proper discharge of his official duties. ['95, p. 160, § 5.]

Hist. '93, p. 152, § 6; am. '95, p. 160, § 5, reen. '99, p. 221, § 6, reen. R. C. § 203, reen. C. L. 228:5.

Cross ref. Express reference to this section: Report of inspector: § 5480.

§ 5475. Complaints to inspector: Duty of inspector. Whenever the inspector of mines shall receive a formal complaint in writing, signed by three or more persons, setting forth that the mine in which they are employed is dangerous in any respect, he shall, in person, visit and examine such mine: *Provided,* Every such formal complaint shall in all cases specifically set forth the nature of the danger existing at the mine and shall describe, with as much certainty as is possible, how such danger, apparent or real, renders such mine dangerous, and shall set forth the time when such danger was first observed, and shall distinctly set forth whether or not any notice of such defect or danger has been given by the complainants, or any one else to their knowledge, to the superintendent or other person in charge of such mine, and if no such complaint has been made to such superintendent or other person in charge, the reason why it has not been made: *Provided further,* That all complaints shall be duly verified by the parties complaining, before some officer authorized by law to administer oaths. After such complaint shall have been received by the inspector of mines, it shall be the duty of such inspector to serve a certified copy thereof, but without the names of the complainants, upon the owner, lessor, lessee, agent, manager or other person in charge, and, as soon as possible after receiving such complaint to visit and examine such mine, and if from such examination he shall find such complaint to be just, he shall give notice in writing of the danger existing to the owner, lessor, lessee, agent, manager or other person in charge thereof, and in such notice may, in his discretion, order such mine or workings in which such danger exists, closed until such danger has been removed. The names of complainants complaining as in this section provided, shall not, under any circumstances, be divulged to any person by said inspector except such action be necessary in the administration of justice in the courts of the state. ['95, p. 160, § 6.]

Hist. '93, p. 152, § 7; am. '95, p. 160, § 6, reen. '99, p. 221, § 7, reen. R. C. § 204, reen. C. L. 228:6.

§ 5476. Neglect of mine owner: Duty of attorney general. It shall be the duty of the inspector of mines upon the neglect or refusal of any owner, lessor, lessee, agent, manager or other person in charge of any mine or working, notified of the unsafe or dangerous condition of his mine, promptly to comply with the requirements of the notice

served upon him, at once to notify the attorney general of such neglect or refusal, and the attorney general must thereupon immediately commence action in the name of the state against the party so notified for the recovery of the penalty mentioned in section 5473, in any court of competent jurisdiction, and the amount so recovered shall be paid into the general school fund of the state and constitute a part thereof. ['95, p. 160, § 8.]

Hist. '93, p. 152, § 9; am. '95, p. 160, § 8, reen. '99, p. 221, § 8, reen. R. C. § 205, reen. C. L. 228:7.

§ 5477. Appointment of deputies. With the consent and approval of the governor, the inspector of mines may appoint such deputy inspectors as in his judgment may be necessary. Such deputy inspectors shall be allowed, as full compensation for all services, $5 per day for each day actually engaged in the performance of their duties. [R. C. § 206.]

Hist. '95, p. 160, § 9, reen. '99, p. 221, § 9, reen. R. C. § 206, reen. C. L. 228:8.

§ 5478. Duty of inspector in case of accidents. Whenever a serious or fatal accident shall occur in any mine in the state of Idaho, it shall be the duty of the owner, lessor, lessee, agent, manager or other person in charge thereof, immediately and by the quickest means, to notify the inspector of mines or his deputy, as may be most convenient, of such accident; and upon receiving such notice the inspector or his deputy, or both, shall at once repair to the place of the accident and investigate fully the cause of such accident; and the inspector or his deputy shall be present at any coroner's inquest held over the remains of any person or persons killed in any such accident, and shall have power at such inquest to examine and cross-examine witnesses, and may have process to compel the attendance of necessary witnesses at such inquest. If the inspector or deputy inspector can not be immediately present in case of a fatal or serious accident occurring, it shall be the duty of the owner, lessor, lessee, agent, manager or other person in charge of the mine in which such accident has occurred, to have statements made and verified by those witnessing such accident (in case no person was present at the time of the accident, then the statement of those first present thereafter shall be taken), which statements shall be verified, and such verified statements shall be placed in the hands of the inspector or deputy inspector, upon the demand of such officer. Whenever any deputy inspector is present at any coroner's inquest and assists in the examination, he shall, at the conclusion thereof, at once prepare and forward to the inspector a full and detailed report of the accident, giving all information obtainable regarding the same. [R. C. § 207.]

Hist. '95, p. 160, § 10, reen. '99, p. 221, § 10, reen. R. C. § 207, reen. C. L. 228:9.

§ 5479. Duties of deputies. The duties of deputy inspectors shall only be such as are indicated in the preceding section; that is, to attend and act either with or in place of the inspector of mines in cases of accident, at the scene of such accident; and at coroner's inquests, and to make reports. [R. C. § 208.]

Hist. '95, p. 160, § 11, reen. '99, p. 221, § 11, reen. R. C. § 208, reen. C. L. 228:10.

§ 5480. Report of inspector. The inspector of mines shall, on or before the 1st day of December of each year file with the governor of the state a printed report giving:

1. A list of all accidents that have occurred during the year, the nature and cause of the same, together with the persons killed and injured.

2. The number of mines visited or examined during the year; the number of mines in operation; the number of mines idle; the number of men employed; the wages paid, and the nationality of employees.

3. The name and location of each mine in the state, which has been examined and from which the inspector has received a report as provided in section 5474, and all data possible in regard to the manner of working the same, whether by shaft, tunnel, incline or otherwise; the condition of the hoisting machinery, boilers, whims, engines, cars, buckets, ropes and chains, used in the mines; also the appliances used for the extinguishing of fires; the manner and methods of working and timbering the shafts, drifts, inclines, stopes, winzes, tunnels and uprises through which persons pass to and fro while engaged in their daily labor; the character of the exits from the mine, the methods of ventilation, and the system of signals used in the mine.

4. The number and character of notices served, together with suggestions and recommendations made, and the manner in which such suggestions and recommendations were complied with.

5. The number of complaints received and actions thereon.

6. The number of prosecutions for neglect or refusal to comply with notices.

7. A summary of the reports received from mine owners and deputy inspectors.

8. A full statement containing all available statistical and other information calculated to exhibit the mineral resources of the state, and to promote the development of the same.

9. Generally, such other information and suggestions as may be deemed advisable. [R. C. § 209.]

Hist. '95, p. 160, § 12, reen. '99, p. 221, § 12, modified by '03, p. 149, § 2 (see § 279); compiled and reen. R. C. § 209, reen. C. L. 228:11.

CHAPTER 211.

BUREAU OF MINES AND GEOLOGY.

Hist. Section 4 of the act herein contained, providing an appropriation of $30,000 for 1919-21 has been omitted as temporary.

Comp. leg.—Ore. Similar: '13, c. 324, pp. 632-5.

§ 5481. State bureau of mines and geology: Creation: Board of control. There is hereby created a state bureau of mines and geology which shall be under the direction of the state board of control of the said bureau, consisting of the following members, to-wit:

The governor of the state of Idaho, who shall be ex officio chairman; the dean of the school of mines of the university of Idaho, who shall be ex officio secretary of the board; the state inspector of mines; the head of the department of geology of the university of Idaho; the president of the Idaho Mining Association; all of whom shall serve as members of the said board without pay: *Provided, however,* That the members of said board shall receive their actual and necessary traveling expenses while attending the meetings of the board. ['19, c. 54, § 1, p. 163.]

§ 5482. Same: Meetings: Office. The state bureau of mines and geology shall hold annual meetings at Boise, Idaho, on the first Monday of April of each year and such other meetings as it may determine

upon. The chief office of said bureau and the office of its secretary shall be maintained at the university of Idaho. ['19, c. 54, § 2, p. 163.]

§ 5483. Same: Cooperation with federal agencies: Surveys: Bulletins. It shall be the duty of the said state bureau of mines and geology to conduct cooperative work with the United States bureau of mines in the investigation of mining and metallurgical problems of the state, the condition being that the federal expenditure for such purposes shall at least equal that of the state; to conduct cooperative work with the United States geological survey in completing the topographical mapping of the state, in hydrographic surveys or in other geological work deemed by the board advantageous to the development of the mineral or water power resources of the state, provided that the federal expenditure for such purposes shall be at least equal to that of the state; to conduct such geological and economic investigations or surveys of the mineral resources of the state as may be deemed by the board advantageous; and to publish from time to time such bulletins and reports of progress as the board may deem expedient. ['19, c. 54, § 3, p. 163.]

§ 5484. Same: Reports. The state bureau of mines and geology shall annually, on or before the first day of January, make to the governor of the state a report of its expenditures and of the work of said bureau during the preceding year; and biennially, on or before the first day of January preceding the meeting of the state legislature, it shall make a similar report of its doings and its expenditures to the governor and the state legislature, which report shall contain any recommendations which it desires to make for the development of the mineral resources of the state. ['19, c. 54, § 5, p. 164.]

CHAPTER 212.

OPERATION AND EQUIPMENT OF MINES.

ARTICLE 1.

GENERAL SAFETY REGULATIONS.

§ 5485. Regulations for all operators. The rules, regulations and methods prescribed in sections 5486-5513 shall be observed and followed by each and every person, employee, firm or corporation operating mines within the state of Idaho. ['09, p. 266, S. B. 160, § 1.]

Hist. '09, p. 266, S. B. 160, § 1, reen.
C. L. 229:1.

Fire Protection and Exits.

§ 5486. Fire protection for frame structures. Shafts or tunnels, which at the present time are covered with frame buildings, such as shaft houses, blacksmith shops, machine shops or engine rooms, shall be provided with fire protection. In all cases, dry hand grenade fire extinguishers shall be available at convenient points around the buildings, and water protection under sufficient natural pressure, with at least one hydrant, with hose and nozzle attachment, located outside of the building, shall be provided wherever water is available. ['09, p. 266, S. B. 160, § 2.]

Hist. '09, p. 266, S. B. 160, § 2, reen.
C L. 229:2.

§ 5487. Fire doors. Every working adit or crosscut tunnel entrance, where wooden buildings exist, at or near the portal of same, shall be provided with a fire door not less than 50 feet in from the earth portal of the tunnel. This door shall be hung and so adjusted that, upon being re-

leased, it will close of its own accord, either by its own weight, when hung from the top of the tunnel, or by means of suspended weights, when hung from the side. The door shall be held open by a rope passing over a pulley, terminating outside of any of the buildings at the mouth of the tunnel and shall be so fitted that, when closed, it will cut off the circulation of air as completely as possible. Where electric haulage is used in said adit or crosscut tunnel, a door consisting of two doors hung from the sides and closing tightly can be used.

If there be no other exit which can be reached from the underground workings connected with such entrance tunnel, then such entrance tunnel shall further be provided with a short raise and ladderway to the surface immediately inside of the fire door. ['09, p. 266, S. B. 160, § 3.]

Hist. '09, p. 266, S. B. 160, § 3, reen.
C. L. 229:3.

§ 5488. More than one exit from underground workings. All mines employing underground more than 15 men, and where the vein has been driven on and stoping commenced, shall be provided with more than one exit, and where there is no such escapement raise or exit, work on such an outlet shall be commenced immediately, and be diligently carried on until completed. ['09, p. 266, S. B. 160, § 4.]

Hist. '09, p. 266, S. B. 160, § 4, reen.
C. L. 229:4.

§ 5489. Shaft ladderways. Shafts sunk to a greater depth than 100 feet must have two or more compartments, one compartment to be used for a manway, and to be fitted with a good, substantial ladderway, provided with platforms or cross pieces at intervals of not to exceed 20 feet, and where practicable, the ladders should be in lengths of not to exceed 20 feet, and inclined at a convenient angle. ['09, p. 266, S. B. 160, § 5.]

Hist. '09, p. 266, S. B. 160, § 5, reen.
C. L. 229:5.

§ 5490. Same: Exit. Where wooden buildings exist, at or near the collar of a shaft, and where there is no other exit which may be reached from this shaft, through underground workings, then the manway compartment of the shaft must be partitioned off from the other compartments, and provided with a trapdoor, over the manway compartment, at the surface, which must be kept closed or so arranged that it can be closed from a point outside of the building by the releasing of a rope, and said manway compartment shall in addition be connected with the surface by a short drift or raise starting at a point not less than 25 feet below the collar of the shaft and terminating outside of the building. ['09, p. 266, S. B. 160, § 6.]

Hist. '09, p. 266, S. B. 160, § 6, reen.
C. L. 229:6.

§ 5491. Construction of buildings at entrance. The construction of new buildings, for mechanical plant, timber sheds, blacksmith shop or for any other purpose, over or at the entrance to a mine, shall be prohibited, excepting in high, snowy countries where a shed may be permitted between the buildings and the entrance to the mine, which can be rapidly destroyed in case of fire, but all frame buildings shall be placed at a distance of not less than 25 feet from the entrance. ['09, p. 266, S. B. 160, § 7.]

Hist. '09, p. 266, S. B. 160, § 7, reen.
C. L. 229:7.

§ 5492. Protection of shafts and openings. The collar of all shafts shall be fixed and protected, so that persons and foreign objects can not fall into the shafts, and all openings in mines such as chutes, winzes, timber slides and mill holes, when not in use for any considerable length of

time, shall be protected by a plank or guard rail, and all abandoned or unused surface shafts or raises to the surface shall be securely fenced off or covered. ['09, p. 266, S. B. 160, § 8.]

Hist. '09, p. 266, S. B. 160, § 8, reen. C. L. 229:8.

Shafts and Hoists.

§ 5493. Shaft cages and buckets. It shall be unlawful for any person to sink or operate a vertical or steeply inclined shaft to a greater depth than 250 feet without having the same equipped with a mine cage, skip or bucket fitted with safety clutches.

Where a bucket is used the same must be attached to a fixed safety crosshead by two chains or cables. Loose heads for shaft buckets are strictly prohibited.

Where a cage or skip is used, it must be provided with a bonnet in addition to safety clutches. The bonnet must be made of boiler sheet iron of at least three-sixteenths inch thickness, and must cover the top of the cage in such manner as to afford the greatest protection to life and limb from any falling objects.

Where a cage and skip are used together, in the same compartment of the shaft, the bonnet may be dispensed with, if the skip is placed above the cage: *Provided,* This chapter does not apply to skips, cages or buckets used solely to hoist or lower materials. ['09, p. 266, S. B. 160, § 9.]

Hist. '09, p. 266, S. B. 160, § 9, reen. C. L. 229:9.

§ 5494. Same: Safety devices. All gallows frames shall be equipped with automatic chairs, or some other automatic device, placed in such a position as to catch the cage or skip, and prevent its falling, in case of overwinding and consequent breaking of the cable. ['15, c. 46, subd. 10, p. 133.]

Hist. '09, p. 266, S. B. 160, § 10; am. '15, c. 46, subd. 10, p. 133, reen. C. L. 229:10.

§ 5495. Gallows frames. After a shaft has reached 200 feet in depth and stoping commenced, the gallows frame shall not be less than 40 feet in height between the collar of the shaft and sheave wheel. ['09, p. 266, S. B. 160, § 11.]

Hist. '09, p. 266, S. B. 160, § 11, reen. C. L. 229:11.

§ 5496. Hoist indicator. Wherever a steam, electric, gas, air or water driven hoist is used, in the handling of men, in mines, it shall be equipped with an indicator, placed in clear view of the hoist engineer, and geared positively to the shaft or drum of the hoist, and so adjusted with dial or slide as to provide a target or indicator that will at all times show the exact location of the bucket, cage or skip. ['09, p. 266, S. B. 160, § 12.]

Hist. '09, p. 266, S. B. 160, § 12, reen. C. L. 229:12.

§ 5497. Insulation of wires. Electric power cables, where used underground, shall be thoroughly insulated; and, where electric haulage is used underground, the trolley wires must be protected by inverted U-shaped guards, placed along the trolley wires, opposite any handloading chutes. ['09, p. 266, S. B. 160, § 13.]

Hist. '09, p. 266, S. B. 160, § 13, reen. C. L. 229:13.

§ 5498. Hoist signal devices. Every shaft that is equipped with a bucket, cage or skip operated by a hoist shall be supplied with a pull bell,

and also with an electric bell and flashlight signal, where practicable. ['09, p. 266, S. B. 160, § 14.]

Hist. '09, p. 266, S. B. 160, § 14, reen. C. L. 229:14.

§ 5499. Hoist signal code. At all mines where hoisting apparatus is used in the state of Idaho the following code of bell signals shall hereafter be adopted and used:

One bell, hoist.

One bell, stop (if in motion).

Two bells, lower.

Three bells, hoist men (run slowly).

Four bells, blasting signal. Engineer must answer by raising bucket or cage a few feet and letting it back slowly; then one bell, hoist men away from blast.

Nine bells, danger signal (fire, accident or other danger), followed by the station call where the danger exists.

No other person other than the cager shall ring the signal bell except in case of absolute necessity, and then only after giving seven bells, thereby notifying the hoist engineer that someone other than the cager is ringing the bell.

STATION SIGNALS.

Bells.	Pause.	Bells.	No. Station.
2	"	1	1
2	"	2	2
2	"	3	3
2	"	4	4
2	"	5	5
3	"	1	6
5	"	2	7
etc.	etc.	etc.	etc.
5	"	5	20

['15, c. 46, subd. 15, p. 133.]

Hist. '09, p. 266, S. B. 160, § 15; am. '15, c. 46, subd. 15, p. 133, reen. C. L. 229:15.

§ 5500. Same: Posting. Every mining property using hoisting apparatus within the state of Idaho shall keep one copy of this entire code posted on the gallows frame, and a copy of the bell signals before the hoist engineer, and on each station. Signals to meet local demands and not in conflict with the above may be added by individual operators, but the same must be posted in clear and legible form in conjunction with the above code. ['15, c. 46, subd. 16, p. 134.]

Hist. '09, p. 266, S. B. 160, § 16; am. '15, c. 46, subd. 16, p. 134, reen. C. L. 229:16.

§ 5501. Same: Engineer to be advised when men are handled. It shall be unlawful for any cager or other person to ride upon a cage or skip except after having given a bell signal known by the engineer to be a signal for the handling of men. No private or short signals will be allowed when men are to be hoisted or lowered. ['09, p. 266, S. B. 160, § 17.]

Hist. '09, p. 266, S. B. 160, § 17, reen. C. L. 229:17.

§ 5502. Same: Signals by other than cager. It shall be unlawful for any one, excepting the cager, to ring the hoist bells without first giv-

ing a special signal, notifying the hoist engineer that some one other than the cager is ringing the bell. ['09, p. 266, S. B. 160, § 18.]

Hist. '09, p. 266, S. B. 160, § 18, reen.
C. L. 229:18.

§ 5503. Persons who may accompany supplies. It shall be unlawful for men to travel on a cage or skip loaded with steel supplies or material, other than the cager or those who are assisting him in the loading and unloading of such material. ['09, p. 266, S. B. 160, § 19.]

Hist. '09, p. 266, S. B. 160, § 19, reen.
C. L. 229:19.

§ 5504. Riding in dangerous position unlawful. It shall be unlawful for any person, whether working for himself or whether he be in the employ of any other person, company or corporation, to ride upon the bail or cable of a hoisting bucket, cage or skip. ['09, p. 266, S. B. 160, § 20.]

Hist. '09, p. 266, S. B. 160, § 20, reen.
C. L. 229:20.

§ 5505. Engineer to act only on signal. It shall be unlawful for any hoist engineer to raise or lower a bucket, cage or skip except upon bell signals. ['09, p. 266, S. B. 160, § 21.]

Hist. '09, p. 266, S. B. 160, § 21, reen.
C. L. 229:21.

§ 5506. Hoist engineer must be qualified. When a man is being broken in as hoist engineer and when he is under the tutorage of a qualified hoist engineer, and a signal is given to hoist or lower men, the qualified hoist engineer there present must take charge of the hoist, the new man not being allowed to handle the hoist when men are on the cage or skip until he has qualified as a hoist engineer. ['09, p. 266, S. B. 160, § 22.]

Hist. '09, p. 266, S. B. 160, § 22, reen.
C. L. 229:22.

§ 5507. Hoist engineer must attend exclusively to duty. It shall be unlawful for any hoist engineer, while on duty, to answer questions or converse with any one in any manner whatever, excepting such persons as may be assisting him in the operation of the hoist, and then only when necessary. When approached by any one desiring to converse with him, he shall bring the hoist to rest and descend from the bridge before answering any such inquiry, or entering into conversation. ['09, p. 266, S. B. 160, § 23.]

Hist. '09, p. 266, S. B. 160, § 23, reen.
C. L. 229:23.

§ 5508. Speed regulations. It is unlawful for any person, company or corporation to hoist or lower men at a greater speed than 600 feet per minute; or to hoist or lower the men when going on or coming off of shift, after the cage has remained idle several hours, until one round trip has been made with the empty cage; and when a shaft is equipped with chairs at the several levels, the hoist engineer must slow up when passing stations when men are on the cage or skip. ['09, p. 266, S. B. 160, § 24.]

Hist. '09, p. 266, S. B. 160, § 24, reen.
C. L. 229:24.

§ 5509. Drunkards and minors ineligible. No person addicted to the use of intoxicating liquors or under 21 years of age shall be employed as hoisting engineer, and no person under the influence of liquor shall be permitted under ground, either in the capacity of employee or otherwise. ['09, p. 266, S. B. 160, § 25.]

Hist. '09, p. 266, S. B. 160, § 25, reen.
C. L. 229:25.

Explosives and Oils.

§ 5510. Storing of explosives. It shall be unlawful for any mining company or person to store more explosives in the underground workings of any mine where men are employed than is required for 24 hours' use, and it shall also be unlawful to store or thaw powder in any buildings used as a dwelling or in which men are employed in any capacity, excepting in the storing, thawing or removing of the same, and storage places for powder shall be situated not less than 200 feet distant from any dwelling or working place for men, unless some impregnable natural object intervenes, and then only in a properly designated building or an underground excavation to be used exclusively for that purpose, and conspicuously marked as such.

Powder thawers using fire, candles, lanterns or lights of any kind are hereby prohibited in mines employing more than 15 men. ['09, p. 266, S. B. 160, § 26.]

Hist. '09, p. 266, S. B. 160, § 26, reen.
C. L. 229:26.

§ 5511. Tamping bars. No person, whether working for himself or in the employ of another person, company or corporation, while loading or charging a hole with nitroglycerine powder or other explosive, or in removing powder from same, shall use or employ any steel or iron bar; nor shall any mine manager, superintendent, foreman or shift boss, or other person having the management or direction of mine labor, allow or permit the use of steel, iron or other metal tamping bar by employees under his management or direction. ['09, p. 266, S. B. 160, § 27.]

Hist. '09, p. 266, S. B. 160, § 27, reen.
C. L. 229:27.

§ 5512. Storage of oils. Oils and other inflammable materials shall be stored or kept at a safe distance from the mine buildings, and at a safe distance from the powder magazine, and their removal from said building for use shall be in such quantities as are necessary to meet the requirements of one day only. ['09, p. 266, S. B. 160, § 28.]

Hist. '09, p. 266, S. B. 160, § 28, reen.
C. L. 229:28.

Enforcement.

§ 5513. Penalties for violations. Any person, firm or corporation operating mines within the state of Idaho who shall fail, neglect or refuse to comply with any provisions of this article relating to the duties of employees shall be guilty of a misdemeanor, and upon conviction shall be fined and the sum of not more than $300 or imprisonment for not more than six months, or by both such fine and imprisonment.

And any employee in any mine who shall fail, neglect or refuse to comply with any of the requirements of this article relating to the duties of employees shall be guilty of a misdemeanor, and upon conviction shall be fined the sum of not more than $300 or imprisonment for not more than six months, or both such fine and imprisonment. ['09, p. 266, S. B. 160, § 29.]

Hist. '09, p. 266, S. B. 160, § 29, reen.
C. L. 229:29.

§ 5514. Duty of prosecuting attorney. It shall be the duty of the prosecuting attorney of the proper county to prosecute the violation of the provisions of this article, upon the furnishing of the necessary information by or at the direction of the inspector of mines. ['09, c. 266, S. B. 160, § 30.]

Hist. '09, p. 266, S. B. 160, § 30, reen.
C. L. 229:30.

§ 5515. Publication of regulations. It shall be the duty of the state inspector of mines to have printed a sufficient number of copies of this article for distribution. ['09, p. 266, S. B. 160, § 31.]

Hist. '09, p. 266, S. B. 160, § 31, reen. C. L. 229:31.

ARTICLE 2.

DUST PREVENTION.

§ 5516. Dust prevention apparatus: Operator must furnish. It shall be unlawful for any owner, operator or person in charge of any underground mine to cause to be drilled or bored by machinery a hole or holes in any stope or raise in ground that causes dust from drilling, unless said machinery is equipped with a water jet or spray or other means equally efficient to prevent the escape of dust. ['17, c. 86, § 1, p. 302.]

Hist. '17, c. 86, § 1, p. 302, reen. C. L. 229:32.

§ 5517. Same: Employee must use. Where machinery used for drilling or boring holes in stopes or raises is equipped as required by the preceding section it shall be unlawful for any person or persons to drill or bore a hole in said stope or raise without using said applicance for the prevention of dust. ['17, c. 86, § 2, p. 302.]

Hist. '17, c. 86, § 2, p. 302, reen. C. L. 229:33.

§ 5518. Penalty for violation. Any person who violates either of the two preceding sections, or any owner, operator or person in charge of any underground mine who hires, contracts with or causes any person to violate the two preceding sections shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment. ['17, c. 86, § 3, p. 302.]

Hist. '17, c. 86, § 3, p. 302, reen. C. L. 229:34.

§ 5519. Definitions. The words "person," "operator," "owner" and "person in charge," wherever used in this article, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of the territories, the laws of any state or the laws of any foreign country. ['17, c. 86, § 4, p. 302.]

Hist. '17, c. 86, § 4, p. 302, reen. C. L. 229:35.

CHAPTER 213.

LOCATION OF MINING CLAIMS.

ARTICLE 1.

LODE CLAIMS.

§ 5520. [3206] **Dimensions of lode claims.** Mining claims hereafter located upon veins or lodes of quartz or other rock in place bearing any of the metals or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States, may extend to 300 feet on each side of the middle of the vein or lode: *Provided,* That when the locators have set stakes, posts or monuments described in the following section, to indicate the line of the vein, ledge or lode, such stakes, posts or monuments must be taken, for the purpose of such location, to mark correctly the line thereof, and such line must not afterward be changed so as to

affect rights acquired, or interfere with any locations made, subsequent thereto. ['95, p. 25, § 1.]

Hist. (See '81, p. 262, § 1) R. S. § 3100; am. '95, p. 25, § 1, reen. '99, p. 237, § 1, reen. R. C. § 3206, reen. C. L. ib.

Cited: Ambergis Min. Co. v. Day (1906) 12 I. 108, 85 P. 109; Nicholls v. Lewis & Clark M. Co. (1910) 18 I. 224, 109 P. 846, 28 L. R. A. (N. S.) 1029.

§ 5521. [3207] **Location monument and notice.** The locator, at the time of making the discovery of such vein or lode, must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery and distance claimed along the vein each way from such monument. Within 10 days from the date of discovery he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side lines, a monument, marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries he must post at his discovery monument his notice of location in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim, and seventh, the name of the mining district, county and state. When from any cause, a monument can not be safely planted at the true corner or angle, it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner or angle. Monuments may be made of any such material or form as will readily give notice, and when of posts or trees, they must be hewn and marked upon the side facing toward the discovery, and must be at least four inches square or in diameter. Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. At the time the locator so marks the boundaries of his claim he may do so in any direction that will not interfere with rights or claims which existed prior to his discovery. ['99, p. 440, § 1.]

Hist. (See '81, p. 262, §§ 2, 3) R. S. § 3101; am. '95, p. 25, § 2, reen. '99, p. 237, § 2; am. '99, p. 440, § 1, reen. R. C. § 3207, reen. C. L. ib.

Necessity of discovery: A vein or lode must be discovered before a valid location can be made thereon; one cannot locate a quartz claim on porphyry, granite, limestone or quartzite unless he has previously discovered a vein or lode. (Con. op.) Ambergis Min. Co. v. Day (1906) 12 I. 108, 85 P. 109.

Location by agent: An agent for the locator may do the things required by this section in locating a claim. Dunlap v. Pattison (1895) 4 I. 473, 42 P. 504, 95 A. S. R. 140.

Sufficiency of notice: The location notice must describe the claim by reference to some natural object or permanent monument which will identify the claim and will furnish a reasonable certainty that the locus of the claim has not been, and cannot well be changed; the reference must be such as will enable a skilled engineer to identify the claim without reference to contiguous claims, the location of which are uncertain, and the courses and distances from the permanent monument to the discovery stakes or corner stakes, must be stated with reasonable accuracy. Brown v. Levan (1896) 4 I. 794, 46 P. 661.

A location which is tied to a natural object or permanent monument, described as the mouth of Big Canyon, and which fixes the discovery stake at 600 feet from such monument, without indicating the direction from the point of discovery is void. Clearwater Short Line Ry. v. San Garde (1900) 7 I. 106, 61 P. 137.

A located mining claim is a natural object or landmark, or fixed object which may be referred to in the location notice. Morrison v. Regan (1902) 8 I. 291, 67 P. 955.

Where a location certificate contains a reference to a landmark, it should not be declared insufficient upon the mere inspection of the certificate and in the absence of evidence, unless it clearly fails to identify the claim. Ib.

A location notice describing the claim as "Commencing at this stake and notice which is situated about 300 feet in a northwesterly direction from the Minnesota mine; that it is an extension of the Red Jacket mine and running thence along the vein or lode in an easterly direction to a similar stake and notice," is sufficient. Ib.

Where the location of a mining claim is made in good faith, the court will not

hold the locator to a very strict compliance with the law in respect to his location notice. If by any reasonable construction, in view of the surrounding circumstances the language employed in the description will impart notice to subsequent locators, it is sufficient. The natural objects or permanent monuments referred to in the statutes may be on the ground located, or off, as the case may be. Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14.

If by any reasonable construction in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, such notice of location is sufficient. Snowy Peak M. Co. v. Tamarack etc. Co. (1910) 17 I. 630, 107 P. 60.

The intent of the law is to require the locator to make his location so definite and certain that from the location notice and the stakes and monuments on the ground the limits and boundaries of the claim may be readily ascertained, and so definite and certain as to prevent the changing or floating of the claim. Flynn Group Mining Co. v. Murphy (1910) 18 I. 266, 109 P. 851, 138 A. S. R. 201.

The location notice is not required to describe the exterior boundaries of the claim. Ib.

The sufficiency of the description of the property or the tie to a natural object or permanent monument is open to explanation by other evidence than the notices to show whether or not the property could be definitely identified from such description. Humphreys v. Idaho Gold etc. Co. (1912) 21 I. 126, 120 P. 823, 40 L. R. A. (N. S.) 817.

A description which is so erroneous as to be delusive and misleading renders the location void. Swanson v. Koeniger (1913) 25 I. 361, 137 P. 891.

Actual notice: If the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, no technicalities will be resorted to to sustain his relocation of the same ground. Flynn Group Mining Co. v. Murphy, supra.

Marking exterior boundaries: It takes more than the posting of a discovery notice to constitute a valid location. It is just as essential that the exterior boundaries be marked. Nicholls v. Lewis & Clark M. Co. (1910) 18 I. 224, 109 P. 846, 28 L. R. A. (N. S.) 1029.

Excessive location: Where an excessive mineral location has been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with the fraudulent intent of holding the entire area under one location, such location is void; or if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed. Nicholls v. Lewis & Clark M. Co. supra; Flynn Group M. Co. v. Murphy, supra.

Adverse possession: Under U. S. R. S. § 2332 the claimant to mineral lands who has been in the open, exclusive adverse possession of a claim for a continuous period equal to that required by the local statute of limitations governing adverse possession of real estate, is relieved of the necessity of making proof of posting and recording a notice of location and such other proofs as are usually furnished by the county recorder. Humphreys v. Idaho Gold M. etc. Co. supra.

Valid location with continued compliance with law gives exclusive right to ground within lines. Swanson v. Kettler (1909) 17 I. 321, 105 P. 1059, 224 U. S. 180, 56 L. ed. 721, 33 S. C. R. 455.

§ 5522. [3208] **Shaft must be sunk.** Within 60 days after such location, the locator or his assigns must sink a shaft upon the lode to the depth of at least 10 feet from the lowest part of the rim of such shaft to the surface, and of not less than 16 square feet area. Any excavation which shall cut such vein 10 feet from the lowest part of the rim of such shaft and which shall measure 160 cubic feet in extent shall be considered a compliance with this provision. Any located claim upon which work has been done in compliance with the above requirements is not, unless abandoned, subject to relocation for a period of 90 days from and after the date of location. ['95, p. 25, § 3.]

Hist. '95, p. 25, § 3, reen. '99, p. 237, § 3, reen. R. C. § 3208, reen. C. L. ib.

Time essential: The work required to be done must be performed within the time limited as a condition precedent to the vesting of the title; a neglect in this respect can not be cured by the performance of the work after the time limited, but before the institution of an adverse claim. Kramer v. Settle (1873) 1 I. 485.

Fencing: Neither the government of the United States nor the state of Idaho has enacted any statute requiring the locator of a mining claim to fence the same or in any way protect or inclose any pits, shafts or excavations on such claim against livestock. Strong v. Brown (1914) 26 I. 1, 140 P. 773, Ann. Cas. 1916E, 482, 52 L. R. A. (N. S.) 140.

§ 5523. [3209] **Notice must be recorded.** Within 90 days after the location of the claim the locator or his assigns must file for record in the office of the county recorder of the county, or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location. ['95, p. 25, § 4.]

Hist. '95, p. 25, § 4, reen. '99, p. 237, § 4, reen. R. C. § 3209, reen. C. L. ib.

Notice is prima facie evidence: The location notice or certificate, when recorded, is prima facie evidence of all the facts the statute requires it to contain, and which are therein sufficiently set forth. Bismark Min. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14.

Adverse possession: Under U. S. R. S. § 2332, a claimant to mineral lands who has been in adverse possession for a continuous period equal to that required by the local statute of limitations is relieved of the necessity of making proof of recording a notice of location. Humphreys v. Idaho Gold etc. Co. (1912) 21 I. 126, 120 P. 823, 40 L. R. A. (N. S.) 817.

§ 5524. [3210] **Record of additional certificate.** If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this chapter, such locator or his assigns may file an additional certificate subject to the conditions of this chapter, and to contain all that this chapter requires an original certificate to contain: *Provided,* That such amended location does not interfere with the existing rights of others at the time when such amendment is made. ['95, p. 25, § 5.]

Hist. '95, p. 25, § 5, reen. '99, p. 237, § 5, reen. R. C. § 3210, reen. C. L. ib.

Amended locations: An amended location may be made by any one having authority to make the same, and such authority need not be in writing. Morrison v. Regan (1902) 8 I. 291, 67 P. 955.

The proviso of this section that amended locations do not interfere with the existing rights of others at the time of amendment, only applies to changes of boundaries or to cases where part of an overlapping claim which has been abandoned is taken in, and does not apply to amended locations by which the surface boundaries are not changed, or where no part of an overlapping claim is taken in. Morrison v. Regan (1902) 8 I. 291, 67 P. 955.

An amended certificate may cure a defective or erroneous original certificate and relates back to the date of the original certificate, unless such original is absolutely void, or where the rights of others have intervened between the date of the original and amended locations. Ib.

Amended locations, where they do not interfere with existing rights, relate back to the date of the original locations. Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14.

§ 5525. Affidavit of performance of labor: Fee: As evidence. Within 60 days after any time set or period allowed for the performance of labor, or making improvements upon any lode or placer claim, the person in whose behalf such work or improvement is performed, or some person for him, must make and record an affidavit in substance as follows:

State of Idaho, county of....., ss.

Before me, the subscribed, personally appeared....., who being first duly sworn says, that at least..... dollars worth of work or improvements were performed or made upon.....claim, situate in.....mining district, county of....., state of Idaho:

That such expenditure was made by, for, or at the expense of....., owner of said claim, for the purpose of holding said claim; all stakes, monuments or trees marking boundaries of said claim are in proper place and position.

Subscribed and sworn to before me this.....day of....., 19.....

The fee for administering the oath and recording the foregoing affidavit, when taken before any county recorder or deputy mineral recorder, shall be 50 cents: *Provided, however,* That any number of claims in the same mining district, belonging to the same person or persons, association or corporation, may be included in one affidavit without the additional charge. The fee for recording the same when the oath is

taken before any other officer authorized to administer oaths shall be 50 cents.

Such affidavit, or a certified copy thereof in case the original is lost, shall be prima facie evidence of the performance of such labor. The failure to file such affidavit shall be considered prima facie evidence that such labor has not been done. ['13, c. 72, § 1, p. 308.]

Hist. R. S. § 3101; am. '99, p. 237, § 6; am. '99, p. 440, § 2, reen. R. C. § 3211; am. '13, c. 72, § 1, p. 308, reen. C. L. § 3211.

Cited: Empire Copper Co. v. Henderson (1908) 15 I. 635, 99 P. 127.

Correction of affidavit: If a mistake is made in such notice, it may be corrected by oral evidence. The fact as to whether the work was done is the main question, and not its method of proof. Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14.

Prima facie evidence overcome: When the prima facie evidence is met and overcome by positive evidence that the labor had not been performed, it then devolves upon the respondent to show by evidence of a positive aud affirmative nature other than the affidavit that the work had actually been performed. Dickens-West M. Co. v. Crescent etc. Co. (1914) 26 I. 153 141 P. 566.

§ 5526. [3212] **Location of abandoned claim.** The location of abandoned claims shall be done in the same manner as if the location were of a new claim; but the locator may, instead of sinking a new discovery shaft, sink the original discovery shaft 10 feet deeper than it was at the time of his location, or he may drive the open cut, or tunnel, 10 feet further along the course of the lead, lode or vein, and must erect new posts or monuments. ['95, p. 25, § 7.]

Hist. '95, p. 25, § 7, reen. '99, p. 237, § 7, reen. R. C. § 3212, reen. C. L. ib.

§ 5527. [3213] **Notice must claim only one location.** No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purport to claim more than one location it is absolutely void. ['95, p. 25, § 8.]

Hist. '95, p. 25, § 8, reen. '99, p. 237, § 8, reen. R. C. § 3213, reen. C. L. ib.

§ 5528. [3214] **Security to surface owners: Injunction.** When the right to mine is in any case separate from the ownership or right of occupancy of the surface ground, the owners or rightful occupants of the surface ground may demand satisfactory security from the miners, and if it be refused or not given, may enjoin such miners from working such ground until such security is given. The court granting the writ of injunction shall fix the amount and nature of the security. ['95, p. 25, § 10.]

Hist. '95, p. 25, § 10, reen. '99, p. 237, § 10, reen. R. C. § 3214, reen. C. L. ib.

§ 5529. [3215] **Appointment of deputy recorders.** For the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where they may deem it necessary, and at all places more than 20 miles distant from an existing office, whenever 10 or more mining locators interested petition for the appointment of a deputy. Upon failure of any recorder to appoint a deputy for 10 days after the petition in writing has been presented to him, the resident miners in such district may appoint, temporarily, one of their number to act as recorder for the district, whose record shall be as valid as if made by the deputy, and must be entered by the recorder as hereinafter required: *Provided,* That whenever at any time afterward, the recorder has appointed a deputy for such district or place, the authority of the person elected by the resident miners ceases. ['95, p. 25, § 9.]

Hist. (See '81, p. 262, § 4); R. S. § 3103; am. '95, p. 25, § 9, reen. '99, p. 237, § 9, reen. R. C. § 3215, reen. C. L. ib.

Appointment of subdeputy: A deputy recorder has no power to appoint another deputy to act in his place, and an affidavit sworn to before the deputy so appointed by him would be void. Van Buren v. McKinley (1901) 8 I. 93, 66 P. 936.

§ 5530. [3216] **Affidavit of locators.** At or before the time of presenting a location notice for record, whether it be for a quartz or placer claim, one of the locators named in the same must make and subscribe an affidavit, in writing on or attached to the notice, substantially in the following form to wit:

State of Idaho, county of.....,ss.

I, ..., do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such), and that I am acquainted with the mining ground described in this notice of location, and herewith called the.....ledge, lode or claim; that the ground and claim therein described or any part thereof has not, to the best of my knowledge and belief, been located according to the laws of the United States and this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and (in the case of quartz claims) that I have opened new ground to the extent or depth of 10 feet as required by the laws of Idaho.

Signature.....

Subscribed and sworn to before me this....day of.....A. D. 19....

Signature.....

['95, p. 25, § 13.]

Hist. (See '81, p. 262, § 5) R. S. § 3104; am. '95, p. 25, § 13, reen. '99, p. 237, § 13, reen. R. C. § 3216, reen. C. L. ib.

Cited: Bismark M. Co. v. North Sunbeam Co. (1908) 14 I. 516, 95 P. 14.

Validity of section: This section in requiring an affidavit to a location notice prescribes a reasonable regulation and is not in conflict with U. S. R. S. § 2322. Van Buren v. McKinley (1901) 8 I. 93, 66 P. 936.

Necessity of affidavit: The affidavit as required by this section is necessary to a valid location. Ib.

Who may make affidavit: An agent or attorney in fact may locate a mining claim for his principal and may make the affidavit required by this section. Dunlap v. Pattison (1895) 4 I. 473, 42 P. 504, 95 A. S. R. 140.

§ 5531. [3217] **Manner of recording notices: Fees.** The location notice herein required to be recorded must be recorded by the deputy appointed for the district, or the person appointed for that purpose as above provided (when the legal fee therefor is tendered) in a book kept for that purpose. Said book must be indexed, with the names of all the locators arranged in alphabetical order, according to the family or surname of each. The fee to be tendered for making such record, administering the oath to the locator and certifying the same, for indexing the names appearing on the notice, and to include recording the notice by the recorder as hereinafter required, and the indexing by said recorder, is $2, which fee must be equally divided between the recorder and the deputy or the person acting under an election as hereinbefore provided, and no other additional sum of money must be demanded or received by either of them, for any services connected with the recording of any location notice made pursuant to the requirements of this chapter. ['95, p. 25, § 14.]

Hist. (See '81, p. 262, § 6) R. S. § 3105; am. '95, p. 25, § 14, reen. '99, p. 237, § 14, reen. R. C. § 3217, reen. C. L. ib.

§ 5532. [3218] **Transmission of notices to county recorder.** The deputy recorder of mining claims of each district, or the person elected as

hereinbefore provided to make the record in case of the failure of the recorder to appoint a deputy, must, at least once in each month, transmit to the recorder at the county seat, all the notices of location filed with him for record and not previously transmitted, which must at once be recorded by said recorder, in a book to be kept in his office, to be known as the book of mining claims. The names of all persons appearing in every notice of location must be indexed by the recorder, said names being arranged in said index in alphabetical order, according to the first letter of the surname of said locators. [R. S. § 3106.]

Hist. (See '81, p. 262, § 7) R. S. § 3106; reen. R. C. § 3218, reen. C. L. ib.

§ 5533. [3219] **Same: Transmission to deputies.** It shall be the duty of the county recorder of the several counties of this state, within 14 days after receiving them, to transmit to the deputy mining recorder of the district wherein the claims located are situated, all location notices, both quartz and placer, which shall not have been already recorded in the office of the deputy mining recorder. It shall be the duty of such deputy mining recorder to record in his records all such notices received by him, and he shall receive as compensation therefor from the recorder sending them, one-half the fee authorized by law to be charged for the recording of mining claims. After recording such notices the deputy mining recorder shall return the same to the county recorder. [R. C. § 3219.]

Hist. '03, p. 290, § 1; am. R. C. § 3219, reen. C. L. ib.

§ 5534. [3220] **Seal of deputies: Limitation on powers.** The deputy recorders provided for in this chapter are not, by virtue of the provisions hereof, authorized to perform any other than the special duties herein specified. They must keep an official seal, and the records in their custody are public records, but the seal of a deputy recorder must not be attached to any paper except for the purpose of authenticating certificates attached to transcripts of the records in his custody as deputy recorder. [R. S. § 3107.]

Hist. (See '81, p. 262, § 8) R. S. § 3107, reen. R. C. § 3220, reen. C. L. ib.

ARTICLE 2.

PLACER CLAIMS.

§ 5535. [3221] **Location of placer claims.** Placer claims, as mentioned in section 2329 of the Revised Statutes of the United States, may be located for the purpose of mining deposits and precious stones after the discovery of such deposits. ['95, p. 25, § 11.]

Hist. '95, p. 25, § 11, reen. '99, p. 237, § 11, reen. R. C. § 3221, reen. C. L. ib.

§ 5536. [3222] **Monuments: Notice: Excavation: Record of notice.** The locator of any placer mining claim located for the purpose of mining placer deposits or precious stones must, at the time of making the location, place a substantial post or monument, as is required in the location of quartz claims, at each corner of the location, and must also post on one of the same a notice of location containing the date of the location, the name of the locator, the name and dimensions of the claim, the mining district (if any) and county in which the same is situated; and must also give the distance and direction from said post or monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim. Within 15 days after making the location, the locator must make an

excavation upon the claim of not less than 100 cubic feet, for the purpose of prospecting the same. Within 30 days after the location, the locator must file for record in the office of the recorder of the county, or the deputy recorder of the mining district in which the claim is situated, a substantial copy of his copy of notice of location, to which must be attached an affidavit such as is required in case of quartz claims. ['97, p. 13, § 1.]

Hist. '95, p. 25, § 12; am. '97, p. 13, § 1, reen. '99, p. 237, § 12, reen. R. C. § 3222, reen. C. L. ib.

CHAPTER 214.

RIGHTS OF WAY AND EASEMENTS FOR THE DEVELOPMENT OF MINES.

§ 5537. [3223] **Right of way for mining purposes.** The owner, locator or occupant of a mining claim, whether patented under the laws of the United States or held by location or possession, may have and acquire a right of way for ingress and egress, when necessary in working such mining claim, over and across the lands or mining claims of others, whether patented or otherwise. [R. S. § 3130.]

Hist. (See '77, p. 70, § 1) R. S. § 3130, reen. R. C. § 3223, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

Purpose for which taken: This chapter designates the purposes for which mining property may be taken. Unless mining property is being applied or held for the same or a more necessary public use which will be defeated thereby it may be taken in aid of that industry under the power of eminent domain for one or more of those purposes designated and none other. Marsh M. Co. v. Inland Empire M. & M. Co. (1916) 30 I. 1, 165 P. 1128.

The fact that land sought to be condemned is held as a mining claim for prospective public use does not protect it from being condemned for public use. (Dis. op.) Marsh M. Co. v. Inland Empire M. & M. Co. Ib.

§ 5538. [3224] **Same: For railroads, ditches and tunnels.** When any mine or mining claim is so situated, that for the more convenient enjoyment of the same a road, railroad or tramway therefrom, or ditch or canal to convey water thereto, or a ditch, flume, cut or tunnel to drain or convey the waters or tailings therefrom, or a tunnel or shaft, may be necessary for the better working thereof, which road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, may require the use or occupancy of lands or mining grounds, owned, occupied or possessed by others than the person or persons or body corporate, requiring an easement for any of the purposes described, the owner, claimant or occupant of the mine or mining claim first above mentioned, is entitled to a right of way, entry and possession for all the uses and privileges for such road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, in, upon, through and across such other lands or mining claims, upon compliance with the provisions of this chapter. [R. S. § 3131.]

Hist. (See '81, p. 266, § 1) R. S. § 3131, reen. R. C. § 3224, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177; Marsh M. Co. v. Inland Empire M. & M. Co. (1916) 30 I. 1, 165 P. 1128.

§ 5539. [3225] **Action to condemn right of way.** When the owner, claimant or occupant of any mine or mining claim desires to work the same, and it is necessary, to enable him to do so successfully and conveniently, that he have a right of way for any of the purposes mentioned in the foregoing sections, if such right of way can not be acquired by agreement with the claimant or owner of the lands or claims over, under, through, across or upon which he seeks to acquire such right of way, he may commence an action in the district court in and for the county in which such right of way, or some part thereof, is

situated, by filing a verified complaint containing a particular description of the character and extent of the right sought, a description of the mine or claim of the plaintiff, and of the mine or claim and lands to be affected by such right of way or privilege, with the name of the occupant or owner thereof. He may also set forth any tender of compensation that he may have made, and demand the relief sought. ['99, p. 350, § 1.]

Hist. (See '77, p. 70, § 3) R. S. § 3132; am. '99, p. 350, § 1, reen. R. C. § 3225, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5540. [3226] **Issuance and service of summons.** Upon the filing of such complaint the clerk must issue a summons as provided in other civil actions, and the same must be served in the manner prescribed by law for service in ordinary actions. ['99, p. 350, § 2.]

Hist. (See '77, p. 70, § 4) R. S. § 3133; am. '99, p. 350, § 2, reen. R. C. § 3226, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

Cross ref. Form of summons: § 6672; service: § 6676.

§ 5541. [3227] **Appointment of commissioners.** At any time after the service of the summons the plaintiff may upon 10 days' notice to the defendant, apply to the district court or the judge thereof for the appointment of commissioners to assess the damages resulting from the grant of such right of way. If upon the hearing of such motion, and the affidavits and proofs offered by the respective parties, the judge shall be of the opinion that the plaintiff has made a prima facie case entitling him to the relief demanded in the complaint, or any part thereof, he shall appoint three commissioners, who must be disinterested persons, residents of the county, to assess the damages resulting to the claims, mines or lands of the defendant. But if such commissioners are not applied for and appointed, or their award is not approved by the judge or court, or if an appeal is taken from their award as hereinafter provided, the action shall be tried and determined by the court, and the provisions of the Code of Civil Procedure applicable thereto shall govern the proceedings therein as in other civil actions. Either party shall be entitled to a jury trial and may move for a new trial and appeal as in other cases. ['99, p. 350, § 3.]

Hist. (See '77, p. 70, § 5) R. S. § 3134; am. '99, p. 350, § 3; reen. R. C. § 3227, reen. C. L. ib.

Cross ref. Condemnation proceedings in district court: §§ 7404-7423. New trials: §§ 6887-6894. Appeals: §§ 7152-7172.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5542. [3228] **Oath, view and report of commissioners.** The commissioners so appointed must be sworn to faithfully and impartially discharge their duties, and must proceed without unreasonable delay to examine the premises and assess the damages resulting from such right or privilege prayed for, and report the amount of the same to the judge appointing them; and if such right of way affects the property of more than one person or company, such report must contain an assessment of damages to each company or person. [R. S. § 3135.]

Hist. (See '77, p. 70, § 6) R. S. § 3135, reen. R. C. § 3228, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5543. [3229] **Setting aside report.** For good cause shown, the judge may set aside the report of such commissioners and appoint three other commissioners whose duty shall be the same as above mentioned. [R. S. § 3136.]

Hist. (See '77, p. 70, § 7) R. S. § 3136, reen. R. C. § 3229, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5544. [3230] **Rights upon payment of damages.** Upon the payment of the sum assessed as damages as aforesaid, to the persons to whom it is awarded, or a tender thereof to them, then the person petitioning as aforesaid, is entitled to the right of way prayed for in his petition, and may immediately proceed to occupy the same and erect thereon such works and structures, and make therein such excavations, as may be necessary to the use and enjoyment of the right of way so awarded. [R. S. § 3137.]

Hist. (See '77, p. 70, § 8) R. S. § 3137, reen. R. C. § 3230, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5545. [3231] **Appeal from commissioners' award.** Appeals from the assessment of damages made by the commissioners may be made and prosecuted in the proper district court by any party interested, at any time within 10 days after the filing of the report of the commissioners. A written notice of such appeal must be served upon the appellee in the same manner as summons is served in civil actions. The appellant must file with the clerk of the court to which the appeal is taken, a bond with sureties to be approved by the clerk in the amount of the assessment appealed from in favor of the appellee, conditioned that the appellant will pay any costs that may be awarded to the appellee, and abide any judgment that may be rendered in the cause. [R. S. § 3138.]

Hist. (See '77, p. 70, § 9) R. S. § 3138, reen. R. C. § 3231, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

Cross ref. Service of summons: § 4144.

§ 5546. [3232] **Trial on appeal.** An appeal brings before the district court the necessity of the right of way or easement for the successful and convenient working of the mining claim and the amount of damages; and upon such appeal the case must be tried anew, and either party is entitled to a jury. [R. S. § 3139.]

Hist. (See '77, p. 70, § 10) R. S. § 3139, reen. R. C. § 3232, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5547. [3233] **Effect of appeal: Bond and deposit of damages.** The prosecution of an appeal from the award of the commissioners or from the judgment of the district court does not hinder, delay or prevent the plaintiff from exercising all the rights and privileges granted by the award or judgment, if he deposit with the clerk of the district court the full amount of the damages awarded or adjudged the defendant, and execute and deliver to the clerk a bond with sufficient sureties to be approved by the clerk, in an amount to be fixed by the judge of the district court, conditioned to pay to the defendant any additional amount, over and above the amount so deposited that the defendant may recover, and all costs to which he may be entitled under the provisions of this chapter. At any time after such deposit and before the final determination of the action the defendant may, upon demand, receive from the clerk the amount so deposited, but his acceptance of the same or any part thereof, shall bar any further prosecution of the appeal, and shall be deemed an acquiescence and consent to the award and judgment, and the defendant shall not be entitled to any costs subsequent to the judgment. ['99, p. 350, § 4.]

Hist. ('77, p. 70, § 11) R. S. § 3140; am. '99, p. 350, § 4, reen. R. C. § 3233, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5548. [3234] **Costs of appeal.** If the defendant recover judgment against the necessity of the easement, or for $50 more damages than the plaintiff has tendered him as provided in the next section, or for $50 more damages than the commissioners or judgment of the district

court awarded him, he shall recover the costs of the appeal, otherwise he must pay all such costs. ['99, p. 350, § 5.]

Hist. (See '77, p. 70, § 12) R. S. § 3141; am. '99, p. 350, § 5, reen. R. C. § 3234, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

§ 5549. [3235] **Costs of proceedings.** The costs and expenses of proceedings under the provisions of this chapter, except as herein otherwise provided, must be paid by the party making the application: *Provided,* That if the applicant before the commencement of such proceedings has tendered to the parties owning or occupying the lands or mining claims, a sum equal to or more than the amount of damages recovered, all of the costs and expenses must be paid by the party or parties owning the land or claims affected by such right of way, and who appeared and resisted the claim of the applicants thereto. [R. S. § 3142.]

Hist. (See '77, p. 70, § 13) R. S. § 3142, reen. R. C. § 3235, reen. C. L. ib.

Cited: Baillie v. Larson (1905) 138 F. 177.

CHAPTER 215.

MINING TUNNELS.

§ 5550. [3236] **Right to cross located claim.** Any person or company who has or who may hereafter have a tunnel or crosscut, the mouth of which is located upon his own ground or upon ground in his lawful occupation, shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of the tunnel, but not to follow or drive upon any vein belonging to the owner of such claim. ['99, p. 442, § 1.]

Hist. '99, p. 442, § 1, reen. R. C. § 3236, reen. C. L. ib.

Comp. leg.—Colo. See Colo. Mill's An. Stat. V. 3, § 3141a.

Constitutionality and validity: This act, in granting to owners of ground having a tunnel located thereon, the right to run the same through the claims of others on payment of actual damages is not subject to the objection of depriving any person of property without due process of law. Baillie v. Larson (1905) 138 F. 177.

The enactment of this law is authorized by United States Revised Statutes § 2338 (U. S. Comp. St. 1901, p. 1436) providing that, as a condition of sale of mineral lands, the local legislature of any state may prescribe rules for working mines, involving easements, drainage and other necessary means to their complete development. Ib.

§ 5551. [3237] **Owner of intersected claim may inspect tunnel.** Each tunnel or crosscut may be driven and worked for the purpose of drainage and for the purpose of reaching and working mining ground of the tunnel owner beyond the intersected claim. The owner or owners of any vein or any claim or claims so intersected, or his duly authorized agent, shall have the right to enter such tunnel upon application to the owner or owners or person in charge of said tunnel, without resorting to any process of law, for the purpose of making a survey and inspecting such vein or veins as may be crossed within the boundary lines of such intersected claim, and if the owner or owners of such tunnel shall, by bulkheading, damming back, or in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the natural drainage of water from such intersected claim or claims without the consent of the owner or owners thereof. it shall work a forfeiture of all rights granted under the preceding section. ['99, p. 442, § 2.]

Hist. '99, p. 442, § 2, reen. R. C. § 3237, reen. C. L. ib.

Comp. leg.—Colo. See Colo. Mill's An. St. V. 3, § 3141b.

§ 5552. [3238] **Title to ore taken from intersected claim.** If any ore, the property of the owner of the claim intersected or crossed, be ex-

tracted in driving such tunnel, it shall be the property of the owner of the vein from which it was taken and the owner of the tunnel shall be liable for all actual damages or injury done to the owner of the claim crossed by his tunnel. ['99, p. 442, § 3.]

Hist. '99, p. 442, § 3, reen. R. C. § 3238, reen. C. L. ib.

Comp. leg.—Colo. See Colo. Mill's An. Stat. V. 3, § 3141c.

§ 5553. [3239] **Burden of proof as to discovered vein.** In all actions between the tunnel owner and others involving the right to any vein discovered in such tunnel, the burden of proving that the vein so discovered is not the property of the adverse claimant in such action shall be on the tunnel owner. ['99, p. 442, § 4.]

Hist. '99, p. 442, § 4, reen. R. C. § 3239, reen. C. L. ib.

Comp. leg.—Colo. See Colo. Mill's An. Stat. V. 3, § 3141d.

CHAPTER 216.

PROCEEDING BY LIENHOLDER UPON UNPATENTED MINING CLAIM TO PREVENT FORFEITURE.

§ 5554. Order for performance of assessment work. Whenever a judgment, attachment or mortgage creditor has a lien upon unpatented mining claims in this state and the annual assessment work required by the provisions of section 2324 of the Revised Statutes of the United States has not been performed upon such mining claims by the 1st day of December in any year, the judgment, attachment or mortgage creditor may apply to the court having jurisdiction for an order allowing such judgment, attachment or mortgage creditor to perform such annual assessment work upon such unpatented mining claims in order to prevent a forfeiture of such mining claims and to preserve the lien of the judgment, attachment or mortgage until the final issuance of sheriff's deed. ['11, c. 174, § 1, p. 568.]

Hist. '11, c. 174, § 1, p. 568, reen. C. L. 233:2.

§ 5555. Cost of assessment a lien. Upon the making of such order the judgment, attachment or mortgage creditor shall be authorized and empowered to incur all the expenses necessary in the performance of the annual assessment work upon such mining claims, and upon filing in the court in which such action is pending a verified statement of such expenses, the cost thereof shall be taxed in the action, suit or proceeding and become and be a lien upon said premises, and execution may issue therefor against said premises: *Provided,* That no deficiency judgment shall be entered against the owner of said mining property for any portion of such expense if the proceeds of the sale thereof are insufficient to satisfy the same. ['11, c. 174, § 2, p. 569.]

Hist. '11, c. 174, § 2, p. 569, reen. C. L. 233:1.

Cross ref. Lien of creditor of mining partnership: § 5859.

TITLE XLIV. WATER RIGHTS AND IRRIGATION.

Hist. Two acts passed in 1881 were the basis of the irrigation law of the state for a number of years. The act of Feb. 10, 1881 (Laws '81, p. 267) regulated the appropriation of water, requiring the posting of notices at the point of diversion and the recording of the same as in the case of mining claims, and prescribing the manner of procuring rights of way by proceedings before the county commissioners. The act of Feb. 7 (Laws '81, p. 273) regulated the distribution of water through water masters whose election and duties were therein provided for. The provisions of these two acts were substantially perpetuated in R. S., Civ. C., Title 9 (§§ 3155-3205).

A new act covering the appropriation of water and providing for fixing water rates by the district court was enacted in 1895 (Laws '95, p. 174). This act was in part reenacted and in part repealed by the act of Feb. 25, 1899 (Laws '99, p. 380) which added several new provisions to the law and gave to the county commissioners jurisdiction to fix water rates. The appropriation provisions of the 1899 law were repealed by Laws '03, p. 223, which, for the first time, departed from the old system of posting and recording notices of appropriation, placing the matter in the hands of the state engineer. The act of 1903, with such sections of the 1899 and earlier laws as are still in force, comprise the basis of this title, which has been frequently amended since the enactment of the R. C.

'19, c. 8, § 38, p. 65 (§ 351 herein) abolished the office of state engineer, and § 37 of the same act (§ 350 herein) vested his powers and duties in the department of reclamation. The section notes "Compiled upon authority '19, c. 8," etc., indicate that the substitutions of offices and officials authorized by that act have been made accordingly; the text of the preexisting law not being changed except in so far as necessary in making substitutions.

Cross ref. Other provisions bearing on the irrigation laws may be found as follows: Const. XV: water rights. Title XXVI, reclamation of arid lands: cc. 135-142. Title XXXIII, irrigation districts: cc. 175-178. Title XXXIV, drainage districts: c. 179; adjudication of water rights: § 6749 et seq; penal provisions of the irrigation law: § 8529 et seq. Water and canal corporations and water users' associations: § 4842 et seq.

Comp. leg. The present Idaho appropriation law is based on the statutes of Wyoming and Colorado. The first 12 sections follow the "Wyoming system." See R. S. Wyo. 1889, § 917 et seq. Under the "Colorado system," for the purpose of adjudicating the priority rights to the use of water, the courts have original jurisdiction. Mill's Ann. Stat. Colo. c. 1, p. 149, § 2399. In this respect the Idaho law follows that of Colorado. Under the Wyoming system such jurisdiction is vested in a board of control. Rev. St. (Wyo.) 1899, § 857 et seq.

CHAPTER 217.

GENERAL PROVISIONS.

§ 5556. [3240] **Nature of property in water.** Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved, All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water. ['01, p. 191, § 9b.]

Hist. '01, p. 191, § 9b, reen. R. C. § 3240, reen. C. L. ib.

Cross ref. Use of water a public use: Const. XV, 1.

Cited: Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208; Walbridge v. Robinson (1912) 22 I. 236, 125 P. 812, 43 L. R. A. (N. S.) 240; Murray v. P. U. C. (1915) 27 I. 603, 619, 150 P. 47, P. U. R. 1915F 436, 441; Bennett v. Twin Falls etc. Co. (1915) 27 I. 643, 150 P. 336; Ireton v. Idaho Irr. Co. (1917) 30 I. 310, 164 P. 687.

Constitutionality: This section is in harmony with Const. XV, 7. Adams v. Twin Falls-Oakley L. & W. Co. (1916) 29 I. 357, 161 P. 322.

Rights to ditches: Possessory rights to ditches and to the use of water may each have an existence independent of the other. A ditch may be conveyed, reserving the water right, or the water may be conveyed, reserving the ditch. Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co. (1898) 5 I. 793, 51 P. 990.

Nature of water right: The clause of this section which provides that the right of the water user shall not be considered as being a property right in itself but shall become a complement, or one of the appurtenances, of the land on which the water is applied, does not deprive or divest the right to the use of water of any of the qualities or elements of property it otherwise might have. (Con. op. Sullivan, J. dis.) Hard v. Boise City Irr. etc. Co. (1904) 9 I. 589, 76 P. 331.

Remedies for nonpayment of maintenance: For user's default in payment of maintenance, water company may proceed either under this section or under § 3288. Adams v. Twin Falls-Oakley L. & W. Co. (1916) 29 I. 357, 161 P. 322.

Contractual provision empowering company to refuse delivery of water during default by user in payment other than for maintenance is contrary to public policy and void. Ib.

§ 5557. Measurement of water. A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state, and it shall be the duty of the department of reclamation to devise a simple, uniform system for the measurement and distribution of water.

Hist. '99, p. 380, §§ 1, 21, reen. R. C. § 3241, reen. C. L. 3241; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Acre foot recognized as standard for stored water: § 5569.

Cited: (In brief of counsel) S. v. Twin Falls etc. Co. (1916) 30 I. 41, 166 P. 220.

Courts must recognize standard: This section is the measurement of water which should be recognized by the court in entering a decree of distribution of water. A decree for all the water of a stream is void for uncertainty. Lee v. Hanford (1912) 21 I. 327, 121 P. 558.

§ 5558. [3242] **Right acquired by appropriation.** The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation. ['99, p. 380, § 2.]

Hist. (See R. S. § 3155) '99, p. 380, § 2, reen. R. C. § 3242, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1410; Kerr's C. ib.

Cited: Speer v. Stephenson (1909) 16 I. 707, 102 P. 365; Nielson v. Parker (1911) 19 I. 727, 115 P. 488; Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208; Bower v. Moorman (1915) 27 I. 162, 147 P. 496, Ann. Cas. 1917C 99.

§ 5559. [3243] **Appropriation must be for beneficial purpose.** The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases. ['99, p. 380, § 3.]

Hist. (See R. S. § 3156) '99, p. 380, § 3, reen. R. C. § 3243, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1411; Kerr's C. ib.

Cited: Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208.

Beneficial use, time: An appropriator of water for irrigation purposes, after conducting the water to the point of intended use, has a reasonable length of time to apply it to such intended use. Hall v. Blackman (1902) 8 I. 272, 68 P. 19; Bennett v. Nourse (1912) 22 I. 249, 257, 125 P. 1038.

§ 5560. Use of natural channels: Measurement of commingled water. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; and water may be turned into any ditch, natural channel or waterway from reservoirs or other sources of water supply, and such water may be substituted or exchanged for an equal amount of water diverted from the stream, creek or river into which such water flows, or any tributary thereof, but in reclaiming the water so mingled, or diverting water in lieu thereof from any such stream, creek, river or tributary, the amount

of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. ['11, c. 149, p. 454.]

Hist. R. S. § 3158, reen. R. C. § 3244; am. '11, c. 149, p. 454, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1413; Kerr's C. ib.

Cited: Schodde v. Twin Falls Land & Water Co. (1908) 161 F. 43.

§ 5561. [3245] **Priority.** As between appropriators, the first in time is first in right. ['99, p. 380, § 4.]

Hist. (See R. S. § 3159) '99, p. 380, § 4, reen. R. C. § 3245, reen. C. L. ib.

Cross ref. Right of priority and preferences as between domestic, irrigation and mining uses: Const. XV, 3. Priority of right between persons who have settled on land with the view of receiving water for agricultural purposes under a sale, rental or distribution, is subject to reasonable limitations as to the quantity of water used and the time of use: Const. XV, 5.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1414; Kerr's C. ib.

Cited: Lee v. Hanford (1912) 21 I. 327, 121 P. 558; Brose v. Directors Nampa etc. Irr. Dist. (1913) 24 I. 116, 121, 132 P. 799.

Riparian rights repudiated: A prior appropriator of water has a right to the use thereof which is superior to the claim of a riparian proprietor not based upon appropriation but on the doctrine of riparian rights. (Berry, J. dissents) Drake v. Earhart (1890) 2 I. 750, 23 P. 541.

Priorities: The first appropriation of water for useful or beneficial purposes gives the prior right thereto, and the right once vested will be protected and upheld unless abandoned. Malad Valley Irr. Co. v. Campbell (1888) 2 I. 411, 18 P. 52; Geertson v. Barrack (1892) 3 I. 344, 29 P. 42; Dunniway v. Lawson (1898) 6 I. 28, 51 P. 1032. The doctrine of priority must be applied although its application may be harsh and unjust in the particular case. Kirk v. Bartholomew (1892) 3 I. 367, 29 P. 40.

The right of a prior appropriator of water to the use of the same to the extent of his appropriation is not defeated by his having, through mistake, used a portion of the water on land belonging to another. Mahoney v. Neiswanger (1899) 6 I. 750, 59 P. 561.

Extent of right: One who first appropriated all the waters of a creek, and since the appropriation continually used the same for the purpose of irrigating his lands, is entitled to all of said waters, to the extent of the capacity of his ditches, necessary to the proper irrigation of his lands, as against subsequent locators. Hillman v. Hardwick (1891) 3 I. 255, 28 P. 438.

Date of priority: When two persons as partners appropriated water sufficient to irrigate 480 acres of land, owned by them as tenants in common, in 1872, and actually irrigated 200 acres of land until 1886, when they severed their interests, one taking the uncultivated portion and the other the cultivated, the rights of each to their respective shares of water appropriated by them jointly, dates from 1872. Hall v. Blackman (1902) 8 I. 272, 68 P. 19.

Where one settled on unsurveyed lands and, during the year of such settlement, opened up an old ditch which had been constructed and used by a previous settler, put in a headgate and conveyed waters of a stream 150 feet to and upon the lands claimed by him, and in the following year extended the ditch so as to better distribute the water over his claim, the water right so acquired dates from the time when the water was actually delivered upon the ground for the use of which it was diverted, and the priority thereby acquired was not broken by a subsequent sale of the claim, ditch and water right, and transfer of possession to the vendee. Brown v. Newell (1906) 12 I. 166, 85 P. 385.

Protection of right: Where the prior appropriation and right to the use of water is established, the appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against an interference therewith is proper protective relief. Moe v. Harger (1904) 10 I. 302, 77 P. 645.

Decree establishing priority: Where priority of appropriation, the amount of water appropriated and the beneficial use thereof have been established, the court, in its decree establishing such facts, cannot go further and dictate the manner in which the appropriator shall use the water, so long as it is adapted to a beneficial purpose. McGiness v. Stanfield (1898) 6 I. 372, 55 P. 1020.

State engineer's permits subject to prior rights: The state engineer has no right, power or authority to interfere with vested rights or to grant a permit for the appropriation and diversion of the water of a stream, which has already been diverted and applied to a beneficial use. Lockwood v. Freeman (1908) 15 I. 395, 98 P. 295; Nielson v. Parker (1911) 19 I. 727, 115 P. 488.

Subterranean waters: The first appropriator of subterranean waters is the first in right. Bower v. Moorman (1915) 27 I. 162, 147 P. 496.

§ 5562. [3246] **Same: Waste, seepage and spring waters.** All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall

be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams. ['99, p. 380, § 23.]

Hist. '99, p. 380, § 23, reen. R. C. § 3246, reen. C. L. ib.

Waste water: If waste water only is furnished by a canal company to an applicant, under a sale thereof or a rental therefor, the same becomes a dedication only of such waste water; hence, the user thereof can maintain an action against the canal company only to compel it to furnish him with such waste water, if any; he cannot compel the canal company to furnish a perpetual supply of water, such as is required to be furnished to an original appropriator. Gerber v. Nampa etc. Irr. Dist (on rehearing, 1909) 16 I. 22, 100 P. 80.

Appropriation of water in canals: There is a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream, and the rights of later applicants for water are subordinate to those of prior consumers, which, when exercised in full, exhaust the carrying capacity of the canal. Gerber v. Nampa etc. Irr. Dist. (1911) 19 I. 765, 774, 116 P. 104.

Seepage water: Seepage water from a canal having its source in a watershed other than that in which the seepage occurs is subject to appropriation under this section. Breyer v. Baker, 31 I. 387, 171 P. 1135.

§ 5563. [3247] **Change in point of diversion.** The person entitled to the use of water may change the place of diversion, if others are not injured by such change; and may extend the conduit by which the diversion is made to places beyond that where the first use was made. ['99, p. 380, § 11.]

Hist. (See R. S. § 3157) '99, p. 380, § 11, reen. R. C. § 3247, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1412; Kerr's C. ib.

Cited: Schodde v. Twin Falls Land & Water Co. (1908) 161 F. 43.

Change in diversion or use: A person entitled to the use of water may change the place of diversion or place of use so long as others are not injured by the change. Hard v. Boise City Irr. etc. Co. (1904) 9 I. 589, 76 P. 331; Bennett v. Nourse (1912) 22 I. 249, 125 P. 1038; Hall v. Blackman (1912) 22 I. 539, 126 P. 1045; Basinger v. Taylor (1917) 30 I. 289, 164 P. 522. But the the change cannot be made if others are injured thereby. Walker v. McGiness (1902) 8 I. 540, 69 P. 1003; Hill v. Standard Min. Co. (1906) 12 I. 223, 85 P. 907; Montpelier M. Co. v. Montpelier (1911) 19 I. 212, 113 P. 741; Hall v. Blackman (1912) 22 I. 556, 126 P. 1047.

Such change does not work a forfeiture or is not an abandonment of such right. Joyce v. Rubin (1913) 23 I. 296, 130 P. 793.

Extent of right: The right to change the place of diversion includes cases in which the use of the water amounts to its absorption, or is such as to imply notice to subsequent appropriators that such change may reasonably be expected, but excludes appropriations to be used at a specific place for the purpose of operating machinery and other works, where the water is used and then returned to the stream practically undiminished in quantity, when such change will damage a subsequent appropriator. Last Chance Min. Co. v. Bunker Hill etc. Min. Co. (1892) 49 F. 430.

Transfer of rights: Users of water from a ditch or canal acquire a property right therein which they may transfer to other lands under such ditch or canal, or may sell and transfer to a purchaser who may also transfer the same to other lands under the ditch and canal, so long as the change does not interfere with the rights of others. (Sullivan, C. J. dissents) Hard v. Boise City Irr. etc. Co. 1904) 9 I. 589, 76 P. 331.

Approval of state engineer: A change made without the approval of the state engineer does not forfeit the right. Joyce v. Rubin (1913) 23 I. 296, 130 P. 793.

This section is not in conflict with § 5582. But an appropriator who relies upon a statutory appropriation through a state engineer's permit, must apply to the state engineer to change the place of use. Washington S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

§ 5564. [3248] **Change in course of ditch prohibited when.** Whenever any ditch or canal has been constructed for the purpose of conveying water and selling the same for irrigating purposes, it is unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to prevent or interfere with the use of water from said ditch or canal, by any one who, prior to the proposed change, had used water for irrigating purposes from said ditch or canal. [R. S. part of § 3189.]

Hist. R. S. part of § 3189, reen. R. C. § 3248, reen. C. L. ib.

§ 5565. [3249] **Right of ditch owners to divert water.** The proprietors of any ditch, canal or conduit, or other works for the carriage of

water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. ['99, p. 380, § 32.]

Hist. '99, p. 380, § 32, reen. R. C. § 3249, reen. C. L. ib.

Cited: S. v. Twin Falls C. Co. (1911) 21 I. 410, 429, 121 P. 1039, appeal dismissed 235 U. S. 690, 35 S. C. R. 205, 59 L. ed. 427.

§ 5566. [3250] **Domestic purposes defined.** The phrase "domestic purposes" as contained in this title shall be construed to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household. ['99, p. 380, part of § 12.]

Hist. '99, p. 380, part of § 12, reen. R. C. § 3250, reen. C. L. ib.

§ 5567. [3251] **Completion defined.** By completion is meant conducting the waters to the place of intended use. ['99, p. 380, § 7.]

Hist. (See R. S. § 3162) '99, p. 380, § 7, reen. R. C. § 3251, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1417; Kerr's C. ib.

Cited: Sandpoint Water & Light Co. v. Panhandle etc. Co. (1905) 11 I. 405, 83 P. 347; Schodde v. Twin Falls Land & Water Co. (1908) 161 F. 43.

CHAPTER 218.

APPROPRIATION OF WATER.

ARTICLE 1.

PERMITS, CERTIFICATES AND LICENSES.

§ 5568. [3252] **Water rights acquired under chapter.** All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. [R. C. § 3252.]

Hist. '03, p. 223, § 41; am. R. C. § 3252, reen. C. L. ib.

Cited: Sandpoint Water & Light Co. v. Panhandle etc. Dev. Co. (1905) 11 I. 405, 83 P. 347; (in brief of counsel) King v. Chamberlin (1911) 20 I. 504.

Appropriation by user: There are two methods by which one may acquire a water right. One may obtain a prior right to the use of water of a stream where he actually diverts and applies the same to a beneficial use, although he may never have applied to the state engineer for a permit to do so. Nielson v. Parker (1911) 19 I. 727, 115 P. 488; Youngs v. Regan (1911) 20 I. 275, 118 P. 499; Furey v. Taylor (1912) 22 I. 603, 127 P. 676; Crane Falls etc. Co. v. Snake River etc. Co. (1913) 24 I. 63, 133 P. 655; Wash. S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073; (dis. op.) Basinger v. Taylor (1917) 30 I. 289, 164 P. 522.

Water may be appropriated without a compliance with the steps provided by the statute, but in such case it requires actual application to a beneficial use to complete the appropriation; the right is limited to the amount so applied, and with date of priority determined by such application to beneficial use.

The claimant seeking a decree to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use claimed. Reno v. Richards, 32 I. —, 178 P. 81.

Riparian owners subject to law: Riparian owners who desire to appropriate public waters for a beneficial use must comply with the provisions of the law the same as those who are not riparian owners. Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821.

Repeal: This section repealed prior appropriation acts which provided in substance for the posting and recording of a notice and the commencement and completion of diversion works within a reasonable time. For the purpose of historical reference, the following notes of decisions under the old appropriation law are given:

Date of appropriation: One who posts and records his notice of intention to appropriate water, and within 60 days thereafter commences work on his diversion works, and continues the prosecution of the same with reasonable diligence, is en-

titled to have his appropriation date from the posting of notice, and his right is prior and superior to the rights of any subsequent appropriator claiming either by posting notice and compliance with the statute or by the natural diversion and application of the water. Sandpoint W. & L. Co. v. Panhandle etc. Co. (1905) 11 I. 405, 83 P. 347.

Mode of appropriation: A person desiring to appropriate water may do so either by naturally diverting the water and applying it to a beneficial use, or he may pursue the statutory method of posting and recording his notice and commencing to prosecute his work within the statutory time. Ib.

Beneficial application of water: The appropriator is entitled to a reasonable time within which to get his land in cultivation and to make application of the water to the land, and what constitutes a reasonable time is a question of fact dependent upon the circumstances in each particular case. Conant v. Jones (1893) 3 I. 606, 32 P. 250.

A party who appropriated water to run a sawmill, but failed, for 14 years after posting his notice, to erect or put into operation such sawmill, failed to proceed with reasonable diligence and lost his right to the water appropriated. Stickney v. Hanrahan (1907) 7 I. 424, 63 P. 189.

§ 5569. Application to appropriate water. For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, or lakes or other public waters in the state of Idaho, shall, before commencing the construction, enlargement or extension or change in the point of diversion of the ditch, canal, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of reclamation for a permit to make such appropriation. Such application must set forth:

1. The name and post-office address of the applicant.
2. The source of the water supply.
3. The nature of the proposed use.
4. The location and description of the proposed ditch, channel or other work and the amount of water to be diverted and used.
5. The time required for the completion of construction of such works, which in no case shall exceed five years from the date of approval of the application.
6. The time required for the complete application of the water to the proposed use, which must be within six years after the date set for the completion of such works.

Whenever it is desired to appropriate and store flood or winter flow waters, the applicant shall specify in acre feet the quantity of such flood or winter flow waters which he intends to store, but for irrigation purposes he shall not claim more than five acre feet of water per acre of land to be irrigated, nor, in the event of the filing of an application claiming both normal flow and flood water and winter flow water, shall the total amount of water claimed exceed the equivalent of a continuous flow during the irrigation season of more than one cubic foot per second for each 50 acres of land to be irrigated, or more than five acre feet of stored water for each acre of land to be irrigated.

The application shall be accompanied by a plan and map in duplicate of the proposed works for the diversion and application of the water to a beneficial use, showing the character, location and dimensions of the proposed reservoirs, dams, canals, ditches, pipe lines and all other works proposed to be used by them in the diversion of the water, and the area and location of the lands proposed to be irrigated.

If such application is filed by a corporation it shall state (1) the amount of its capital stock, how much thereof has been actually paid in, and the names and places of residence of its directors, and (2) the financial resources of the corporation or person making the application,

and the means by which the funds necesssary to construct the proposed works are to be provided. If for the generation of power or any other purpose than irrigation or domestic use, the purpose for which it is proposed to be used, the nature, location, character, capacity and estimated cost of the works, and whether the water used is to be and will be returned to the stream, and if so, at what point on the stream.

In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of the land proposed to be irrigated, with the total acreage to be reclaimed as near as may be: *Provided,* That no one shall be authorized to divert for irrigation purposes more than one cubic foot of water per second of the normal flow for each 50 acres of land to be so irrigated, or more than five acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of reclamation that a greater amount is necessary: *Provided further,* That the plan of irrigation submitted shall provide for the distribution of water to within not more than one mile of each legal subdivision of the land proposed to be reclaimed by the use of such water: *Provided also,* That in the case of all ditches designed to have a capacity of 10 cubic feet per second or less, such map showing the location of such ditch, and the place of use of such water, or the location of the lands to be irrigated, may be upon blanks furnished by the department of reclamation.

No application shall be accepted and filed by the department of reclamation until the applicant shall have deposited with the department a filing fee of $1, if the quantity of water claimed is one cubic foot or less per second, and if the quantity of water claimed is in excess of one cubic foot per second, the fee to be so deposited by the applicant shall be increased 10 cents for each additional cubic foot or fraction thereof: *Provided,* That where flood and winter flow water for storage purposes is claimed, the fee to be paid by applicant on the filing of the application shall be $1, if the quantity claimed is 250 acre feet, or less, and if the quantity of water claimed is in excess of 250 acre feet the fee to be paid by the applicant shall be increased 10 cents for each additional 250 acre feet or fraction thereof. The department of reclamation shall make and keep in a suitable book a record of all filing fees received in connection with applications for permits to appropriate public waters, and said record shall set out:

1. The name of the applicant.
2. The number of the application.
3. The quantity of water filed on.
4. The amount of the fee received; and,
5. The date of receipt of said fee.

Provided further, That rights initiated prior to the enactment of this amendment, so far as it pertains to flood and winter flow waters, shall not be affected thereby.

Hist. '03, p. 223, § 1; am. '05, p. 357, § 1, reen. R. C. § 3253; am. '13, c. 37, § 1, p. 136, reen. C. L. § 3253; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821.

Contents of application: An application under this section is required to state facts which can only be secured by entrance to the place where the appropriation is made, and survey of the premises and surroundings at the point of diversion and place of improvement, and also a survey of the realty to be taken for dams and ditches to be used in appropriating the water to a beneficial use. Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208.

Private ponds: The law does not purport to deal with private waters, such as private ponds, artificial lakes or wells owned by private persons and formed by collecting and impounding surface waters. King v. Chamberlin (1911) 20 I. 504, 512, 118 P. 1099.

Percolating waters: It can make no difference that the waters collecting and forming what is known as a spring are seepage and percolating waters, rather than from a well-defined subterranean stream, so long as such waters gravitate

to and collect at a certain and definite point, and there constitute a volume of water known and designated as a spring. In either case such waters found upon the public domain are subject to location and appropriation for any useful or beneficial purposes. Le Quime v. Chambers (1908) 15 I. 405, 98 P. 415, 21 L. R. A. (N. S.) 76.

Percolating or subterranean waters are subject to appropriation. Bower v. Moorman (1915) 27 I. 162, 147 P. 496.

Change of diversion: Where a person made application under this section, before or after its amendment in 1913, to appropriate water, and a permit was granted, but he subsequently desired to change the point of diversion, it was necessary for him to comply substantially with § 5582. Washington S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

§ 5570. Same: Examination: Permit: Commencement of work: Bond. On receipt of the application, which shall be of a form prescribed by the department of reclamation, it shall be the duty of that department to make an indorsement thereon of the date of its receipt, and to make a record of such receipt in some suitable book in its office. It shall be the duty of the department to examine said application and ascertain if it sets forth all the facts necessary to show the location, nature and amount of the proposed use. If upon such examination the application is found defective, it shall be the duty of the department of reclamation to return the same for correction within 30 days from the receipt of such application, and the date of such return, with the reason therefor, shall be indorsed on the application, and a record made thereof in a book kept for recording the receipt of such applications. A like record shall be kept of the date of the return of corrected applications, but such corrected applications shall be returned to the department of reclamation within a period of 60 days from the date indorsed thereon by the department: *Provided,* That if it be returned after such period of 60 days, such corrected application shall be treated in all respects as an original application. All applications which shall comply with the provisions of this chapter and with the regulations of the department of reclamation shall be numbered consecutively, and shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to a beneficial use.

The approval of an application shall be indorsed thereon, and a record made of such indorsement in the department of reclamation. The application so indorsed shall constitute a permit, and shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and to perfect the proposed appropriation. In its indorsement of approval on any application the department shall require that actual construction work shall be completed within a period of five years from the date of such approval, and that one-fifth of such work of construction shall be done within one-half the period of time allowed for the completion of such works. The department may limit the application to a less period of time for the completion of such works than is asked for, and likewise the perfecting of the proposed right for a less period than is named in the application, and such indorsement shall give the date when such work shall be completed, also the date when beneficial application of the water to be diverted by such works shall be made for the purpose intended.

Provided, however, That in cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right of way or other matter within the jurisdiction of the United States, or by litigation of any nature which might bring his title to said water in question, the department of reclamation upon proper showing of the existence of any such condition, and be-

ing convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the time caused by such delays shall be added to the time given in the original permit for each and every action required.

Any applicant feeling himself aggrieved by the indorsement made by the department of reclamation upon his application may appeal therefrom to the district court of the county in which the point of diversion of the proposed appropriation shall be situated. Such appeal shall be taken within 60 days from the return of the application by the department of reclamation, and shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the application, certified by the department of reclamation as a true copy, together with the petition to such court, setting forth the appellants's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proofs as shall be adduced by the department or some person duly authorized in its behalf.

The maps accompanying such applications must contain the name of the proposed work, and, when it is possible, the number of the permit. They must in addition, have the name or names of the applicant or applicants, and when the proposed works have a capacity of more than 25 second feet, a certificate of the surveyor giving the date of the survey, his name and post office address. It shall be the duty of the department of reclamation to examine these maps or plats, and to ascertain if they agree with the description contained in the application, and when found to agree, to approve the same, file one copy in its office and return the other, approved, to the party filing them.

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating 25 cubic feet or less per second must, within 60 days from the date upon which said permit issues from the office of the department of reclamation, commence the excavation or construction of the works by which he intends to divert the water ,and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances over which he has no control.

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter, appropriating more than 25 cubic feet per second must, within 60 days from the date upon which the said permit issues from the office of the department of reclamation, file with the department a bond in an amount to be fixed by the department, not exceeding $10,000, in form and sufficiency of sureties to be approved by the deaprtment, conditioned upon faithfully carrying to completion the works of diversion as specified in said permit; the amount of the bond to be fixed by the department within the limits hereinbefore prescribed.

The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all right under his permit.

Hist. '03, p. 223, § 2; am. '05, p. 357, § 2, reen. R. C. § 3254; am. '11, c. 64, p. 184; am. '15, c. 133, p. 289, reen. C. L. § 3254; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: (In brief of counsel) Pierson v. S. Bd. of Land Comrs. (1908) 14 I. 159.

Permit defined: The permit is not an appropriation of the public waters of the state, but is the consent of the state given in the manner provided by law to construct and acquire real property. The permit gives the applicant an inchoate right, which will ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use. Speer v. Stephenson (1909) 16 I. 707, 102 P. 365; Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208; Basinger v. Taylor (1917) 30 I. 289, 164 P. 522

Granting of permit secures no rights to holder, but compliance with conditions of

permit initiates right to use water, which right becomes vested and dates back to the issuance of the permit Washington S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

Vested rights: The state engineer, by granting a subsequent water permit, cannot interfere in any manner with vested rights of prior appropriators. Lockwood v. Freeman (1908) 15 I. 395, 98 P. 295; Nielson v. Parker (1911) 19 I. 727, 115 P. 488; Gard v. Thompson (1912) 21 I. 485, 123 P. 497.

Trespass: The mere fact that the state engineer grants a permit in no way confers any right to enter upon private land for the purpose of making an appropriation. Marshall v. Niagara Springs O. Co. (1912) 22 I. 144, 125 P. 208.

In order to initiate the right to appropriate water under this section, at a point upon land belonging to the state, if it is necessary for the applicant to enter upon land owned by the state for the purpose of making the necessary examination and surveys, maps and plans required in order to make a proper application to the state engineer for a permit, by so entering such party would be a trespasser upon said land, under § 1578 R. C.. Tobey v. Bridgewood (1912) 22 I. 566, 127 P. 172.

Conveyance of water right: A water right is real estate and must be conveyed as real estate, and where one has a valid water permit issued to him by the state engineer he cannot convey the water right secured thereby by simply handing the permit to a would-be purchaser. Gard v. Thompson, supra.

§ 5571. Amended application and permit. Whenever application has been made for a permit to appropriate water for irrigation, or whenever a permit has been issued and the applicant or permit holder desires to change the place of intended use of the water or correct the description of the lands to be irrigated, he shall file a request therefor with the department of reclamation, which shall thereupon note the application on the record of the original application or permit, and shall issue a new permit, noting the amendment therein, and specifying that it is issued as an amendment to the original. The right to the use of water under the amended permit shall date from the time of the original permit: *Provided*, An additional amount of water is not asked for, and except where the rights of others are adversely affected by such changes, in which case it shall date from the filing of the application for the amendment.

Hist. '07, p. 314, § 1, reen. R. C. § 3255, reen. C. L. ib.; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5572. Diversion of private waters. The department of reclamation is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five acres in surface area at high water mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate.

Hist. '11, c. 230, § 1, p. 782, reen. C. L. § 3255a; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5573. Same: Applicants must show right of way. All applications to the department of reclamation for permits to divert or appropriate the waters of any lake, pond, pool or spring shall state whether such lake, pond, pool or spring is wholly or entirely upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water.

Hist. '11, c. 230, § 2, p. 783, reen. C. L. § 3255b; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5574. Proof of completion. On or before the date set for the completion of works for the diversion and application of water under any

permit, the holder of such permit, or his assigns, shall be prepared to submit proof of the completion of such works to the department of reclamation. Such holder of such permit shall first notify the department that he is prepared to submit such proof of completion of such works. Such notice to the department shall be given by registered mail at least 60 days before the date set for the completion of such works, and shall be on a form furnished by such department, and shall state:

1. The name of the person or corporation holding the permit under which such works are constructed.
2. The post office address of such person or the place of business of such corporation.
3. The number of such permit, and the date set for the completion of such works under the same.
4. The use for which said water is intended.
5. Whether or not such works will be fully completed on the date set for such completion and the amount of water which such works are capable of conducting to the place of intended use in accordance with the plans of the same accompanying the application for such permit.
6. If for irrigation, the amount and description of the lands for which said water is available according to such plans.

In case of all canals or other works designed to divert and carry more than 50 cubic feet per second of water, the facts set forth in such notice to the department of reclamation shall be certified to by a well known and competent irrigation engineer.

Upon receipt of such notice by the department of reclamation the department shall immediately order its publication for a period of four weeks in some newspaper designated by the person sending such notice and published in the county in which such works are situated. Such published notice shall also state the date when such proof of completion shall be submitted to the department, and the place where the same shall be submitted, and such publication shall be at the expense of the person making such proof.

Such person or persons establishing such proof of completion may offer the affidavits of competent engineers in relation to the grades, dimensions and capacity of such works, and the amount and location of land to which water can be delivered for irrigation. The department of reclamation may, in the case of canals designed to divert 50 cubic feet per second or more, demand that profiles and cross sections, showing the grade and the finished condition of such works, be filed with it in support of the claims which may be made in relation to the finished condition of such works, by the person or persons holding such permit. And in the case of works capable of diverting, on the date set for such completion, the full amount of water for which such works were intended, the department shall have authority to order the water turned into such works for the purpose of measuring the same.

Provided, That under all permits claiming six and four-tenths feet of water or less, but not otherwise, the permit holder may make such proof of completion without publication of notice by filing with the department of reclamation on or before the date set for completion of works, or within 10 days thereafter, an affidavit setting forth the following information:

1. The name of the person or corporation holding the permit under which such works are constructed.
2. The post office address of such person or the place of business of such corporation.

3. The number of such permit and the date set for the completion of such works under the same.

4. The use for which said water is intended.

5. Whether or not such works will be fully completed on the date set for such completion and the amount of water which such works are capable of conducting to the place of intended use.

6. If for irrigation, the amount and description of the lands for which said water is available according to said permit.

Hist. '03, p. 223, § 4, reen. R. C. § 3257; am. '13, c. 144, § 1, p. 509, reen. C. L. § 3257; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821; Washington S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

Constitutionality: This section does not vest judicial power in the state engineer in violation of Const. V, 2. Boise Irr. etc. Co. v. Stewart (1904) 10 I. 38, 77 P. 25, 321.

§ 5575. Department of reclamation to report on work: Issuance of certificate. On or before the date set for receiving such proof of completion, in all cases where the amount of water claimed under the permit exceeds six and four-tenths cubic feet per second, but not otherwise, the department of reclamation shall make or cause to be made a full inspection and examination of the works constructed, and shall make or cause to be made a report on their condition, ascertaining and stating whether or not they conform to the terms of the application and permit, and are capable of diverting the amount of water intended, and the department shall ascertain how much water such works are capable of diverting and conducting to the place of intended use at the time of such proof of completion. The department shall issue a certificate to the holder of such permit or his assigns, which certificate shall set forth:

1. The name of the holder of the permit under which the works are constructed.

2. The number of such permit.

3. The date of the application for the same.

4. The post office address of such holder.

5. The condition of such works.

6. The purpose for which they were constructed.

7. The quantity of water which can be diverted by the same and conducted to the place of intended use.

8. And if such water is to be used for irrigation, a description of the lands for which water is made available by such works.

The department of reclamation shall file such report and make a record in books kept in its office for the purpose of all the facts in relation to the condition of such works, and their capacity on the date of such proof of completion.

Whenever it shall be desired to enlarge or extend existing works, or complete works not completed on the date set for such completion, all applications for a permit to make such enlargement, extension or completion shall be filed with the department of reclamation, the same as for original construction, and the priority of all rights resulting from such enlargement, extension or completion shall relate to such application.

Hist. '03, p. 223, § 5, reen. R. C. § 3258; am. '13, c. 83, p. 340, reen. C. L. § 3258; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821; in marginal notes to Schodde v. Twin Falls L. & W. Co. (1912) 224 U. S. 107, 56 L. ed. 686, 31 S. C. R. 470.

Constitutionality: This section does not vest judicial power in the state engineer in violation of Const. V, 2. Boise Irr. etc. Co. v. Stewart (1904) 10 I. 38, 77 P. 25, 321.

§ 5576. Appeal from department's decision. Whenever any person or persons feel themselves aggrieved by the determination of the department of reclamation in relation to the question of completion of works constructed under a permit issued by the department, such person or persons may appeal to the courts: *Provided,* That such appeal shall be taken within 60 days from the date of the certificate relating to such completion by such department, and shall be perfected when the appellant shall have filed in the office of the clerk of the district court a copy of the certificate, certified by the department as a true copy, together with the petition to such court setting forth the appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proofs as shall be adduced by the department of reclamation or some person authorized in its behalf.

Hist. '03, p. 223, § 6, reen. R. C. § 3259, reen. C. L. ib.; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5577. Proof of application to beneficial use. On or before the date set for the beneficial use of waters diverted under the provisions of this chapter, which in no case shall be more than six years from the date set for the completion of any canal or other works designed to divert and conduct the public waters of the state to a place of use, or the date for the enlargement or extension or the completion of works for such purpose, the person or persons using such water shall submit proof that they have used such water for the beneficial purpose for which the diversion of such water was intended. Such user of such water shall first notify the department of reclamation that he is prepared to prove that such water has been beneficially applied to the purpose for which it was intended. Such notice to the department shall state:

1. The name and post office address of such user.
2. The use to which such water has been applied.
3. The amount used.
4. The place of such use, and if for irrigation, the description by legal subdivisions of the land so irrigated.
5. The name of the canal or ditch or other works by which such water is conducted to such place of use.
6. The relation or understanding upon which the right to take water from such works is based.
7. The source of supply from which such water is diverted; and,
8. The date of the priority which such user is prepared to establish.

Such notice and such written proof as may be required to be submitted by such user shall be upon forms furnished by the department of reclamation, and such statements shall be sworn to by such user and be supported by the affidavits of two disinterested witnesses.

Upon receipt of such notice by the department of reclamation the department shall order its publication in some newspaper designated by such user and published in the county in which the major portion of such land is situated, for a period of four weeks, and shall fix a date when such proof shall be submitted and name a place where such proof will be received. Such date shall be subsequent to the completion of such publication, and the department shall, on or before the date set for such final proof, examine, or cause to be examined:

1. The place where such water is used, and, if the use is for irrigation, he shall ascertain the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use.

2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.

The department or the person making such examination under the direction of the department shall also, on the date set for such final proof, receive the written statements made by the person or persons submitting such proof, and the affidavits of the witnesses, which statements and affidavits, together with a report of the investigation which the department is instructed to make, shall be forwarded at once to the department: *Provided,* That whenever several of such final proofs shall be offered from the same locality, the department shall arrange, whenever practicable, to have such notices for publication combined, and to have such examinations made by the same person and on the same date, as near as may be, with a view of minimizing the expense of taking such proofs, and such publication shall be at the expense of the person or persons submitting such proof: *Provided also,* That whenever irrigation systems cover more than 25,000 acres, that proof of beneficial use may be made at any time within a period of 10 years from the date set for the completion of the works, and in all such cases, proof of beneficial use may be made by the persons, company or corporation constructing the irrigation works on behalf of the project, and in such cases, the lands upon which the water has been used need not be described by legal subdivisions, but may be described generally as the lands under the irrigation system, and it shall only be necessary to show in such cases that the quantity of water beneficially applied for irrigation has been applied within the limits of the project.

Hist. '03, p. 223, § 7, reen. R. C. § 3260; am. '13, c. 36, p. 134; am. '15, c. 94, § 1, p. 216, reen. C. L. § 3260; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821; Vineyard L. & S. Co. v. Twin Falls Salmon River etc. Co. (1917) 245 F. 9; Vineyard L. & S. Co. v. Twin Falls Oakley etc. Co. (1917) 245 F. 30.

§ 5578. Same: Extension of time. Whenever a less period of time than the maximum prescribed in the preceding section has been granted by the department of reclamation for making proof of beneficial use, upon a satisfactory showing being made by the permit holder, the department can extend the time for making such proof of beneficial use, but in no case shall such extension or extensions, including the original time granted, exceed the maximum prescribed in the preceding section. The department shall grant no extension unless the application therefor be filed with it prior to the date upon which the proof of beneficial use was required to be made under the original terms of the permit, or within 30 days after such date.

Hist. '13, c. 47, § 1, p. 154; am. by implication '15, c. 94, § 1, p. 216; adding a proviso extending the maximum period to 10 years in some cases; compiled and reen. C. L. § 3260a; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5579. Issuance of license. Priority. Upon receipt by the department of reclamation of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall be issued under the seal of the office of the department of reclamation, and shall state the name and post office address of such user, the purpose for which such water is used, the quantity of water which may be used, which in no case shall be an amount in excess of the amount that

has been beneficially applied. If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land which is irrigated by such water. Such license shall bear the date of the application for, and the number of, the permit under which the works from which such water is taken were constructed; the date of the completion of such works; the capacity of such works on such date of completion; the date when proof of beneficial use of such water was made, and also the date of the priority of the right confirmed by such license, which shall be the date of the application for the permit for the construction of the works from which such water is taken, and to which such right relates. All the licenses which relate to the same permit and which bear the same date of priority shall be numbered alike, and shall belong to the same class, and all the rights relating to the same sources of supply shall be numbered numerically in the order of the priority of such rights: *Provided,* That whenever proof of the beneficial application of water shall be offered subsequent to the date stated in the permit, or in any authorized extension thereof, when such beneficial application shall be made, such proof shall be taken, and if satisfactory to the department of reclamation, a license shall be issued by the department the same as though such proof had been made before such date fixed for such beneficial application, but the priority of the right established by such proof shall not date back to the date of the application for the permit to which such right would relate under the provisions of this chapter, but shall bear a date which shall be subsequent to the date of such application, a time equal to the difference between the date set in such permit, or extension thereof, for such beneficial application of such water and the date of such proof: *Provided, however,* That upon irrigation projects where the canals constructed cover an area of 25,000 acres or more, the license issued shall be issued to the persons, association, company or corporation owning the project, and final proof may be made by such owners for the benefit of the entire project and it shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient, and the water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project at any time within a period of 10 years shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not.

Hist. '03, p. 223, § 8, reen. R. C. § 3261; am. '15, c. 94, § 2, p. 218; modified by '13, c. 47, § 1, p. 154, and '15, c. 94, p. 216; compiled and reen. C. L. § 3261; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821; Speer v. Stephenson (1909) 16 I. 707, 102 P. 365; Vineyard L. & S. Co. v. Twin Falls etc. Co. (1917) 245 F. 9; Vineyard L. & S. Co. v. Twin Falls Oakley etc. Co. (1917) 245 F. 30; Newport Water Co. v. Kellogg, 31 I. 574, 174 P. 602.

Doctrine of relation: Doctrine of relation as to priority of appropriation cannot be invoked until final consummation of appropriation as defined by statute, and can be invoked only to extent of completion of appropriation. Basinger v. Taylor (1917) 30 I. 289, 299, 164 P. 522.

§ 5580. Effect of license. Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments

which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: *Provided,* That when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each 50 acres of land so irrigated, unless it can be shown to the satisfaction of the department of reclamation in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water.

Hist. '03, p. 223, § 9, reen. R. C. § 3262, reen. C. L. ib.; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821; Russell v. Irish (1911) 20 I. 194, 118 P. 501.

License and water right: The license is prima facie evidence of a water right, but no certificate issued by state engineer prior to the license is made prima facie evidence of a water right. Basinger v. Taylor (1917) 30 I. 289, 164 P. 522.

By obtaining the issuance of a license, the licensee does not waive any rights he may previously have had through actual diversion and application to a beneficial use. Joyce v. Rubin, 23 I. 296, 130 P. 793; Newport Water Co. v. Kellogg, 31 I. 574, 174 P. 602.

§ 5581. Fees of department. Upon the issuance of a certificate by the department of reclamation in relation to the completion of any canal, ditch or other works constructed under the provisions of this chapter, a fee, to cover the expense of the examination of such works, shall be paid to the department by the person or persons submitting the proof of such completion. For all ditches or canals having a capacity of 10 cubic feet per second or less, such fees shall be $5. For all ditches or canals having a capacity of more than 10 cubic feet per second, such fee shall be at the rate of 30 cents for each second foot of such capacity. For examining the ditches and lands of the user at the time of making final proof of the application of water, a fee of $2 shall be paid to the department, at the time of making such proof, for each legal subdivision of 40 acres or fraction thereof to which such water may have been applied. For examining the ditches or other works and the place where such water is used, when such use is not for irrigation, a fee of $5 shall be paid the department at the time of making such examination and taking the proof of such use: *Provided,* That in the case of water used for irrigation, where two or more users whose lands join or who take water from the same common lateral, join in the publication of the notice of their intention to make such proof of application, a fee of $1 for each legal subdivision of 40 acres or fraction thereof receiving such water shall be paid to the department at the time of making such proof. For making certified copies of any papers on file in his office, the department shall charge a fee at the rate of 20 cents per folio. All fees received by the department of reclamation under the provisions of this chapter shall be recorded in a fee book, and shall at once be turned over to the state treasurer and placed in the general fund of the state.

Hist. '03, p. 223, § 10; am. '05, p. 174, § 1, reen. R. C. § 3263, reen. C. L. ib.; compiled upon authority '19, c. 8, § 37, p. 65.

Construed: While the conduit through which the water user diverts the water may not strictly be a ditch or canal, nevertheless he is liable for a fee based on the capacity of his diversion works. Idaho etc. Co. v. Stephenson (1909) 16 I. 418, 101 P. 821.

§ 5582. Abandonment: Change of place of use: Appeal from department's decision. All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through nonuse or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter: *Provided,* That any person owning any land to which water has been made appurtenant, either by a decree of the court or under the provisions of this chapter, may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other land. Such person desiring to change the place of use of such water shall first make application to the department of reclamation, stating fully in such application the reason for making such transfer. Such application shall describe the land, the use of water on which it is to be abandoned and shall describe the land to which it is desired to have such right transferred, and if such water is to be conducted to such land through another canal or lateral or from a different point of diversion than the one described in the license or decree of the court confirming such right, such facts shall be fully set out in such application, and, if the department shall require it, a plat showing the location of such land and ditches or canals or points of diversion shall be furnished by such applicant, and upon receipt of such application the department shall examine the same and shall, provided no one shall be injured by the transfer, issue to each such applicant, under the seal of its office, a certificate authorizing such transfer, which certificate shall state the name of the applicant and shall contain a copy of the license or an abstract of the decree confirming the right to the use of the water upon the land from which it is desired to transfer such right and a description of the land to which such right is transferred. A fee of $1 shall be paid to the department by such applicant for such certificate of transfer issued by it and such application shall be recorded by the department in a book kept for that purpose, and the department shall not thereafter divert to or upon the lands, the water for which has been so abandoned, any of such water, but shall divert such water from such stream so that it may be used on the lands to which such right has been transferred: *Provided further,* That any person or persons who are owners by decrees of court or by appropriation of a water right and who have, with reasonable diligence, annually increased the beneficial use of the water covered by such water right or who do hereafter with reasonable diligence annually increase the beneficial use of the water held under such water right shall not be subject to the penalties of abandonment and loss by nonuse of such water right, as provided in this section.

Any person or persons feeling themselves aggrieved by the determination of the department of reclamation in issuing or refusing, upon application for permission to change the place of use of water, to issue a certificate authorizing such transfer, may, within 60 days from the date of such refusal, appeal to the district court for the county in which the land is situated to which such water is appurtenant. Such appeal shall be perfected when the appellant shall have given written notice of such appeal to the department of reclamation and shall have filed in the office of the clerk of the district court a copy of the application for change of place of use, certified by the department as a true copy and having indorsed thereon the order of the department refusing to grant a cer-

tificate authorizing such transfer, together with a petition to such court setting forth the appellant's reason for such appeal and evidence of service of notice of appeal on the department. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proofs as shall be adduced by the department of reclamation or some person duly authorized in its behalf. ['17, c. 166, p. 495.]

Hist. '03, p. 223, § 11; am. '05, p. 27, § 1; am. '07, p. 507, § 1, reen. R. C. § 3264; am. '15, c. 34, § 1, p. 103; am. '17, c. 166, p. 495, reen. C. L. § 3264; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: (In brief of counsel) Joyce v. Rubin (1913) 23 I. 296.

Construed: Where one secures a permit under this chapter and appropriates water thereunder it is a statutory appropriation, and to change the point of diversion there must be a substantial compliance with this section. Wash. S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

Compared: This section is not in conflict with § 5563. Wash. S. Sugar Co. v. Goodrich, supra.

§ 5583. Protest against license: Appeal from decision. Any person desiring to protest against the statements made by the person or persons submitting proof of the beneficial application of water in the published notice of their intention to submit such proof, shall file a statement with the department of reclamation on or before the date set for such proof, stating clearly the reason for such protest, and stating the reason, if any, why a license should not be issued confirming the right claimed. Such protest shall be based solely upon the statements in such notice and shall be sworn to by such protestant.

In issuing a license confirming any right to use water for beneficial purposes, the department of reclamation shall be governed in its actions by the records relating to works from which such water is taken which may be on file in the office of the department, and by the reports of the examination of such works, the place where such water is used, and the extent of such use. Such license may confirm such claim in whole or in part, or such license may be refused, such determination depending upon the extent to which such claim is supported by such records, and such examination of the conditions relating to such use made on the ground under the authority of the department. If the department shall refuse to issue a license, the reasons for such refusal shall be recorded in a book kept for the purpose: *Provided,* That any one feeling himself aggrieved by the statements contained in the license issued by the department, or the refusal of the department to issue such license, may appeal therefrom to the district court of the county in which the place of use of the water claimed shall be situated. Such appeal shall be taken within 60 days from the date of such license or the refusal to issue such license, and shall be perfected when the appellant shall have filed in the office of the clerk of such district court a copy of the license, or, if such license shall not have been issued, a copy of the statement made by the department giving the reasons why such license was not issued, a copy of the protests against the issuing of such license filed with the department, and a copy of the report of the examination of the place of use of such water made under the authority of the department, and of other documentary proof in relation to such use which may be filed in the office of the department. Such copies of licenses, reports, protests and other proof shall be certified by the department as true copies. Such copies shall be filed in the office of such clerk together with a petition to such court setting forth the appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proofs as shall

be adduced by the department of reclamation or some person duly authorized in its behalf.

Hist. '03, p. 223, § 12, reen. R. C. § 3265, reen. C. L. ib.; compiled upon authority '19, c. 8, § 37, p. 65.

ARTICLE 2.

CANCELLATION OF PERMITS.

Hist. The act forming the basis of this article repealed a prior law, '03, p. 223, § 3, am. '07, p. 532, § 1, reen. R. C. § 3256.

§ 5584. Permits contestible: By whom. If the holder of a permit to appropriate the public waters shall fail to comply with the requirements of his permit as to the commencing of work or the filing of bond thereunder, or the completion of one-fifth of the construction work within one-half the time allowed for the entire completion of such construction work, or shall fail to complete the entire construction work within the time specified in his permit, said permit may be cancelled and voided by the department of reclamation as hereinafter provided at the instance of any person or persons holding any permit for the diversion of water from the same stream, such permit post dating the permit which is sought to be cancelled.

Hist. '09, p. 299, H. B. 223, § 1, reen. C. L. § 3265a; compiled upon authority '19, c. 8, § 37, p. 65.

Constitutionality: The act, of which this is the first section, does not vest in the state engineer judicial power and is not in conflict with Const. II, 1, or V, 2. Speer v. Stephenson (1909) 16 I. 707, 102 P. 365.

Time limits: If work is not commenced within the time specified in the permit for water, issued by the state engineer, or if one-fifth of the work is not completed within the time therein limited, the failure cannot be cured by extending the time for making proof of the beneficial use of the water attempted to be appropriated. Wash. S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

§ 5585. Petition for cancellation. Any person as above specified desiring the cancellation of a permit shall file with the department of reclamation a petition clearly setting forth the facts upon which he bases his prayer for cancellation, plainly stating wherein the holder of the permit, which is sought to be cancelled, has failed to comply with the law and with the requirements of his permit.

Hist. '09, p. 299, H. B. 223, part of § 2, reen. C. L. § 3265b; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Express reference to this section: Suit to quiet title: § 5591.

§ 5586. Notice of contest. Upon receipt of such petition, the department of reclamation shall issue a notice, naming the petitioner as contestant and all persons, shown by the records of the department of reclamation to have any claim of title or interest in the permit sought to be cancelled as contestees, and requiring all contestees to appear at the office of the department on a day to be specified therein, which day shall be not less than 60 nor more than 90 days from the date of the notice, and show cause, by affidavit, if any there be, why said permit should not be cancelled. Such notice shall be sent by registered mail, addressed to every person named therein at his last known post office address.

Hist. '09, p. 299, H. B. 223, part of § 2, reen. C. L. § 3265c; compiled upon authority '19, c. 8, § 37, p. 65.

Notice of contest: Due process: This provision that permits shall be recorded in the office of the state engineer and requiring notice of contest must be sent by registered mail to the last known post office address of all persons shown by the records to have an interest is sufficient notice and due process. Speer v. Stephenson (1909) 16 I. 707, 725, 102 P. 365.

§ 5587. Hearing. On the day set for the hearing the contestant and such contestees as have filed the affidavit hereinbefore required of them, shall file such affidavits in support of their respective allegations as they may desire, and the department of reclamation may require such additional

evidence and may make or cause to be made by an engineer whom the department may designate, such personal examination of the work done under the permit in question, as the department may deem necessary to enable it to render a fair decision: *Provided,* That before making or causing such examination to be made the department shall estimate the cost of such examination and shall require the contestant to deposit a sum equal to such estimate and if after the making of such examination it is found that the amount so deposited is in excess of the cost of such examination the department shall return such excess to the contestant. For the purpose of producing additional testimony in making investigations, the department may continue the hearing to such time, not exceeding 30 days, as would seem to it advisable.

Hist. '09, p. 299, H. B. 223, part of § 2, reen. C. L. § 3265d; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5588. Department's decision: Notice thereof. After receipt of the affidavits and other evidence introduced, and the report of any engineer designated by the department to inspect the works, the department of reclamation shall as soon as practicable render its decision and on the day of rendition give notice thereof by registered mail to the contestant and all contestees whether they have appeared in the proceedings or not, at the last known post office address, which notice shall state that any party aggrieved by the decision shall have 90 days from the date of the notice in which to commence action or appeal as hereinafter provided for, in the district court of the county in which the intended diversion point under the permit sought to be cancelled is located.

Hist. '09, p. 299, H. B. 223, part of § 2, reen. C. L. § 3265e; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5589. Proceedings in district court. Any party aggrieved by said decision may within 90 days from the date of said notice, appeal to the proper district court as hereinbefore defined from the decision of the department of reclamation, or may commence an action in said court for the determination of the questions involved in the proceedings before the department.

Hist. '09, p. 299, H. B. 223, part of § 3, reen. C. L. § 3265f; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Express reference to this section: Cancellation of permits: § 5594.

Effect of state engineer's decision: The action of the state engineer in deciding to cancel or in refusing to cancel a permit is not conclusive upon the parties, and may be reviewed in the district court upon appeal or may be questioned in a direct proceeding in the district court, and the court in considering such matter is in no way controlled or concluded by the action of the state engineer. Speer v. Stephenson (1909) 16 I. 707, 102 P. 365.

Limitation of actions: The only effect given by the statute to the action of the state engineer in cancelling or refusing to cancel a permit is that such action is thereby fixed as a time from which the statute of limitations begins to run within which an action may be brought in the district court, or an appeal taken from the action of the state engineer, involving the questions involved in the contest before the state engineer. Ib.

§ 5590. Appeal. In case the party aggrieved shall appeal the same shall be taken in the manner following:

He shall, within the time prescribed for the taking of such appeal, file notice with the department of reclamation, stating that he appeals from the said decision to the said court, naming it, and notifying all parties in the proceedings before the department of reclamation to appear at the next term of the said district court, stating the date thereof, to show cause why the said decision of the department shall not be vacated and annulled. The party appealing shall, at the same time, pay to the department of reclamation a fee of $3 for the transmission of all papers, maps

and proceedings before the said department to said district court. The department of reclamation shall thereupon transmit all papers in the proceedings before it to the clerk of the proper district court. The clerk of the district court shall demand a fee of $7 from the appellant before filing said papers and in case the same is not paid upon demand, he shall return said papers to the department which shall proceed as though no appeal had been taken.

The appellant shall forthwith, after filing said notice of appeal, deliver personally, or send by registered mail, a copy of said notice to each person who appeared in the proceedings before the department, and serve said notice personally, or by publication on all parties who did not so appear. Said personal service or service by publication shall be made in the same manner as is or may be provided by law for the service of summons in a civil action, and the order for such publication shall be made by the judge of the court to which the appeal is taken or by the probate judge of the county. Proof of service of such notice, either by affidavit or written admission, shall be filed on or before the first day of the term to which said appeal is taken. If through insufficiency of time, or for any other reason satisfactory to the judge of said district court, it is made to appear that the appellant has not had sufficient time to perfect his appeal, or has been unable, after due diligence, to complete service of his notice of appeal, personally or by publication, prior to the first day of said term of court, the said judge may continue the cause to the next term of said court, and order an alias notice of appeal specifying the first day of said next term as the time of appearance, and said notice shall be served personally or by publication in all respects as the original on parties not served with said original. Service shall be deemed complete, when the date of the service or the date of the last publication occurs at least 10 days prior to the first day of the term, to which said appeal is taken.

The court shall set the appeal for hearing on a day to be fixed by him and the same shall be heard on the papers transmitted by the department of reclamation. Judgment shall be rendered affirming or reversing said decision, and the papers, together with the decision of the court, shall be returned by the clerk to the department of reclamation, which shall be governed in its final disposition of said contest by the said judgment.

Hist. '09, p. 299, H. B. 223, part of § 3; compiled and reen. C. L. § 3265g; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Express reference to this section: Cancellation of permits: § 5594.

§ 5591. Suit to quiet title. In case the party aggrieved by the decision of the department of reclamation elects to bring suit instead of appealing, he shall file in the proper district court a complaint in the nature of a suit to quiet title, either to or against the permit in controversy, as the case may be, within 90 days from the date of said notice of decision by the said department. The clerk, on the filing of said complaint, shall forthwith notify the department of reclamation of the fact that said complaint has been filed, and on receipt of said notice the department shall make a note of the fact on its records, and desist from proceeding further in the case until judgment is rendered in such suit. Said suit and all proceedings had therein shall be prosecuted and conducted in the same manner as in actions to quiet title to real estate, the necessary changes in the pleadings being made. The party aggrieved by the decision of the department shall be plaintiff and all other parties to the proceedings before the department of reclamation, whether they have appeared in such proceedings or not, shall be defendants. Maps and similar exhibits

but not affidavits used before the department may be introduced in evidence on being identified as having been so used in said proceedings. On the rendition of judgment a copy thereof shall be certified to the department of reclamation, which shall conform its records thereto.

The action provided for in this section may be brought without first proceeding in the office of the department of reclamation in the manner prescribed in section 5585.

Hist. '09, p. 299, H. B. 223, § 4, reen. C. L. § 3265h; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Express reference to this section: Cancellation of permits: § 5594.

Indispensable parties: All parties whose claims are adverse to the plaintiffs, whether they appear before the state engineer or not are indispensable parties and must be made defendants in an action under this section. Wash. S. Sugar Co. v. Goodrich (1915) 27 I. 26, 147 P. 1073.

§ 5592. Appeal to supreme court. Either party to an appeal from the department of reclamation, or to an action to quiet title as hereinbefore provided for, may appeal to the supreme court of the state of Idaho from the judgment of the district court within 60 days from the date of the said judgment and not afterward.

Hist. '09, p. 299, H. B. 223, § 5, reen. C. L. § 3265i; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5593. Record of cancellation. In case the decision of the department of reclamation shall be adverse to the contestee and in case no appeal has been taken and no action commenced in the district court within 90 days from said notice of decision, as hereinbefore provided for, said department shall cause to be spread upon the record copy of the permit in question an order of cancellation, which order shall be final and shall determine said permit to be cancelled and voided, by reason of the facts established on the hearing of the contest.

Hist. '09, p. 299, H. B. 223, § 6; compiled and reen. C. L. § 3265j; compiled upon authority '19, c. 8, § 37, p. 65; Speer v. Stephenson (1909) 16 I. 707, 729, 102 P. 365.

§ 5594. Cancellation of permits at instance of department. Whenever the department of reclamation shall deem it advisable to clear the records of its office of permits, the owners of which have failed or neglected to comply with the law and the requirements of said permits as to the date of commencing of work or the filing of bond thereunder, or the completion of one-fifth of the construction work within one-half the time allowed for the completion of such construction work, or the final completion of such construction work, and has reason to believe that any permit or permits are subject to cancellation, as in this article provided, the department shall prepare and mail by registered mail to the holder of each permit which it believes subject to cancellation and which it desires to cancel a notice fully describing the permit in question, with the date of issuance thereof, point or points of diversion, and setting forth in clear and concise manner the reasons why the cancellation of said permit is proposed. Said notice shall be mailed to the last known post office address of the holder of said permit and shall require said permit holder to show cause before the department of reclamation on or before a date therein set, which shall be not less than 30 days from the mailing of said notice, why said permit should not be cancelled.

Any party aggrieved by the decision of the department under the provisions of this section may appeal to the district court in the manner provided in sections 5589-5591.

On failure to appear and make such showing on or before the date set or on failure, in the opinion of the department, to make sufficient showing,

said permit may be cancelled. In lieu of the mailing of said notice by registered mail, service of the same may be made as provided by the laws of Idaho for the service of a summons in civil actions.

Hist. '09, p. 299, H. B. 223, § 7; am. '15, c. 34, § 2, p. 103; am. '17, c. 9, § 1, p. 11; compiled and reen. C. L. § 3265k; compiled upon authority '19, c. 8, § 37, p. 65.

ARTICLE 3.

APPROPRIATIONS FOR USE OUTSIDE STATE.

Use beyond state borders: Prior to the passage of this act there was no authority for the diversion and appropriation of the waters of this state for application to a beneficial use in another state. Walbridge v. Robinson (1912) 22 I. 236, 125 P. 812, 43 L. R. A. (N. S.) 240.

Interstate adjudication: The rights, as between states, to share in the waters of an interstate stream, is a matter for adjustment between the states, and individual users cannot raise a question about the use of such water in another state out of the territorial jurisdiction of the court. Vineyard etc. Co. v. Twin Falls Salmon River etc. Co. (1917) 245 F. 9.

§ 5595. Appropriation for use in Oregon. Whenever it shall be desired to appropriate the public waters of the state of Idaho for use in the state of Oregon, the department of reclamation shall grant a permit upon proper application therefor, provided the department be satisfied that the interests of the state of Idaho will not be materially injured by such use of its public waters in the state of Oregon, and provided the intending appropriator shall file with his application for permit a certificate from the proper officer or official of the state into which the water is to be diverted, showing to the satisfaction of the department of reclamation that the intended appropriation would be beneficial, and that the project for which the intended appropriation is required is feasible.

Hist. '15, c. 111, § 1, p. 254, reen. C. L. § 3265n; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5596. Application and permit. The application for permit and the permit issued thereon as provided in section 5595, shall be in accordance with the laws of the state of Idaho, relative to the filing of application for permit and the obtaining of permit to appropriate the public waters of the state of Idaho. ['15, c. 111, § 2, p. 254.]

Hist. '15, c. 111, § 2, p. 254, reen. C. L. § 3265o.

§ 5597. Proof of completion of works. Proof of completion of works under such permit shall be made in accordance with the laws of the state of Idaho relative to proof of completion under a permit to appropriate the public waters of the state of Idaho, as to all works of diversion under such permit lying within the state of Idaho: *Provided,* That the department of reclamation shall issue no certificate of completion under such proof until it shall have received from the officer or official mentioned in section 5595 a certificate to the effect that the proper public records of such sister state show the works to have been completed under said permit, said certificate to show in second feet the capacities of the various conduits constructed and to show in acre feet the capacities of reservoir, if any there be, constructed in such sister state under said permit.

Hist. '15, c. 111, § 3, p. 254, reen. C. L. § 3265p; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5598. License. The department of reclamation shall issue a license in accordance with the laws of the state of Idaho relative to the issuance of license under a permit, whenever the department shall receive a certificate from the officer or official mentioned in section 5595, to the effect that the proper public records of such sister state show that beneficial

use has been made of the waters sought to be appropriated under said permit, said certificate to show the extent of such use in second-feet. If such use is for irrigation, such certificate shall give a description by legal subdivisions of the land which is irrigated by such water. If such use is for power purposes, such certificate shall describe the location of the point of use.

Hist. '15, c. 111, § 4, p. 255, reen. C. L. § 3265q; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5599. Idaho laws controlling. Appropriations of water made under the provisions of this article shall be subject to the laws of the state of Idaho relative to administration, control and distribution of public waters, so long as said waters appropriated in accordance herewith shall remain within the state of Idaho: *Provided further,* That such rights in their entirety shall be subject to all laws of the state of Idaho which have been or may be passed from time to time relative to the appropriation and control of public waters, to the end that such rights may be upon a parity with water rights within the state of Idaho. ['15, c. 111, § 5, p. 255.]

Hist. '15, c. 111, § 5, p. 255, reen. C. L. § 3265r.

§ 5600. Rules and regulations. The department of reclamation is empowered to make such rules and regulations as may be necessary to the proper administration of the provisions of this article.

Hist. '15, c. 111, § 6, p. 255; compiled and reen. C. L. § 3265s; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5601. Appeal from department's decision. Whenever any person or persons feel themselves aggrieved by the determination or decision of the department of reclamation relative to the granting of permit, the issuance of certification of proof of completion or the issuance of license, as hereinbefore provided for, such person or persons may appeal to the courts: *Provided,* That such appeal shall be taken within 60 days from the date of such determination or decision by the department of reclamation, and shall be perfected when the appellant shall have filed in the office of the clerk of the district court of the county in which the intended point of diversion under the water permit is located, a copy of the official records of the office of the department having to do with such determination or decision of the department.

Hist. '15, c. 111, § 7, p. 255, reen. C. L. § 3265t; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5602. Appropriation subject to reciprocal legislation. No permit to appropriate the public waters of the state of Idaho shall be granted by the department of reclamation, unless the sister state, to which it is desired to divert such water, shall have enacted legislation generally similar in purport to the provisions of this article, whereby water may be appropriated within such sister state for use within the state of Idaho.

Hist. '15, c. 111, § 8, p. 255, reen. C. L. § 3265u; compiled upon authority '19, c. 8, § 37, p. 65.

Reciprocal legislation: Oregon '11, c. 224, p. 404.

§ 5603. Appropriation for use in Wyoming. The department of reclamation shall, under the laws of this state, allow the appropriation of water in this state for beneficial use in the state of Wyoming only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in the state of Idaho. Upon any stream flowing across the state boundary a right of appropriation, having the point of diversion and the place of use in the state of Wyoming and recog-

nized by the laws of that state, shall have the same force and effect as if the point of diversion and the place of use were in this state: *Provided,* That the laws of that state give like force and effect to similar rights acquired in this state.

Hist. '19, c. 118, p. 404; compiled upon authority '19, c. 8, § 37, p. 65.

ARTICLE 4.

SURVEY OF WATER APPROPRIATIONS.

§ 5604. Department to examine streams. It shall be the duty of the department of reclamation to proceed, as soon as may be, to make an examination of the streams of the state (beginning with those whose waters have not yet been allotted), and the works diverting water therefrom, said examination to include the measurement of the discharge of said streams and the carrying capacity of the various ditches and canals diverting water therefrom; an examination of the irrigated lands, and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals, which said observations and measurements shall be reduced to writing and made a matter of record in its office, and it shall be the duty of the department of reclamation to make, or cause to be made, a map or plat on a scale of not less than one inch to the mile, showing, with substantial accuracy, the course of the stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of land which have been irrigated, and it shall also note on such map the lands which are susceptible of irrigation from the ditches and canals already constructed. Such examination shall be made as rapidly as possible to include all the streams used for irrigation in the state. The department of reclamation shall indicate on such map the lands the water rights for which have been adjudicated by the courts, noting on each tract the number of the priority of such rights, and whenever an application for a permit to appropriate water from a stream shown on such map shall be allowed, such department shall indicate on such map the line of such canal or ditch or other works, and indicate by appropriate colors the lands to be irrigated by such works, and shall note thereon the number of such permit. Whenever proof is made that water has been beneficially applied from such works to any of such lands, and license shall be issued for the same as in this chapter provided, the number of such license so issued shall be at once noted on such map on the subdivision of such lands to which such license shall relate, and all these and other facts relating to the development of irrigation on such stream shall be carefully posted on such map.

Hist. '03, p. 223, § 33, reen. R. C. § 3266; compiled and reen C. L. § 3266; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Water resources survey: § 2983.

Constitutionality: It is the duty of the state engineer to examine streams and diversion works, beginning with streams the waters of which have not been adjudicated by decree of court. The work to be done by the engineer under this section is to be paid for by the state and is partly for the purpose of making a permanent record of the water appropriations and rights to the use thereof. The section is constitutional. Boise Irr. etc. Co. v. Stewart (1904) 10 I. 38, 77 P. 25, 321.

CHAPTER 219.

DISTRIBUTION OF WATER AMONG APPROPRIATORS.

ARTICLE 1.

GENERAL PROVISIONS.

§ 5605. [3268] Water divisions: Establishment and boundaries. For the purpose of administering and controlling the public waters, the state of Idaho is hereby divided into three water divisions denominated water division No. 1, water division No. 2, water division No. 3.

Water division No. 1 shall consist of all lands within this state drained by the Snake river and its tributaries as far west as American Falls, and all lands within this state drained by Bear river and its branches, and by other streams flowing on the slope of the Salt Lake basin.

Water division No. 2 shall consist of all lands within this state drained by Snake river and its tributaries on the south side from Bruneau river, and by the Snake river and its tributaries on the north side from American falls to and including the Malad river, also all lands within this state drained by the streams flowing toward and sinking near the northern edge of the Snake river plains, and the lands in this state drained by the Salmon river and its tributaries as far west as the south fork of said river.

Water division No. 3 shall consist of all lands within this state drained by the Snake river and its tributaries on the south side from the mouth of the Bruneau river to and including the Owyhee river, and by the Snake river and its tributaries on the north side from the mouth of the Malad river to and including the Clearwater river, excepting that portion of the water shed of the Salmon river included in water division No. 2, and all that portion of the state lying north of the water shed of said Clearwater river. ['03, p. 223, § 13-16.]

Hist. '03, p. 223, §§ 13, 16, reen. R. C. § 3268, reen. C. L. ib.

Cited: Walbridge v. Robinson (1912) 22 I. 236, 125 P. 812, 43 L. R. A. (N. S.) 240; (in brief of counsel) Bower v. Moorman (1915) 27 I. 162, 166.

§ 5606. Department of reclamation to supervise water distribution. It shall be the duty of the department of reclamation to have immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom. The department must execute the laws relative to the distribution of water in accordance with rights of prior appropriation.

The department of reclamation shall, in the distribution of water from the streams to the canals, be governed by this title.

Hist. First paragraph: '15, c. 34, § 4, p. 106. The act repealed R. C. § 3270, together with other sections providing for a water commissioner to distribute the water in each of the divisiins defined in § 5605. Second paragraph: '03, p. 223, § 32, reen. R. C. § 3283; am. '15, c. 34, § 17, p. 112; reen. C. L. § 3270; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5607. Same: Rules and regulations. The department of reclamation shall provide such rules and regulations in relation to making of proof of completion of works constructed under the provisions of this title, and of the proof of application of the water as provided for in this title, and shall also devise all needful rules for the distribution of water from the streams, as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.

Hist. '15, c. 34, § 8, p. 106, superseding R. C. § 3273, reen. C. L. § 3273; compiled upon authority '19, c. 8, § 37, p. 65.

ARTICLE 2.

WATER DISTRICTS AND WATER MASTERS.

§ 5608. Creation of water districts. The department of reclamation shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: *Provided,* That any stream or water supply, when the distance between the extreme points of diversion thereon is more than 40 miles, may be divided into two or more water districts: *Provided,* That any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: *Provided,* That any stream may be divided into two or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: *Provided,* That this section shall not apply to streams or water supplies whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof.

Hist. '03, p. 223, § 23; am. '07, p. 532, § 2, reen. R. C. § 3274; am. '09, p. 326, H. B. 68, § 1; am. '15, c. 34, § 9, p. 106, reen. C. L. § 3274; compiled upon authority '19, c. 8, § 37, p. 65.

When section not applicable: On streams "whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof" there can be no legal organization of a water district and no persons claiming to be officers of such a district have any authority to determine priorities and amounts or to interfere with the irrigation works of any user. Marsters et al. v. U. S. (1916) 236 F. 663, 149 C. C. A. 659.

§ 5609. Selection and duties of water master. There shall be held on the first Monday in March in each year, commencing at 2 o'clock p. m., a meeting of all persons owning or having the use of an adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the department of reclamation, and the department shall, between January 1 and February 1 of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies or corporations known by it to own or claim the use of the waters of such district.

At such meeting there shall be elected a water master for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall prior to the election of such water master and assistants fix the compensation to be paid them, such compensation not to exceed $7 per day during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to 10 inches of water in the stream or water supply comprising such water district, shall be entitled to one vote. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing water masters and assistants. Within five days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the department of reclamation: *Provided,* That a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation: *Provided,* That each stockholder in said corporation shall be entitled to as many votes as he shall have units

of 10 miners' inches of water, regularly adjudicated, in the stream or water supply comprising such water district: *Provided,* That should said meeting not be held, or should said water master not be chosen or his compensation fixed as above provided, then the department of reclamation must appoint such water master and fix his compensation not exceeding $5 per day.

The department of reclamation may remove any water master whenever such water master fails to perform his duty as water master, upon complaint in that respect being made to the department in writing, by three persons owning or having the right to the use of an adjudicated right in such district: *Provided,* That upon investigation the department finds such charge to be true, and the department may appoint a successor for the unexpired term.

Before entering upon the duties of his office, said water master shall take and subscribe an oath before some officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of his office, and shall file with the clerk of the district court in the county in which said water master resides, said oath and his official bond in the penal sum of $500, with not less than two sureties, to be approved by the judge of the probate court of the county in which he resides and conditioned for the faithful discharge of the duties of his office.

Hist. '03, p. 223, § 24, reen. R. C. § 3275; am. '09, p. 326, H. B. 68, § 1; am. '15, c. 34, § 10, p. 107, reen. C. L. § 3275; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. There is an apparent conflict as to water master's pay between this and § 5614.

Cited: (In brief of counsel) Knowles v. New Sweden Irr. Dist. (1909) 16 I. 217; Marsters et al. v. U. S. (1916) 236 F. 663, 149 C. C. A. 659.

§ 5610. Reports of water masters. All water masters shall make reports to the department of reclamation as often as may be deemed necessary by said department; said reports shall contain the following information: The amount of water necessary to supply all of the ditches, canals and reservoirs of the district; the amount of water actually coming into the district to supply such ditches, canals or reservoirs; whether such supply is on the increase or decrease; what ditches, canals and reservoirs are at times without their proper supply, and the probability as to what the supply will be during the period before the next report will be required, and such other information as the department may suggest. Said department shall carefully file and preserve such reports and shall from them ascertain what ditches, canal and reservoirs are, and what are not, receiving their proper supply of water, and if it shall appear that in any district of that division, any ditch, canal or reservoir is receiving water whose priority postdates that of the ditch, canal or reservoir in another district as ascertained from its register, it shall at once order such postdate ditch, canal or reservoir shut down, and the water given to the elder ditch, canal or reservoir, its orders being directed at all times to the enforcement of priority of appropriation, according to its tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals or reservoirs may be located. The reports of water masters to the department of reclamation shall be filed and kept in the office of the department.

Hist. '03, p. 223, § 25, reen. R. C. § 3276; am. '15, c. 34, § 11, p. 108, reen. C. L. § 3276; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5611. Distribution of water. It shall be the duty of said water master to distribute the waters of the public stream, streams or water supply, comprising his water district, among the several ditches taking

water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of reclamation, the headgates of the ditches heading from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream, or water supply: *Provided,* That any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purpose of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply.

Hist. '03, p. 223, § 26; am. R. C. § 3277; am. '09, p. 326, H. B. 68, § 1; am. '15, c. 34, § 12, p. 109, reen. C. L. § 3277; compiled upon authority '19, c. 8, § 37, p. 65.

Cited: Marsters v. U. S. (1916) 236 F. 663, 149 C. C. A. 659.

Decree governs water master: The water master cannot be required to go beyond the provisions of the decree to ascertain whether or not the same is supported by the findings or whether there is a conflict between the findings and decree, but he can look only to the decree for his instructions as to the amount of water to be distributed to each claimant. Stethem v. Skinner (1905) 11 I. 374, 82 P. 451.

§ 5612. Water master's term of service. Said water masters shall not begin their work until they have been called upon by three or more owners or managers of ditches or persons controlling ditches, in the several districts, by application in writing, stating that there is a necessity for the use and control of the waters of such district, and they shall not continue performing services after the necessity therefor shall cease, which shall be determined by the department of reclamation, and in no event after the 1st of November of each year.

Hist. '03, p. 223, § 27, reen. R. C. § 3278; am. '09, p. 326, H. B. 68, § 1; am. '15, c. 34, § 13, p. 109, reen. C. L. § 3278; compiled upon authority '19, c. 8, 37, p. 65.

Mandatory: This provision is mandatory and the water master cannot recover for services as such water master unless the services were rendered after such written application has been presented to him. Walker v. Elmore Co. (1909) 16 I. 696, 102 P. 389.

§ 5613. Water master may employ assistants. Said water master shall have power, in case of emergency, with the approval of the department of reclamation, to employ suitable assistants to aid him in the discharge of his duties, who shall take the same oath as the water master, and shall obey his instructions, and shall be entitled to not exceed $3 per day for every day they are employed, to be paid upon certificates of the department in the same manner as provided for the payment of water masters: *Provided,* That not more than one assistant shall be appointed to each 15 miles of the stream whose waters have been allotted.

Hist. '03, p. 223, § 28, reen. R. C. § 3279; am. '15, c. 34, § 14, p. 110, reen. C. L. § 3279; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5614. Compensation of water masters. Water masters herein provided for shall each be entitled to pay at the rate of not to exceed $4 per day for each day he shall be actually employed in the duties of his office. Said water master shall make up a sworn statement which shall be approved by the department of reclamation, and shall show the number of days said water master has devoted to the distribution of such water, and the number of days his assistant or assistants have devoted to the same purpose, and such statement shall also show the volume of water, stated in cubic feet per second, he has by virtue of the

allotment of said waters delivered to each user each day, and shall describe the lands to which said water was so delivered. The pay for the services of said water master and his assistants shall be a charge against the land of the users to which said water was so delivered, the expense for said services being first divided between all classes as to priority of allotment or decree, in the proportion which the number of days such water is received by all users in the same class of priority of allotment or decree bears to the whole number of days said water master is engaged in distributing said water; the amount charged to each user in the same class of priority of allotment or decree bearing the same proportion to the amount charged to all users in the same class of priority of allotment or decree as the volume of water delivered to each user bears to the whole amount delivered to all of like class of priority of allotment or decree, by the said water master and his assistants. This statement, which shall show the proper distribution of the said expenses among the various users, shall be filed with the auditor and recorder of the county or counties in which the said water was delivered: *Provided,* That when any portion of the allotted waters is distributed by said water master to the canal of any duly organized canal company, the amount of the expense chargeable for such services shall be a charge against such canal and the account of such charge to be paid by the county in the manner herein provided shall be charged as a tax against such canal, which tax shall be collected in the manner provided by law for the collection of other taxes, and no canal in this state shall be exempt from the payment of such tax.

Hist. '03, p. 223, § 29; am. '07, p. 482, § 1, reen. R. C. § 3280; am. '15, c. 34, p. 110, reen. C. L. § 3280; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Express reference to this section: Compensation of water master appointed by court: § 5626.

There is an apparent conflict as to water master's pay between this and § 5609.

§ 5615. [3281] Same: Payment and collection from water users. A bill, based upon such statement, for the services performed by the said water master and his assistants, shall be presented at a regular meeting of the board of county commissioners, who shall order a warrant issued to said water master or his assistants on the current expense fund of the county. The auditor and recorder of said county shall add the amounts charged to the land of the users, and to such ditches to which said water was delivered, to the taxes of said land or ditches as may be levied for the following year, which shall be collected along with other taxes, and turned into the current expense fund of the county. [R. C. § 3281.]

Hist. '03, p. 223, § 30; am. R. C. § 3281, reen. C. L. ib.

ARTICLE 3.

HEADGATES AND MEASURING DEVICES.

§ 5616. Appropriators required to maintain. The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the department of reclamation suitable headgates and controlling works at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water master or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point and such appropriator shall construct and maintain, when required by the department, a rating flume or other measuring device at such point as is most practical in such canal or ditch for the purpose of assisting the water master or department in determining the amount of water

that may be diverted into said ditch from the stream. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of reclamation.

Hist. '99, p. 223, § 31, reen. R. C. § 3282; am. '13, c. 68, p. 305; am. '15, c. 34, § 16, p. 111; am. '17, c. 53, part of § 1, p. 122, reen. C. L. § 3282; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5617. Duty of department to construct: Lien of cost. If any appropriator or user of public waters neglects or refuses to put in such headgates, controlling works or measuring devices as, in the judgment of the department of reclamation, will provide for the proper measurement, control and distribution of the water, then the department shall give to the owner or user of such works 10 days' notice to remedy the defects in accordance with the requirements set out in said notice. Such notice may be given by registered mail, and in case of the failure or refusal of the owner or user of said works to comply therewith, then said headgates, rating flumes, measuring devices or controlling works may be put in under the direction of the department of reclamation at the expense of the owner or user of said works and the cost and expense thereof, together with the expenses of supervision by the department, shall be a lien upon the works or irrigation system for the improvement of which such headgates, rating flumes, measuring devices or controlling works are put in. The department of reclamation shall make up a statement showing the amount of the cost and expense, the purpose thereof and necessity therefor and shall file the same with the county recorder within 90 days from the completion of the work. Such lien shall be filed for the benefit of the person doing the work or furnishing the material therefor. Attorney's fees shall be allowed by the court upon the foreclosure of such lien.

Hist. '99, p. 223, § 31, reen. R. C. § 3282; am. '13, c. 68, p. 305; am. '15, c. 34, § 16, p. 111; am. '17, c. 53, part of § 1, p. 122, reen. C. L. § 3282a; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5618. Collection of lien as tax. In case, however, the department of reclamation shall deem it undesirable to secure the enforcement of the payment of the cost and expenses of the improvement in the manner hereinbefore mentioned it may file the statement of costs and expenses hereinbefore mentioned with the county recorder for presentation to the board of county commissioners of the county in which the works or a portion of them are located and the said board of county commissioners shall pay the same to the department of reclamation by a warrant drawn on the current expense fund of the county and shall add the amount of the cost and expenses, as shown by the department's certificate, to the taxes of the owner or owners of the canal or ditch whereon the improvement is made. Said board of county commissioners shall cause a notice of the amount of the claim to be sent by registered mail to the owner or owners of the ditch or canal system, and in case said payment is not made, then a penalty of 10 per cent shall be added to the amount and the entire amount shall be collected with the taxes of the owner or owners of the canal or ditch system, and the amount shall be a lien against the property the same as state and county taxes. No canal in this state shall be exempt from the payment of such tax.

Hist. '99, p. 223, § 31, reen. R. C. § 3282; am. '13, c. 68, p. 305; am. '15, c. 34, § 16, p. 111; am. '17, c. 53, part of § 1, p. 123, reen. C. L. § 3282b; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5619. Payment before filing of claim. The owner or owners or users of water through said irrigation works may pay the amount of

the costs and charges, together with interest at the rate of 7 per cent per annum from the date of the completion of the improvement, to the department of reclamation at any time prior to the filing of the lien or the filing of the claim with the county recorder. The department shall issue a receipt for any payment so made and shall remit the same to the state treasurer, who shall place said money in the fund hereinbefore mentioned.

Hist. '99, p. 223, § 31, reen. R. C. § 3282; am. '13, c. 68, p. 305; am. '15, c. 34, § 16, p. 111; am. '17, c. 53, part of § 2, p. 123, reen. C. L. § 3282c; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5620. Measuring devices above reservoirs. Any person, firm or corporation using the channel of any stream or streams or any tributary of such stream or streams in this state as an impounding reservoir shall place therein at a point above and as near as practicable to the backwater of such reservoir such system or device as the department of reclamation may require for measuring the flow of water at such point and in accordance with plans and specifications which shall be furnished by the department. ['17, c. 53, part of § 3, p. 124.]

Hist. '17, c. 53, part of § 3, p. 124, reen. C. L. § 3282d; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5621. Measuring devices along streams. It shall also be the duty of those using water in any water district to place in the streams from which said water is diverted and at such places and intervals on said streams as the department of reclamation may require suitable systems or devices for measuring the flow of water.

Hist. '17, c. 53, part of § 3, p. 124, reen. C. L. § 3282e; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5622. Cost of measuring devices. The cost and expenses incurred in the two preceding sections of this article set forth, if constructed by the department of reclamation, shall be paid pro rata by the several users of water in such district as hereinbefore provided in this article.

Hist. '17, c. 53, part of § 3, p. 124, reen. C. L. § 3282f; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5623. Continuing appropriation. There is hereby appropriated out of any money in the general fund of the treasury in the state of Idaho for the purpose of carrying out the provisions of this article the sum of $5,000, to be a perpetual fund, and the department of reclamation shall draw vouchers on such fund for the purpose of carrying out the provisions of this article.

Hist. '17, c. 53, part of § 2, p. 123, reen. C. L. § 3282g; compiled upon authority '19, c. 8, § 37, p. 65.

ARTICLE 4.

DISTRIBUTION OF STORED WATER.

§ 5624. Conveyance of stored water through natural channel: Appointment of special deputy. Whenever the owner of a reservoir shall desire to use the bed of a stream, or a natural water course, for the purpose of carrying stored water, he shall in writing notify the department of reclamation, giving the date when it is proposed to discharge the water, its volume in acre feet, and in cubic feet per second at the point of discharge, and the persons and ditches entitled to its use. The department shall then appoint a special deputy whose duty it shall be to adjust the headgates of all ditches not entitled to the stored water,

and in such manner that those having the right to the use of such water shall secure the volume to which they are entitled. For the purpose of delivering such stored water the deputy appointed by the department of reclamation may employ such number of assistants as, with the approval of the department, he may deem necessary. The owner of any reservoir proceeding under the provisions of this section shall pay to the special deputy and to each assistant a sum not exceeding $5 per diem for each day consumed in the adjusting of headgates and the delivery of water as hereinbefore provided.

Hist. '09, p. 150, H. B. 197, § 1, reen.
C. L. § 3282h; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5625. Same: Penalty for interference. After the special deputy and his assistants shall have adjusted the headgates of all ditches, the owners of which are not entitled to the use of such stored water as provided in the preceding section and before such stored water shall have passed the headgates so adjusted, any person who shall raise or tamper with any such headgate in such manner as to misappropriate any portion of such water to his own use and benefit whether he be the owner of such headgate or not, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $250, or by imprisonment in the county jail for a period of not less than 30 days nor more than six months, or by both such fine and imprisonment.

Whenever the special deputy or any assistant shall discover any person in the act of committing a misdemeanor declared in this section, he shall arrest such person and turn him over to the sheriff of the county in which the misdemeanor was committed and he shall also file with the county attorney of such county an affidavit setting out the facts with reference to the commission of such misdemeanor. ['09, p. 150, H. B. 197, § 2.]

Hist. '09, p. 150, H. B. 197, § 2, reen.
C. L. § 3282i.

CHAPTER 220.

DISTRIBUTION TO CONSUMERS.

§ 5626. Appointment of water master. It shall be the duty of those owning or controlling any ditch, canal or lateral to appoint a superintendent or water master, whose duty it shall be to measure the water from such ditch, canal or lateral through the outlet of those entitled thereto, according to his or her pro rata share: *Provided,* That any vicinity or neighbborhood, the inhabitants of which use the waters of any ditch, canal or lateral for the purpose of irrigation, or have or claim a common right to the waters of any ditch or lateral for such purposes, provided the waters so claimed or used have not been allotted to the individual users thereof, shall constitute a water district.

Any one or more of said joint owners so using the water of any ditch, canal or lateral as aforesaid, when the appointment of a water master can not be agreed upon, may petition the judge of the district court in whose district the ditch, canal or lateral may be located for the appointment of a water master for said ditch, canal or lateral, and shall set forth in said petition the facts of his or her ownership in said ditch, canal or lateral; the ownership and interest of all other joint owners; the location and length of said ditch, canal or lateral, and requesting

said district court to appoint a water master to take charge of the same. Upon due notice being given to all of the water users under said ditch, canal or lateral, and after hearing before said court, it shall be the duty of the judge of said district court if he deem it necessary or equitable in order that the rights of all water users under said ditch, canal or lateral may be protected, to appoint a water master for the ditch, canal or lateral described in the petition. Said water master to receive such compensation as the court in his judgment may deem adequate, and shall be paid in the same manner as is provided for the payment of water masters under chapter 219, and shall perform the same duties and have the same power and authority as other water masters appointed or elected in accordance with the provisions of this code. ['09, p. 104, H. B. 166.]

Hist. '99, p. 380, § 17, reen. R. C. § 3284; am. '09, p. 104, H. B. 166, reen. C. L. § 3284.
Cited: Walbridge v. Robinson (1912) 22 I. 236, 247, 125 P. 812, 43 L. R. A. (N. S.) 240; Brunzell v. Stephenson (1917) 30 I. 202, 164 P. 89.

§ 5627. [3285] **Injuring ditch or headgate.** Any person who, without the consent of the water master of the district, diverts any water from the ditch or channel where it was placed, or caused, or left to run by the water master or his deputies, or who shuts or opens any ditch, gate or dam with intent so to divert any water, and thereby deprive any person of the use of the same during any part of the time he is entitled to such use, or who, without the consent of the water master, cuts any ditch or the banks thereof, or breaks or destroys any gate or flume, is liable in a civil action to any person injured thereby in three times the actual damage sustained in consequence of any such wrongful act or acts. [R. C. § 3285.]

Hist. (See '81, p. 275) R. S. § 3205; am. R. C. § 3285, reen. C. L. ib.

§ 5628. [3286] **Water companies to furnish headgates and measuring devices.** Any person, association or corporation delivering or distributing water under any fixed annual charge or rental shall provide the necessary gates and measuring devices to render possible and practicable a measurement of the quantity of water being delivered to any consumer (or number of consumers using a common lateral or distributing ditch); and the price charged for the annual use of the water so distributed shall be in proportion to the quantity of water delivered from the works of such person, association or corporation. Such measuring devices shall be of such a character, and provided with such gauges or scales, that the quantity of water being delivered at any time can be ascertained by inspection; and shall be of such general plan as shall meet with the approval of the department of reclamation, which shall inspect any such devices whenever possible to ascertain their character, and the department shall furnish such general information and instructions to any consumer, or the water master of any number of consumers of water, as may be necessary to enable him to ascertain the quantity of water flowing through any such measuring device.

Hist. '97, p. 127, § 2, modified by '99, p. 380, and '09, p. 408, § 59; compiled R. C. § 3286, reen. C. L. ib; compiled upon authority '19, c. 8, § 37, p. 65.

§ 5629. [3287] **Division of land into classes by priority.** When any ditch, canal or reservoir delivering or distributing water to several users has one or more rights or priorities by reason of enlargements made from time to time, the right of the land being irrigated by such works shall be divided into classes; rights of the first class belonging

to those lands reclaimed between the dates of the first and second priorities or rights of such works; rights of the second class belonging to those lands reclaimed between the dates of the second and third priorities of such works; rights of any other class being determined in like manner; but all the rights belonging to the same class shall be equal and subject alike to the regulations of their respective class. ['01, p. 191, § 9a.]

Hist. '01, p. 191, § 9a, reen. R. C. § 3287, reen. C. L. ib.

Constitutionality: This section does not contravene Const. XV, 3, 5. Brose v. Directors Nampa etc. Irr. Dist (1913) 24 I. 116, 132 P. 799.

Purpose of section: Under the statute it is intended that the irrigation company shall make such classification upon such information as it may be able to obtain, and in fairness, and in accordance with the terms of the statute. Brose v. Directors of Nampa etc. Irr. Dist. (1911) 20 I. 281, 118 P. 504.

The board must classify the land the best it can under such evidence it has or may be able to obtain. Brose v. Directors of Nampa etc. Irr. Dist. (1913) 24 I. 116, 132 P. 799.

Effect on rights of water users: Any classification made by an irrigation company under the provisions of this section can in no way affect or control the question of priorities between users, and in no way prohibits or limits any user of water in having the question of priority between users settled and adjudicated in the proper court of the state. Brose v. Directors of Nampa etc. Irr. Dist. (1911) 20 I. 281, 118 P. 504.

The canal company is not given the right to ultimately decide the question of priority as between water users; that power remains with the court, and the adjustment of land into classes is not permanent unless the water users decide so. Brose v. Directors of Nampa etc. Irr. Dist. (1913) 24 I. 116, 132 P. 799.

§ 5630. [3288] **Point of delivery.** Any person, association or corporation which may contract to deliver a certain quantity of water to any party or parties, shall deliver the same to such party or parties, together with a reasonable and necessary allowance for loss by evaporation and seepage, at some convenient point on the main ditch, canal or reservoir of said person, association or corporation, or on any branch or lateral thereof belonging to the owner or owners of such ditch, canal or reservoir. ['95, p. 174, part of § 17.]

Hist. '95, p. 174, part of § 17, reen. R. C. § 3288, reen. C. L. ib.

Cross ref. Express reference to this section: Duties of consumers: §§ 5632, 5633.

Cited: Jackson v. Indian Creek etc. Irr. Co. (1909) 16 I. 430, 101 P. 814; (in dis. op.) S. v. Twin Falls C. Co. (1911) 21 I. 410, 449, 121 P. 1039.

Duty of canal company: It is the duty of a canal company to keep its ditches and canals in repair and to turn the water for the consumer out of its main canal or lateral at such place as will be most convenient for the consumer and cause least waste by seepage and evaporation. Niday v. Barker (1909) 16 I. 73, 101 P. 254.

§ 5631. Amount and lien of rental or maintenance. The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered. But if the title to said tract of land is in the United States or the state of Idaho, then the said amount shall be a first lien upon any crop or crops which may be raised upon said tract of land, which said lien shall be recorded and collected as provided by law for other liens in this state. And any mortgage or other lien upon such tracts of land that may hereafter be given shall in all cases be subject to the lien for price of water as provided in this section. ['95, p. 174, part of § 17.]

Hist. '95, p. 174, part of § 17, reen. R. C. § 3288, reen. C. L. 3288a.

Private contracts authorized: This section clearly authorizes parties to contract with reference to the delivery of water and to fix and determine the amount to be charged as an annual maintenance fee therefor. Jackson v. Indian Creek etc. Irr. Co. (1909) 16 I. 340, 101 P. 814.

Preferential rate: A canal company, not a common carrier, may allow a valid preferential maintenance rate. (Sullivan, C. J. dissents) Nampa etc. Irr. Dist. v. Briggs (1915) 27 I. 84, 102, 121, 147 P. 75.

Alternative remedy: For user's default in payment of maintenance, water company may proceed either under this section or under § 3240. Adams v. Twin Falls-Oakley L. & W. Co. (1916) 29 I. 357, 161 P. 322.

§ 5632. Duties of consumers: Appointment of manager of distributing lateral. Where two or more parties take water from said ditch, canal or reservoir at the same point, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch, such parties shall, on or before April 1 of each year, select some person to have charge during the succeeding season of the distribution of water from such lateral, whose duty it shall be to ascertain and see that the amount of water to which each of the parties interested is entitled is properly apportioned and distributed. It shall be his further duty to see that the said person, association or corporation, contracting to furnish such water shall deliver the amount as provided in section 5630, and in case of dispute between such person and the said person, association or corporation as to the quantity of water to be delivered, or the amount actually delivered, the matter shall be referred to the department of reclamation. The parties entitled to said water shall keep their ditches and laterals in good condition for carrying and distributing the same. In case the parties entitled to the use of water as in this section stated shall neglect or refuse to perform the duties imposed upon them by this section, they shall have no cause for damage against the person, association or corporation furnishing said water for failure to properly furnish and distribute the same.

Hist. '95, p. 174, part of § 17, reen. R. C. § 3288, reen. C. L. § 3288b; compiled upon authority '19, c. 8, § 37, p. 65.

Cross ref. Express reference to this section: Alternative method of selection: § 5633. Duties of manager: § 5634.

§ 5633. Same: Alternative method of selection. Wherever two or more persons take water from any main ditch, canal or reservoir, at the same point, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch, as provided in section 5630, the person selected by such parties on or before April 1 of each year, as provided in section 5632, may be selected and appointed by a written instrument designating such person, signed by the majority of such persons so using the said ditch for their said water, and filed with the water master or other managing agent or director of such main canal, ditch or reservoir. ['09, p. 108, S. B. 162, § 1.]

Hist. '09, p. 108, S. B. 162, § 1, reen. C. L. § 3288c.

§ 5634. Duties of manager of distributing lateral. Such person shall be known as the manager of such distributing lateral for the season for which he is selected, and in addition to the powers granted to him by section 5632 he shall have power to require of each user of such lateral such user's proportion of the amount of labor, material or money reasonably necessary for the proper repair and maintenance of such lateral, and to require measuring weirs to be installed for distributing the water among the users, and each user of such lateral shall furnish his proportion of such labor, material or money upon three days' notice so to do, and, in default of so doing, such manager may employ other labor in his place, or furnish the material or money necessary, and such user shall pay to the manager the reasonable value of such material or labor so furnished by the manager, upon demand, in case of default in payment by such user the said manager may sue and collect the same in any court of competent jurisdiction, and in addition to all costs, the court shall allow said manager his reasonable attorney's fees incurred in that behalf. ['09, p. 108, S. B. 162, § 2.]

Hist. '09, p. 108, S. B. 162, § 2, reen. C. L. § 3288d.

§ 5635. Users of water defined. The term "users of water" from a community ditch shall be understood to include the owner of the land on which the water is used, or any tenant or other person in possession and control of said premises. ['09, p. 108, S. B. 162, § 3.]

Hist. '09, p. 108, S. B. 162, § 3, reen. C. L. § 3288e.

§ 5636. [3289] **Company to furnish water on demand.** Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: *Provided*, That no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this state. ['99, p. 380, § 19.]

Hist. '99, p. 380, § 19, reen. R. C. § 3289, reen. C. L. ib.

Cross ref. Penalty for neglect to deliver water: § 8538.

Action to compel delivery: An applicant for the use of water who has complied with the provisions of this act and who is refused water, although the company has sufficient unsold water to supply him, is entitled to a writ of mandate to compel the delivery of water. Bardsley v. Boise Irr. Co. (1901) 8 I. 155, 67 P. 428. But the complaint must allege a demand and must tender compensation or security for the payment of the charges for delivery; it is insufficient to allege that the plaintiff offered to secure the payment of such charges. Ib.

Remedies of water company: This section does not repeal § 5659, and a water company which delivers water to a consumer without demanding prepayment of the charges therefor may sue at law to recover the amount of such charges already earned by it, but cannot shut off the consumer's water because he refuses to make payment. Shelby v. Farmers' etc. Ditch Co. (1905) 10 I. 723, 80 P. 222.

Illegal contracts: Contracts whereby an irrigation company agrees to furnish more water than it has ability to furnish are illegal. Gerber v. Nampa etc. Irr. Dist. (1909) 16 I. 1, 11, 100 P. 80.

Where a party is entitled to water from a ditch company and does everything that the constitution and laws of the state require him to do in order to get it, the water company is bound to deliver him the water and cannot require him to sign a special contract binding him to do things which the law does not require him to do in order to get the water. Green v. Byers (1909) 16 I. 178, 101 P. 79.

Under this section any water company or corporation is forbidden to contract or sell more water than it is entitled to and must not sell more water than it has. S. v. Twin Falls etc. Co. (1916) 30 I. 41, 166 P. 220.

§ 5637. [3290] **Application for water.** Any person or persons owning or controlling land which has or has not been irrigated from any such canal, shall on or before January 1 of any year, inform the owner or person in control of such canal whether or not he desires the water from said canal for the irrigation of land during the succeeding season, stating also the quantity of water needed. In distributing water from any such canal, ditch or conduit during any season, preference shall be given to those applications for water for land irrigated from said canal the preceding season, and a surplus of water, if any there be, shall be distributed to the lands in the numerical order of the applications for it. But no demand for the purchase of a so-called perpetual water right, or any contract fixing the annual charges or the quantity of water to be used per acre, shall be imposed as a condition precedent to the delivery of water annually as provided in this chapter; but the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land; and the annual charges to be made and to be fixed under the further provisions of this title, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered. ['99, p. 380, § 20.]

Hist. '99, p. 380, § 20, reen. R. C. § 3290, reen. C. L. ib.

Cited: Bardsley v. Boise Irr. etc. Co. (1901) 8 I. 155, 67 P. 428.

Application: This section has no application to a case where all prior applications for water have been supplied and the ditch company still has water for rental and distribution, and in such case an applicant may enforce the delivery of water, although he did not make his application prior to January 1. Helphry v. Perrault (1906) 12 I. 451, 86 P. 417.

§ 5638. [3291] **Sale or rental constitutes a dedication.** Whenever any waters have been or shall be appropriated or used for agricultural or domestic purposes under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use upon the tract of land for which such appropriation or use has been secured, and, whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter be deprived of the annual use of the same when needed for agricultural or domestic purposes upon the tract of land for which such appropriation or use has been secured, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law. "Domestic purposes" shall not be construed to include any manner of land irrigation. Any person, association or corporation violating any of the provisions of this section, shall be liable for all damage to any party or parties injured thereby, which damage shall be determined by the proper court. ['95, p. 174, § 14.]

Hist. '95, p. 174, § 14, reen. R. C. § 3291, reen. C. L. ib.

Cross ref. Similar provision: Const. XV, 4.

Conditions of use: Determination: The terms and conditions upon which a person is to be entitled to the use of water from a ditch or canal company are to be determined by the courts. Wilterding v. Green (1896) 4 I. 773, 45 P. 134.

§ 5639. [3292] **Consumer's title not affected by transfer of ditch.** When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties purchasing such right a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased. ['95, p. 174, § 16.]

Hist. '95, p. 174, § 16, reen. R. C. § 3292, reen C. L. ib.

Construed: This section was intended to apply to such water rights as are described in Const. XV, 4; that is, a water right only where there has been an actual application of the water to the land for a beneficial use. Hewitt v. Great Western etc. Co. (1911) 20 I. 235, 118 P. 296.

Perpetual water rights superior to prior and subsequent liens: Upon the purchase and payment of a permanent water right such water right thereafter is in no way affected by the lien of any mortgage given

by the company from whom such water right is purchased, or by any foreclosure of any such mortgage, whether given before or after the sale of such water right. Hewitt v. Great Western etc. Co. (1911) 20 I. 235, 118 P. 296.

§ 5640. [3293] **Liability for waste of water.** No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; and any person using an excess of water, is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto, is liable for all damages sustained by any other person, who would have been entitled to the use of such excess water, as fixed by this section. [R. S. § 3190.]

Hist. (See '81, p. 273) R. S. § 3190, reen. R. C. § 3293, reen. C. L. ib.

Economical use is public policy: The duty of careful and economical use of water is one that by statute as well as public policy is imposed upon every water user. S. v. Twin Falls C. Co. (1911) 21 I. 410, 121 P. 1039, appeal dismissed 235 U. S. 690, 35 S. C. R. 205, 59 L. ed. 427.

Law a part of contracts: By reading this section into a water contract, the water user is entitled to receive the amount of water specified in his contract to the extent necessary to irrigate the crop or crops which he cultivates in accordance with the usages of good husbandry. He is not entitled to receive a greater amount than is necessary to irrigate his crops, nor in any event a greater amount than that specified in the contract. (On rehearing) S. v. Twin Falls etc. Co. (1916) 30 I. 41, 77, 166 P. 220.

Waste water: Where it is necessary in order sufficiently and economically to irrigate land to divert and apply more water than the soil will absorb, the excess so diverted is not waste within meaning of this and § 8529. What constitutes waste, as contemplated by these sections depends upon the circumstances of each case and is a question of fact. Beasley v. Engstrom (1917) 31 I. 14, 168 P. 1145.

CHAPTER 221.

FIXING WATER RATES.

Cited: Walbridge v. Robinson (1912) 22 I. 236, 125 P. 812, 43 L. R. A. (N. S.) 240.

§ 5641. [3294] **Application to county commissioners.** The county commissioners of each county now organized, and of each county to be hereafter organized in this state, shall, at their regular session in January of each year and at such other sessions as they in their discretion may deem proper, hear and consider all applications which may be made to them by any party or parties interested in either furnishing or delivering for compensation, or by any person or persons using or consuming, water for irrigation or other beneficial purpose or purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: *Provided,* That when any ditch, canal or conduit shall extend into two or more counties, the county commissioners of each of such counties shall fix the maximum rate for water used in that county. ['99, p. 380, § 26.]

Hist. '99, p. 380, § 26, reen. R. C. § 3294, reen. C. L. ib.

Cross ref. The legislature may provide the manner in which reasonable maximum rates for the use of water may be established: Const. XV, 6.

Cited: Walbridge v. Robinson (1912) 22 I. 236, 125 P. 812, 43 L. R. A. (N. S.) 240.

Rates fixed by contract: While the county commissioners are authorized, by this section, to fix water rates, the legislature has by § 5630 also authorized parties to enter into a contract with reference to the rate to be charged; and such contract when made, before the commissioners have established any rates, will be enforced. Jackson v. Indian Creek etc. Irr. Co. (1909) 16 I. 430, 101 P. 814.

Private contracts granting water rights at fixed prices entered into prior to act of March 7, 1895 ('95, p. 174), the first legislation providing for fixing rates, were not affected by such act or subsequent legislation. Boise City I. & L. Co. v. Turner (1905) 176 F. 373.

Change of rates: A rate once adjudged reasonable, must be presumed to have remained reasonable until such time as such rate is changed in conformity with the statute. Green v. Jones (1912) 22 I. 560, 126 P. 1051.

At any time after the expiration of one year from the time rates were established any party in interest may petition the board to fix a new rate. Ib.

§ 5642. [3295] **Setting date for hearing.** Every such board of county commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal or conduit, enter an order fixing a day not sooner than 10 days thereafter, nor later than 20 days (a special meeting may be called for that purpose), when they will hear all parties interested in such water works aforesaid, or in procuring water therefrom, for any of the said purposes as well as all documentary or oral evidence or depositions taken according to law, touching said ditch or other water works aforesaid, and the cost of furnishing water therefrom. ['99, p. 380, § 27.]

Hist. '99, p. 380, § 27, reen. R. C. § 3295, reen. C. L. ib.

§ 5643. [3296] **Service of notice of hearing.** At the time so fixed all persons interested as aforesaid, on either side of the controversy, in lands which may be irrigated by such ditch or other water works aforesaid, may appear by themselves or by their agents or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water: *Provided,* The applicant or applicants, if the application be made by a party or parties as aforesaid desirous of procuring water, shall, within 10 days from the time of entering the said order fixing the hearing, cause a copy of such order, duly certified, to be delivered to the owner or owners of such ditch, canal or conduit or to the president, secretary, or agent of the company, if it be owned by a corporation or association having such officers; if any such owner cannot be found, a copy shall be left at the usual place of business of the company of which he is such officer, or at his residence if such company have no place of business. And if such ditch or water works aforesaid shall be owned by several owners, not being an incorporated company, it shall be sufficient to serve such notice by delivering a copy to a majority of them. If the applicant be the owner or party controlling such ditch, canal or conduit, such notice shall be given by causing printed copies of such order in handbill form, in conspicuous type, to be posted securely in 10 or more places throughout the county and section watered by such ditch or other water works aforesaid, if the water be used for irrigation. The person or persons making such services or posting such printed copies shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the board of county commissioners. Depositions mentioned in the preceding section to be used before said commissioners shall be taken by any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same. ['99, p. 380, § 28.]

Hist. '99, p. 380, § 28, reen. R. C. § 3296, reen. C. L. ib.

§ 5644. [3297] **Conduct of hearing: Order: Appeal.** Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary; but when in session they shall hear and

examine all legal testimony or proofs offered by any party interested as aforesaid, as well as concerning the original cost and present value of the works and structure of such ditch, canal or conduit, as well as the cost and expense of maintaining and operating the same, and all matters which may affect the establishment of reasonable maximum rates for water to be furnished and delivered therefrom, and they may issue subpoenas for witnesses, which subpoenas shall be served in the same manner in which subpoenas are served in civil cases; and said board may also issue subpoenas for the production of all books and papers required before them. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to obey the subpoenas of the board of county commissioners, compel obedience thereto, or punish for refusal to obey after hearing as in cases of attachment for contempt of such district court. Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal or conduit, or other water works in question, with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water thereafter delivered from such ditch or other water works as last aforesaid, within the county in which such commissioners act; and such rate shall not be changed within one year from the time when such rate shall be so fixed: *Provided,* That an appeal may be taken to the district court from any act, order or proceeding of the board by any person or corporation aggrieved thereby, as in other cases under the general statute of the state of Idaho, governing appeals from an order or proceeding of the board of county commissioners. ['05, p. 3, § 1.]

Hist. '99, p. 380, § 29; am. '05, p. 3, § 1, reen. R. C. § 3297, reen. C. L. ib.

Cross ref. Provisions governing appeals from county commissioners: §§ 3509-3512.

Appeal: This section expressly confers jurisdiction upon the district court to hear appeals from orders of boards of county commissioners fixing water rates. Rust v. Stewart (1901) 7 I. 558, 64 P. 222.

The intent of this provision is that a water rate, once established, is to remain in force until the establishment of a new one in conformity with law. Green v. Jones (1912) 22 I. 560, 126 P. 1051.

§ 5645. [3298] **Matters considered in fixing rate.** In fixing the rates at which water shall be furnished, the board of commissioners shall take into consideration the cost of the works, the expense of keeping the same in repair, and all other conditions that affect the cost of delivering the same. Whenever it shall appear to the board of county commissioners from competent evidence that any consumer or consumers of water distributed through any ditch or canal, is entitled to the distribution or use of any water therefrom, at not to exceed a proportionate amount of the actual cost of maintenance and operation of said ditch or canal, they shall, upon request of such person or persons so entitled, fix the rate per cubic foot per second to be charged to such consumer or consumers for the current year. ['99, p. 380, § 30.]

Hist. '99, p. 380, § 30, reen. R. C. § 3298, reen. C. L. ib.

CHAPTER 222.

RIGHTS OF WAY.

§ 5646. [3299] **Rights of land owners to water.** All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed. [R. S. § 3180.]

Hist. R. S. § 3180, reen. R. C. § 3299, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 1422.

Cited: (Dis. op.) Drake v. Earhart (1890) 2 I. 750, 23 P. 541.

Riparian rights repudiated: In the dissenting opinion in Drake v. Earhart, supra, Justice Berry cited this section in support of the application of the doctrine of riparian rights to the irrigation law, but the majority of the court, without citing this section, declared in effect that the doctrine of riparian rights has no place in the jurisprudence of this state.

§ 5647. [3300] **Right to right of way.** When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right of way through the lands of others, for the purposes of irrigation: *Provided,* That in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interests of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct. [R. S. § 3181.]

Hist. (See '81, p. 269) R. S. § 3181, reen. R. C. § 3300, reen. C. L. ib.

§ 5648. [3301] **Same.** Where the owners of any spring, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use, and to accomplish such object it is necessary to cross with ditches, flumes or other conduit, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner above provided. [R. S. § 3185.]

Hist. (See '81, p. 271) R. S. § 3185, reen. R. C. § 3301, reen. C. L. ib.

§ 5649. [3302] **Same: Over state lands.** The right of way over and upon any and all lands owned or controlled by the state of Idaho is hereby granted to any and all persons for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use: *Provided,* That no property shall be taken under the provisions of this section until a just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use. ['99, p. 380, § 13.]

Hist. '99, p. 380, § 13, reen. R. C. § 3302, reen. C. L. ib.

Cross ref. Procurement of right of way over state lands: c. 133.

Condemnation of state lands: This section, taken in conjunction with R. S. § 5212, authorizes an action in the district court to condemn state lands for a public use. Hollister v. State (1903) 9 I. 8, 71 P. 541.

A right of way over state land can only be acquired after just compensation shall be paid therefor, to be ascertained in the manner prescribed by law. Tobey v. Bridgewood (1912) 22 I. 566, 127 P. 172.

§ 5650. [3303] **Right of way for riparian proprietors.** All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite

for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the following section. [R. C. § 3303.]

Hist. (See '81, p. 271) R. S. § 3184; am. R. C. § 3303, reen. C. L. ib.

Nature of right: This section gives a mere license to use an appropriate method for raising water, but the method or means adopted does not attach as an appurtenance to the appropriation of the water as against other appropriators. Schodde v. Twin Falls L. & W. Co. 161 F. 43, 88 C. C. A. 207, aff. 224 U. S. 107, 56 L. ed. 686, 32 S. Ct. 470.

The license given by this section does not confer any power to appropriate, without reference to beneficial use, the entire volume of a river or its current, to the destruction of the rights of others to make appropriations of the unused water. Schodde v. Twin Falls L. & W. Co. (1912) 224 U. S. 107, 56 L. ed. 686, 31 S. Ct. 470, aff. 161 F. 43, 88 C. C. A. 207, 41 L. R. A. (N. S.) 101.

§ 5651. [3304] **Right of eminent domain.** In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain. ['99, p. 380, § 14.]

Hist. '99, p. 380, § 14, reen. R. C. § 3304, reen. C. L. ib.

Cross ref. Law of eminent domain: §§ 7404-7423.

§ 5652. Right of way for drains. Whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, and they cannot agree among themselves or with the parties who own land below through which it is expedient to carry the drain in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigating works of diversion, and the right of way for such drains shall be regarded as equal to that of irrigation canals. ['11, c. 125, p. 413.]

Hist. '11, c. 125, p. 413, reen. C. L. § 3304a.

§ 5653. [3305] **Right to cross ditches.** Any person, company or corporation, owners of any ditch, flume or other conduit, cannot lawfully deny to any other person, company or corporation the right to cross their right of way with another ditch, flume or conduit either upon a higher or lower level, where the same can be done in a convenient and safe manner: *Provided,* That such second person, company or corporation shall be liable for all damages that may accrue from the construction of such ditch, flume or other conduit across the conduit of another. [R. C. § 3305.]

Hist. '99, p. 380, last half; am. R. C. § 3305, reen. C. L. ib.

CHAPTER 223.

MAINTENANCE AND REPAIR OF DITCHES.

§ 5654. [3306] **Ditches to be kept full.** Every person, company or corporation owning or controlling any ditch, canal or conduit for the purpose of irrigation shall, during the time from April 1 to the 1st day of November of each year, keep a flow of water therein sufficient to the requirements of such persons as are properly entitled to the use of water therefrom: *Provided, however,* That when the public streams or other natural water sources from which the water is obtained is too low and inadequate for that purpose, then such ditch, canal or conduit shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priority from the streams or other natural sources as provided by law. ['99, p. 380, § 15.]

Hist. '99, p. 380, § 15, reen. R. C. § 3306, reen. C. L. ib.

Cited: Twin Falls L. & W. Co. v. Lind (1908) 14 I. 348, 94 P. 164.

§ 5655. [3307] **Maintenance of ditch.** The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the 1st of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water. ['99, p. 380, § 16.]

Hist. '99, p. 380, § 16, reen. R. C. § 3307, reen. C. L. ib.

Cited: Niday v. Barker (1909) 16 I. 73, 80, 100 P. 254.

§ 5656. [3308] **Maintenance of embankments.** The owner or owners of any irrigating ditch, canal or conduit shall carefully keep and maintain the embankments thereof in good repair, in order to prevent the water from wasting during the irrigation season, and shall not at any time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain or than can be used for beneficial or useful purposes; it being the meaning of this section to prevent the wasting and useless discharge and running away of water. ['99, p. 380, § 22.]

Hist. '99, p. 380, § 22, reen. R. C. § 3308, reen. C. L. ib.

Cross ref. Penalty for wasting water: § 8529.

§ 5657. [3309] **Prevention of damage to others.** The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others. [R. S. § 3186.]

Hist. (See '81, p. 271) R. S. § 3186, reen. R. C. § 3309, reen. C. L. ib.

§ 5658. Bridges over ditches. All owners of any ditch, canal or conduit, or any other means for conveying water, shall build substantial bridges not less than 16 feet wide, and with boards not less than two inches in thickness (unless the same shall be on a county or state road, when such boards shall not be less than three inches thick), at all places where any county or state road crosses the same, or any road kept open and used by any neighborhood of people for their benefit and convenience. In case of neglect or refusal of such owners to build such bridges as above required, after a notice of 10 days being given by the said board of county commissioners of the proper county, said board shall proceed to the construction of the same, and shall collect the cost thereof together with the costs of suit: *Provided*, That after any bridge shall have been constructed across any ditch, canal or conduit on any county or state road in accordance with the provisions of this section, it shall thereafter be maintained at the public expense. [C. L. § 3310.]

Hist. '99, p. 380, § 25, reen. R. C. § 3310; compiled and reen. C. L. § 3310, on authority of MacCammelly v. Pioneer Irr. Dist. (1909) 17 I. 415, 422, 105 P. 1076.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 551. (In brief of counsel) Gooding Highway Dist. v. Ida. Irr. Co. (1917) 30 I. 232, 164 P. 99.

Who liable for cost: The county must construct all bridges to complete highway over ditch laid out after the ditch has been constructed, but otherwise if the highway built first. MacCammelly v. Pioneer Irr. Dist. (1909) 17 I. 415, 105 P. 1076.

If ditch or canal is constructed prior to establishment of public highway which intersects it, expense of building bridge must be borne by county or highway district Gooding Highway Dist. v. Ida. Irr. Co (1917) 30 I. 232, 164 P. 99.

§ 5659. [3311] **Repair of community ditches.** Where a ditch is common property, or there is a common right to the use of the water of a

ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the water master of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three days after notice so to do from the water master or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the water master in his own name. [R. S. § 3203.]

Hist. (See '81, p. 275) R. S. § 3203, reen. R. C. § 3311, reen. C. L. ib.

Remedy of water company: This section is not repealed by laws '99, p. 380, and a water company which delivers water to a consumer without obtaining prepayment of the charges therefor, cannot shut off the consumer's water because of his refusal to pay such charges, but may maintain an action to recover the amount of the charges. Shelby v. Farmers' etc. Ditch Co. (1905) 10 I. 723, 80 P. 222.

§ 5660. [3311a] **Change of lateral ditch.** Where any lateral ditch has heretofore been, or may hereafter be, constructed across the lands of another, the person or persons owning or controlling the said land shall have the right at their own expense to change said lateral ditch to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such lateral ditch. ['07, p. 227, § 4.]

Hist. '07, p. 237, § 4, reen. R. C. § 3311a, reen. C. L. ib. This section is also found in the Penal Code, § 8535.

TITLE XLV. CONTRACTS AND OBLIGATIONS.

Cross ref. Statute of frauds: § 7976 et seq.

CHAPTER 224.

GENERAL PROVISIONS.

§ 5661. [3312] **Who may contract.** All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights. [R. S. § 3220.]

Hist. (See '64, p. 515, § 1) R. S. § 3220, reen. R. C. § 3312, reen. C. L. ib.

Cross ref. Disaffirmance of contract by minor: § 4585 et seq. Contracts of insane persons: § 4589 et seq.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1556; Kerr's C. ib.

Right to contract: A married woman is not "deprived of her civil liberty" within the meaning of this section, so as to render her incapable of contracting. Bassett v. Bean (1894) 4 I. 106, 36 P. 501. This section does not confer upon married women the right to make any and all contracts that may be made by a feme sole. Dernham & Kaufman v. Rowle (1896) 4 I. 753, 44 P. 643.

§ 5662. [3313] **Enforcement by beneficiary.** A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it. [R. S. § 3221.]

Hist. R. S. § 3221, reen. R. C. § 3313, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1559; Kerr's C. ib.

Cited: (In brief of counsel) Sauve v. Title Guaranty & Surety Co. (1916) 29 I. 146, 148.

§ 5663. [3314] **Presumption of consideration.** A written instrument is presumptive evidence of a consideration. [R. S. § 3222.]

Hist. R. S. § 3222, reen. R. C. § 3314, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1614; Kerr's C. ib.

Cited: (In brief of counsel) McIntosh v. O. R. & N. Co. (1909) 17 I. 100.

Presumption may be overcome: Where no consideration is mentioned in document party not estopped from showing no consideration in fact. Porter v. Title Guaranty etc. Co. (1909) 17 I. 364, 106 P. 299, 27 L. R. A. (N. S.) 111.

Separate contract of married woman: This presumption is insufficient to obviate the necessity of showing, where the person sought to be held on a promissory note, is a married woman, that the debt was contracted for her own use or benefit or the use or benefit of her separate estate. McFarland v. Johnson (1912) 22 I. 694, 127 P. 911.

§ 5664. [3315] **Want of consideration: Burden of proof.** The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it. [R. S. § 3223.]

Hist. R. S. § 3223, reen. R. C. § 3315, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1615; Kerr's C. ib.

Cited: (In brief of counsel) McIntosh v. O. R. N. Co. (1909) 17 I. 100.

§ 5665. [3316] **Contracts may be oral.** All contracts may be oral except such as are specially required by statute to be in writing. [R. S. § 3224.]

Hist. R. S. § 3224, reen. R. C. § 3316, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1622; Kerr's C. ib.

Cross ref. Contracts required to be in writing: § 7976 et seq.

§ 5666. [3317] **Contract not put in writing through fraud.** Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing and acts upon such belief to his prejudice, may enforce it against the fraudulent party. [R. S. § 3225.]

Hist. R. S. § 3225, reen. R. C. § 3317, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1623; Kerr's C. ib.

Cited: Davenport v. Burke (1915) 27 I. 464, 473, 149 P. 511.

Estoppel: Where defendant led plaintiff to believe that he had signed a written contract for an interest in certain mining claims, and induced plaintiff to purchase claims on which he had options, and to otherwise expend money and time to carry out the provisions of the agreement, defendant cannot assert in an action to enforce the contract, that the contract is void under the statute of frauds because he did not in fact sign the same. Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482.

§ 5667. [3318] **Corporate or official seal: How affixed.** A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written. [R. S. § 3226.]

Hist. R. S. § 3226, reen. R. C. § 3318, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1628; Kerr's C. ib.

§ 5668. [3319] **Distinction as to sealed instruments abolished.** All distinctions between sealed and unsealed instruments are abolished. [R. S. § 3227.]

Hist. R. S. § 3227, reen. R. C. § 3319, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1629; Kerr's C. ib.

§ 5669. [3320] **Construction of conflicting provisions.** Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form, and if the two are absolutely repugnant, the latter must be so far disregarded. [R. S. § 3228.]

Hist. R. S. § 3228, reen. R. C. § 3320, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1651; Kerr's C. ib.

§ 5670. [3321] **Limitations on right to sue.** Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void. [R. S. § 3229.]

Hist. R. S. § 3229, reen. R. C. § 3321, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 1672; repealed 1874.

Cited: (In dis. op.) Duvall v. Nat. Ins. Co. (1916) 28 I. 356, 366, 154 P. 632.

Applied: A provision in a contract of insurance to the effect that no action at law or suit in equity shall be commenced before three months nor after six months from the date on which affirmative proof of accident must be furnished to the company is repugnant to this section. Douville v. Pacific Coast Casualty Co. (1914) 25 I. 396, 138 P. 506, Ann. Cas. 1917A 112.

A provision in a benefit certificate of a fraternal insurance society to the effect that no action may be maintained thereon unless brought within one year of the date of death violates this section and is void. Gaffney v. Royal Neighbors of America, 31 I. 549, 174 P. 1014.

Stipulation for arbitration: A stipulation in a building contract to submit differences to arbitrators whose decision shall be final, is void. Huber v. St. Joseph's Hospital (1905) 11 I. 631, 83 P. 768.

§ 5671. [3322] **Debtor may demand receipt.** A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation. [R. S. § 3230.]

Hist. R. S. § 3230, reen. R. C. § 3322, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1499; Kerr's C. ib.

§ 5672. [3323] **Objection to offer of performance.** All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated. [R. S. § 3231.]

Hist. R. S. § 3231, reen. R. C. § 3323, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 1501; Kerr's C. ib.

CHAPTER 225.

UNIFORM SALES LAW.

Note: This act was recommended to the state for adoption by the conference of commissioners on uniform state laws in August, 1906. In 1918 it had been adopted by 19 jurisdictions in the United States.

Hist. The act was adopted in Idaho '19, c. 149, p. 443, effective Jan. 1, 1920, and is here given as adopted, a few minor changes due to clerical errors having been made to conform to the uniform draft.

A prior law on the subject of sales is found in R. C. §§ 3324-31, reen. C. L. §§ 3324-31, repealed by the law herein contained.

ARTICLE 1.

FORMATION OF THE CONTRACT.

§ 5673. Contracts to sell and sales. 1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

3. A contract to sell or a sale may be absolute or conditional.

4. There may be a contract to sell or a sale between one part owner and another. ['19, c. 149, § 1, p. 445.]

§ 5674. Capacity: Liabilities for necessaries. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery. ['19, c. 149, § 2, p. 445.]

Formalities of the Contract.

§ 5675. Form of contract or sale. Subject to the provisions of this law and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. ['19, c. 149, § 3, p. 445.]

§ 5676. Statute of frauds. A contract to sell or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods. ['19, c. 149, § 4, p. 445.]

Cross ref. Statute of frauds: § 7976.

Subject Matter of Contract.

§ 5677. Existing and future goods. 1. The goods which form the subject of a contract to sell may be either goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this law called "future goods."

2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods. ['19, c. 149, § 5, p. 446.]

§ 5678. Undivided shares. 1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer be-

comes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears. ['19, c. 149, § 6, p. 446.]

Cross ref. Express reference to this section: Property does not pass until goods are ascertained: § 5689.

§ 5679. Destruction of goods sold. 1. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

2. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

a. As avoided, or

b. As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible. ['19, c. 149, § 7, p. 447.]

§ 5680. Destruction of goods contracted to be sold. 1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract,—

a. As avoided, or

b. As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible. ['19, c. 149, § 8, p. 447.]

The Price.

§ 5681. Definition and ascertainment of price. 1. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

2. The price may be made payable in any personal property.

3. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this law shall not apply.

4. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. ['19, c. 149, § 9, p. 447.]

§ 5682. Sale at a valuation. 1. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby

avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

2. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by articles 4 and 5 of this chapter. ['19, c. 149, § 10, p. 448.]

Conditions and Warranties.

§ 5683. Effect of conditions. 1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.

2. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods. ['19, c. 149, § 11, p. 448.]

§ 5684. Definition of express warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. ['19, c. 149, § 12, p. 448.]

§ 5685. Implied warranties of title. In a contract to sell or a sale, unless a contrary intention appears, there is:

1. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest. ['19, c. 149, § 13, p. 449.]

§ 5686. Implied warranty in sale by description. Where there is a contract to sell or a sale of goods by description there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. ['19, c. 149, § 14, p. 449.]

§ 5687. Implied warranties of quality. Subject to the provisions of this law and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.
3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.
4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.
5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
6. An express warranty or condition does not negative a warranty or condition implied under this law unless inconsistent therewith. ['19, c. 149, § 15, p. 449.]

Sale by Sample.

§ 5688. Implied warranties in sale by sample. In the case of a contract to sell or a sale by sample:
1. There is an implied warranty that the bulk shall correspond with the sample in quality.
2. There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 5719, paragraph 3.
3. If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. ['19, c. 149, § 16, p. 450.]

Sale by sample: (This citation was to C. L. § 3325) If the goods furnished are not up to the standard of sample the purchaser must use reasonable diligence in apprising the vendor, and make his objection and refuse to accept further goods of the kind. Brown v. Scheurman (1912) 22 I. 724, 128 P. 83.

ARTICLE 2.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

§ 5689. No property passes until goods are ascertained. Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 5678. ['19, c. 149, § 17, p. 450.]

§ 5690. Property in specific goods passes when parties so intend.
1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case. ['19, c. 149, § 18, p. 450.]

§ 5691. Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. 1. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

a. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

b. If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. 1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 5692. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. ['19, c. 149, § 19, p. 451.]

Cross ref. Express reference to this section: Delivery to carrier on behalf of buyer: § 5718.

§ 5692. Reservation of right of possession or property when goods are shipped. 1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved not-

withstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading, he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods without notice of the facts making the transfer wrongful. ['19, c. 149, § 20, p. 452.]

Cross ref. Express reference to this section: Rules for ascertaining intention: § 5691.

§ 5693. Sale by auction. In case of sale by auction:

1. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

3. A right to bid may be reserved expressly by or on behalf of the seller.

4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer. ['19, c. 149, § 21, p. 453.]

§ 5694. Risk of loss. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

1. Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in

the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

2. Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. ['19, c. 149, § 22, p. 453.]

Transfer of Title.

§ 5695. Sale by a person not the owner. 1. Subject to the provisions of this law, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2. Nothing in this law, however, shall affect:

a. The provisions of any factors' acts, recording acts, of [or] any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

b. The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction. ['19, c. 149, § 23, p. 454.]

Hist. Bracketed word inserted to correct to original draft of uniform law.

§ 5696. Sale by one having a voidable title. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title. ['19, c. 149, § 24, p. 454.]

§ 5697. Sale by seller in possession of goods already sold. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. ['19, c. 149, § 25, p. 454.]

§ 5698. Creditors' rights against sold goods in sellers' possession. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void. ['19, c. 149, § 26, p. 454.]

§ 5699. Definition of negotiable documents of title. A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title. ['19, c. 149, § 27, p. 455.]

§ 5700. Negotiation of negotiable documents by delivery. A negotiable document of title may be negotiated by delivery:

1. Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

2. Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the

order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to a bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee. ['19, c. 149, § 28, p. 455.]

§ 5701. Negotiation of negotiable documents by indorsement. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner. ['19, c. 149, § 29, p. 455.]

§ 5702. Negotiable documents of title marked "not negotiable." If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "nonnegotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this law. But nothing in this law contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "nonnegotiable," or the like. ['19, c. 149, § 30, p. 455.]

§ 5703. Transfer of nonnegotiable documents. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right. ['19, c. 149, § 31, p. 456.]

§ 5704. Who may negotiate a document. A negotiable document of title may be negotiated:

1. By the owner thereof, or
2. By any person to whom the possession or custody of the document has been intrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been intrusted, or if at the time of such intrusting the document is in such form that it may be negotiated by delivery. ['19, c. 149, § 32, p. 456.]

Hist. "The" substituted for "of" before "bailee" to correct to uniform bill.

§ 5705. Rights of persons to whom document has been negotiated. A person to whom a negotiable document of title has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and
2. The direct obligation of the bailee issuing the document to hold

possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him. ['19, c. 149, § 33, p. 456.]

§ 5706. Rights of persons to whom document has been transferred. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is nonnegotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a nonnegotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. ['19, c. 149, § 34, p. 456.]

§ 5707. Transfer of negotiable document without indorsement. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. ['19, c. 149, § 35, p. 457.]

§ 5708. Warranties on sale of document. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

1. That the document is genuine.
2. That he has a legal right to negotiate or transfer it.
3. That he has knowledge of no fact which would impair the validity or worth of the document, and
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby. ['19, c. 149, § 36, p. 457.]

§ 5709. Indorser not a guarantor. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations. ['19, c. 149, § 37, p. 457.]

§ 5710. When negotiation not impaired by fraud, mistake or duress. The validity of a negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to intrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress. ['19, c. 149, § 38, p. 457.]

§ 5711. Attachment or levy upon goods for which a negotiable document has been issued. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a pur-

chaser in good faith for value would bind the owner and a negotiable document of title is issued for them they can not thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court. ['19, c. 149, § 39, p. 458.]

§ 5712. Creditors' remedies to reach negotiable documents. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed by law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. ['19, c. 149, § 40, p. 458.]

ARTICLE 3.

PERFORMANCE OF THE CONTRACT.

§ 5713. Seller must deliver and buyer accept goods. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale. ['19, c. 149, § 41, p. 458.]

§ 5714. Delivery and payment are concurrent conditions. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. ['19, c. 149, § 42, p. 458.]

§ 5715. Place, time and manner of delivery. 1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract expressed or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

3. Where the goods at the time of the sale are in possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller. ['19, c. 149, § 43, p. 458.]

§ 5716. Delivery of wrong quantity. 1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties. ['19, c. 149, § 44, p. 459.]

§ 5717. Delivery in instalments. 1. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

2. Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken. ['19, c. 149, § 45, p. 460.]

§ 5718. Delivery to a carrier on behalf of the buyer. 1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 5691, rule 5, or unless a contrary intent appears.

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit. ['19, c. 149, § 46, p. 460.]

§ 5719. Right to examine the goods. 1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity

of examining them for the purpose of ascertaining whether they are in conformity with the contract.

2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination. ['19, c. 149, § 47, p. 461.]

Cross ref. Express reference to this section: Implied warranties in sale by sample: § 5688.

§ 5720. What constitutes acceptance. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. ['19, c. 149, § 48, p. 461.]

§ 5721. Acceptance does not bar action for damages. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know such breach, the seller shall not be liable therefor. ['19, c. 149, § 49, p. 461.]

§ 5722. Buyer is not bound to return goods wrongfully delivered. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them. ['19, c. 149, § 50, p. 461.]

§ 5723. Buyer's liability for failing to accept delivery. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or the refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the right against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default. ['19, c. 149, § 51, p. 462.]

ARTICLE 4.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Cross ref. Express reference to this article: Sale at a valuation: § 5682.

§ 5724. Definition of unpaid seller. 1. The seller of goods is deemed to be an unpaid seller within the meaning of this law:

a. When the whole of the price has not been paid or tendered.

b. When a bill of exchange or other negotiable instrument has been

received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

2. In this part of this law the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller. ['19, c. 149, § 52, p. 462.]

§ 5725. Remedies of an unpaid seller. 1. Subject to the provisions of this law, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

a. A lien on the goods or right to retain them for the price while he is in possession of them.

b. In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them.

c. A right of resale as limited by this law.

d. A right to rescind the sale as limited by this law.

2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer. ['19, c. 149, § 53, p. 462.]

Unpaid Seller's Lien.

§ 5726. When right of lien may be exercised. 1. Subject to the provisions of this law, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

a. Where the goods have been sold without any stipulation as to credit.

b. Where the goods have been sold on credit, but the term of credit has expired.

c. Where the buyer becomes insolvent.

2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. ['19, c. 149, § 54, p. 463.]

§ 5727. Lien after part delivery. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention. ['19, c. 149, § 55, p. 463.]

§ 5728. When lien is lost. 1. The unpaid seller of goods loses his lien thereon:

a. When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

b. When the buyer or his agent lawfully obtains possession of the goods.

c. By waiver thereof.

2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods. ['19, c. 149, § 56, p. 463.]

Stoppage in Transitu.

§ 5729. Seller may stop goods on buyer's insolvency. Subject to the provisions of this law, when the buyer of goods is or becomes insol-

vent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession. ['19, c. 149, § 57, p. 463.]

Cross ref. Express reference to this section: When goods are in transit: § 5730.

§ 5730. When goods are in transit. 1. Goods are in transit within the meaning of section 5729:

a. From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

b. If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

2. Goods are not longer in transit within the meaning of section 5729.

a. If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination.

b. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer.

c. If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

3. If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

4. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods. ['19, c. 149, § 58, p. 464.]

§ 5731. Ways of exercising the right to stop. 1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence may prevent a delivery to the buyer.

2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation. ['19, c. 149, § 59, p. 464.]

Resale by the Seller.

§ 5732. When and how resale may be made. 1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

3. It is not essential to the validity of a resale that notice of an intention to recall the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

4. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

5. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale. ['19, c. 149, § 60, p. 465.]

Rescission by the Seller.

§ 5733. When and how the seller may rescind the sale. 1. An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default, in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of recission was asserted. ['19, c. 149, § 61, p. 465.]

§ 5734. Effect of sale of goods subject to lien or stoppage in transitu. Subject to the provisions of this law, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu. ['19, c. 149, § 62, p. 466.]

ARTICLE 5.

ACTIONS FOR BREACH OF THE CONTRACT.

Cross ref. Express reference to this article: Sale at a valuation: § 5682.

Remedies of the Seller.

§ 5735. Action for the price. 1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 5736, paragraph 4, are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price. ['19, c. 149, § 63, p. 466.]

§ 5736. Action for damages for nonacceptance of the goods. 1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages. ['19, c. 149, § 64, p. 467.]

Cross ref. Express reference to this section: Action for price: § 5735.

§ 5737. When seller may rescind contract or sale. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his

obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer. ['19, c. 149, § 65, p. 467.]

Remedies of the Buyer.

§ 5738. Action for converting or detaining goods. 1. Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld. ['19, c. 149, § 66, p. 468.]

§ 5739. Action for failing to deliver goods. 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. ['19, c. 149, § 67, p. 468.]

§ 5740. Specific performance. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just. ['19, c. 149, § 68, p. 468.]

§ 5741. Remedies for breach of warranty. 1. Where there is a breach of warranty by the seller, the buyer may, at his election:

a. Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

b. Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.

c. Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.

d. Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if

deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods.

If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 5725.

6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. ['19, c. 149, § 69, p. 468.]

§ 5742. Interest and special damages. Nothing in this law shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. ['19, c. 149, § 70, p. 470.]

ARTICLE 6.

INTERPRETATION.

§ 5743. Variation of implied obligations. Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale. ['19, c. 149, § 71, p. 470.]

§ 5744. Rights may be enforced by action. Where any right, duty or liability is declared by this law, it may, unless otherwise by this law provided, be enforced by action. ['19, c. 149, § 72, p. 470.]

§ 5745. Rule for cases not provided for. In any case not provided for in this law, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods. ['19, c. 149, § 73, p. 470.]

§ 5746. Interpretation shall give effect to purpose of uniformity. This law shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it. ['19, c. 149, § 74, p. 470.]

§ 5747. Provisions not applicable to mortgages. The provisions of this law relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security. ['19, c. 149, § 75, p. 470.]

§ 5748. Definitions. 1. In this law, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale.

"Order" in sections of this law relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction or as security therefor.

2. A thing is done "in good faith" within the meaning of this law when it is in fact done honestly, whether it be done negligently or not.

3. A person is insolvent within the meaning of this law who either has ceased to pay his debts in the ordinary course of business or can not pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

4. Goods are in a "deliverable state" within the meaning of this law when they are in such a state that the buyer would under the contract, be bound to take delivery of them. ['19, c. 149, § 76, p. 470.]

Hist. "Dock warranty" changed to "dock warrant" to correct obvious error.

§ 5749. Law does not apply to existing sale or contract to sell. None of the provisions of this law shall apply to any sale, or to any contract to sell, made prior to the taking effect of this law. ['19, c. 149, § 77, p. 472.]

§ 5750. No repeal of uniform warehouse receipt law or uniform bills of lading law. Nothing in this law or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the law to make uniform the law of warehouse receipts, or of the law to make uniform the law of bills of lading. ['19, c. 149, § 78, p. 472.]

§ 5751. Name of law. This law may be cited as the uniform sales law. ['19, c. 149, § 81, p. 473.]

Hist. Latter part of section omitted as temporary.

CHAPTER 226.

BULK SALES LAW.

Hist. '03, p. 11, §§ 1-4, reen. R. C. §§ 3332-5; repealed '19, c. 110, p. 392, and a new law, herein contained, enacted, which is in the nature of an amendment to that repealed.

Comp. leg.—Wash. See Bal. Ann. C. (Sup.) § 3102.

Constitutionality: This act ('03, p. 11), which provides for "sales of goods in bulk," is a constitutional and valid law. It does not constitute class legislation within the inhibition of the constitution, and is a proper and reasonable exercise of the state's police power. Boise Assn. of Credit Men v. Ellis (1914) 26 I. 438, 144 P. 6, L. R. A. (N. S.) 1915E 917.

§ 5752. Vendor to make statement of indebtedness. It shall be the duty of every person who shall bargain for or purchase any portion of the stock of goods, wares or merchandise in bulk, or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk for cash or on credit or any portion of the property, furniture, fixtures, or equipment or supplies of a hotel, restaurant, barber shop or any place of business wherein the furniture, fixtures, or equipment are used in carrying on said business, otherwise than in the regular course of trade before paying to the vendor or his agent or representative or delivering to the vendor or his agent or representative any part of the purchase price thereof, or any promissory note or other evidence of same, to demand and receive from such vendor or his agent, or if the vendor or agent be a corporation, then from the president, vice president, secretary, or managing agent of such corporation, a sworn statement in writing substantially as hereinafter provided of the names and addresses of all the creditors of said vendor to whom said vendor may be indebted, together with the amount of the indebtedness due or owing or to become due or owing, by said vendor, to each of said creditors, and it shall be the duty of said vendor or his agent to furnish such statement which shall be verified by oath to substantially the following effect:

State of Idaho, county of....., ss.

Before me personally appeared (vendor or agent as the case may be) who being by me first duly sworn, on his oath, did depose and say that the foregoing statement contains the names of all the creditors (name of vendor), together with their addresses, and that the amounts set opposite each of said respective names is the amount now due and owing or which shall become due and owing by (vendor) to such creditors, and that there are no creditors holding claims due or which shall become due for or on account of goods, wares, or merchandise purchased upon credit or for the purchase price of fixtures or equipment, or for services performed, or on account of money borrowed to carry on the business of which said goods, fixtures, equipment, or supplies are a part, other than as set forth in said statement and in this affidavit, that are within the personal knowledge of affiant.

Subscribed and sworn to before me this.....day of....., A. D. 19.....

['19, c. 110, § 1, p. 392.]

Cross ref. Express reference to this section: False statement constitutes perjury: § 5754.

§ 5753. Liability of vendee. Whenever any person shall bargain for the purchase in bulk of any portion of a stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk or the property, furniture, fixtures, equipment or supplies of a hotel or restaurant, barber shop or other place of business wherein the furniture, fixtures, and equipment are used in carrying on said business, otherwise than in the regular course of trade, for cash or on credit, and shall pay any part of the price, or execute and deliver to the vendor thereof, or his agent, or to any person for his use, any promissory note or other evidence of indebtedness, or give credit, whether or not evidenced by promissory note or other evidence of indebtedness, for said purchase price or any part thereof, without at least five days previously thereto having demanded of and received from said vendor or from his agent the statement provided for in section 5752 and verified as therein provided, and without notifying also at least five days previously thereto, personally or by registered mail, every creditor as shown upon said verified statement of said proposed sale or transfer, with the price thereof, the person to whom said sale or transfer is made, and the time and conditions of payment, and without paying or seeing to it that the purchase money of the said property is applied to the payment of the bona fide claims of the creditors of the vendor as shown upon said verified statement, share and share alike, unless otherwise provided for by the statutes designating priority of payments, such sale or transfer shall be fraudulent and void, and said vendee shall be personally liable to any creditor or to all creditors of said vendor for their proportionate share of the purchase price of said business, whether the same has been paid by vendee to vendor or not. ['19, c. 110, § 2, p. 393.]

Fixtures: (Before amendment) A stock of goods, wares and merchandise, when sold in bulk, does not by implication include the fixtures as a part of the sale. Boise Assn. of Credit Men v. Ellis (1914) 26 I. 438, 144 P. 6, L. R. A. (N. S.) 1915E. 917.

§ 5754. False statement constitutes perjury. Any vendor of any portion of a stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the

seller's business or an entire stock of merchandise in bulk or the property, fixtures, equipment, or supplies of a hotel or restaurant, barber shop or other business, wherein the furniture, fixtures, equipment or supplies are used in carrying on said business, or any person who is acting for or on behalf of any such vendor, who shall knowingly or wilfully make or deliver or cause to be made or delivered, a statement as provided for in section 5752 which shall not include the names of all of the creditors of such vendor, with the correct amount due and to become due to each of them, or which shall contain any false or untrue statement, shall be deemed guilty of perjury, and upon conviction thereof shall be punished accordingly. ['19, c. 110, § 3, p. 394.]

Cross ref. Penalty for perjury: § 8168.

§ 5755. Waiver of creditors. If the vendor of any portion of a stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk or the property, fixtures, equipment, or supplies of a hotel or restaurant, barber shop, or other business wherein the furniture, fixtures or equipment are used in carrying on said business in bulk, produces and delivers a written waiver of the provisions of this chapter, from at least a majority in number and amount of his credtors, as shown by said verified statement, then in that case the provisions of this chapter shall not apply. ['19, c. 110, § 4, p. 394.]

§ 5756. Application of law. Sellers, or vendors and purchasers under this title, shall include corporations, associations, copartnerships and individuals, but nothing contained in this title shall apply to sales or transfers by executors, administrators, receivers, or assignees, under a voluntary assignment for the benefit of creditors, trustees in bankruptcy or any public officer under judicial process. ['19, c. 110, § 5, p. 395.]

TITLE XLVI. PARTNERSHIP.

CHAPTER 227.

SPECIAL PARTNERSHIP.

Cross ref. '19, c. 151, p. 474 (§ 5782-5812 herein) the uniform limited partnership law, repealed these sections in part. Section 30 of this act is in part as follows: "A limited or special partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of sections 3336 to 3360, inclusive, of chapter 245 of Compiled Laws, except that such partnership shall not be renewed unless so provided in the original agreement." Section 31 is as follows: "Except as affecting existing limited partnerships to the extent set forth in section 30, sections 3336 to 3360, inclusive, of chapter 245 of Compiled Laws are hereby repealed."

§ 5757. [3336] **How formed.** A special partnership may be formed by two or more persons in the manner and with the effect prescribed in this chapter, for the transaction of any business except banking or insurance. [R. S. § 3270.]

Hist. (See '85, p. 148, § 1) R. S. § 3270, reen. R. C. § 3336, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2477; Kerr's C. ib.

§ 5758. [3337] **General and special partners.** A special partnership may consist of one or more persons called general partners, and one or more persons called special partners. [R. S. § 3271.]

Hist. (See '85, p. 148, § 2) R. S. § 3271, reen. R. C. § 3337, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2478; Kerr's C. ib.

§ 5759. [3338] **Certificate of partners.** Persons desirous of forming a special partnership must severally sign a certificate stating:

1. The name under which the partnership is to be conducted.
2. The general nature of the business intended to be transacted.
3. The names of all the partners, and their residences, specifying which are general and which are special partners.
4. The amount of capital which each special partner has contributed to the common stock.
5. The periods at which such partnership will begin and end. [R. S. § 3272.]

Hist. (See '85, p. 148, § 3) R. S. § 3272, reen. R. C. § 3338, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2479; Kerr's C. ib.

§ 5760. [3339] **Same: Acknowledgment and record.** Certificates under the last section must be acknowledged by all the partners, before some officer authorized to take acknowledgments of deeds, and recorded in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection; and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it is recorded, must be recorded in like manner in the office of the recorder in every such county. If any false statement is made in any such certificate, all the persons interested in the partnership are liable, as general partners, for all the engagements thereof. [R. S. § 3273.]

Hist. (See '85, p. 148, § 4) R. S. § 3273, reen. R. C. § 3339, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2480; Kerr's C. ib.

§ 5761. [3340] **Affidavit of partners.** An affidavit of each of the partners, stating that the sums specified in the certificate of partnership as having been contributed by each of the special partners, have been

actually and in good faith paid, must be filed in the same office with the original certificate. [R. S. § 3274.]

Hist. (See '85, p. 148, § 5) R. S. § 3274, reen. R. C. § 3340, reen. C. L. ib. Comp. leg.—Cal. Similar: Civ. C. 1872, § 2481; Kerr's C. ib.

§ 5762. [3341] **When formed.** No special partnership is formed until the provisions of the last five sections are complied with. [R. S. § 3275.]

Hist. (See '85, p. 148, § 6) R. S. § 3275, reen. R. C. § 3341, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2482; Kerr's C. ib.

§ 5763. [3342] **Publication of certificate.** The certificate mentioned in this chapter or a statement of its substance, must be published in a newspaper printed in the county where the original certificate is filed, and if no newspaper is there printed, then in a newspaper in this state published nearest thereto. Such publication must be made once a week for four successive weeks, beginning within one month from the time of filing the certificate. In case such publication is not so made, the partnership must be deemed general. [R. S. § 3276.]

Hist. (See '85, p. 148, § 7) R. S. § 3276, reen. R. C. § 3342, reen. C. L. ib. Comp. leg.—Cal. Similar: Civ. C. 1872, § 2483; Kerr's C. ib.

Cross ref. Express reference to this section: Affidavit of publication: § 5764.

§ 5764. [3343] **Affidavit of publication.** An affidavit of the making of the publication mentioned in the preceding section made by the printer, publisher or chief clerk of the newspaper in which such publication is made, may be filed with the county recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated. [R. S. § 3277.]

Hist. (See '85, p. 148, § 8) R. S. § 3277, reen. R. C. § 3343, reen. C. L. ib. Comp. leg.—Cal. Similar: Civ. C. 1872, § 2484; Kerr's C. ib.

§ 5765. [3344] **Renewal of special partnership.** Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation. [R. S. § 3278.]

Hist. (See '85, p. 148, § 9) R. S. § 3278, reen. R. C. § 3344, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2485; Kerr's C. ib.

§ 5766. [3345] **Authority of general partners.** The general partners only have authority to transact the business of a special partnership. [R. S. § 3279.]

Hist. (See '85, p. 148, § 10) R. S. § 3279, reen. R. C. § 3345, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2489; Kerr's C. ib.

§ 5767. [3346] **Authority of special partners.** A special partner may at all times investigate the partnership affairs, and advise his partners or their agents, as to their management. [R. S. § 3280.]

Hist. (See '85, p. 148, § 11) R. S. § 3280, reen. R. C. § 3346, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2490; Kerr's C. ib.

§ 5768. [3347] **Loans by special partners.** A special partner may lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor; but in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied. [R. S. § 3281.]

Hist. (See '85, p. 148, § 12) R. S. § 3281, reen. R. C. § 3347, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2491; Kerr's C. ib.

§ 5769. [3348] **General partners may sue and be sued.** In all matters relating to a special partnership, its general partners may sue and be sued

alone, in the same manner as if there were no special partners. [R. S. § 3282.]

Hist. (See '85, p. 148, § 13) R. S. § 3282, reen. R. C. § 3348, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2492; Kerr's C. ib.

§ 5770. [3349] **Withdrawal of capital.** No special partner under any pretense may withdraw any part of the capital invested by him in the partnership, during its continuance. [R. S. § 3283.]

Hist. (See '85, p. 148, § 14) R. S. § 3283, reen. R. C. § 3349, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2493; Kerr's C. ib.

§ 5771. [3350] **Interest and profits.** A special partner may receive such lawful interest and such proportion of profits as may be agreed upon if not paid out of the capital invested in the partnership by him, or by some other special partner, and is not bound to refund the same to meet subsequent losses. [R. S. § 3284.]

Hist. (See '85, p. 148, § 15) R. S. § 3284, reen. R. C. § 3350, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2494; Kerr's C. ib.

§ 5772. [3351] **Unauthorized withdrawal of capital.** If a special partner withdraws capital from the firm contrary to the provisions of this chapter he thereby becomes a general partner. [R. S. § 3285.]

Hist. (See '85, p. 148, § 16) R. S. § 3285, reen. R. C. § 3351, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2495; Kerr's C. ib.

§ 5773. [3352] **Preferential transfer void.** Every transfer of the property of a special partnership, or of any partner therein, made after or in contemplation of the insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner, over any other creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created or security given, in like manner and with the like intent, is in like manner void. [R. S. § 3286.]

Hist. (See '85, p. 148, § 17) R. S. § 3286, reen. R. C. § 3352, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2496; Kerr's C. ib.

§ 5774. [3353] **Liability of general partners.** The general partners in a special partnership are liable to the same extent as partners in a general partnership. [R. S. § 3287.]

Hist. (See '85, p. 148, § 18) R. S. § 3287, reen. R. C. § 3353, reen. C. L. ib. Comp. leg.—Cal. Same: Civ. C. 1872, § 2500; Kerr's C. ib.

§ 5775. [3354] **Liability of special partners.** The contribution of a special partner to the capital of the firm, and the increase thereof, is liable for its debts, but he is not otherwise liable therefor, except as follows:

1. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable as a general partner to all creditors of the firm.
2. If he has wilfully interfered with the business of the firm, except as permitted in this chapter, he is liable in like manner; or,
3. If he has wilfully joined in or assented to an act contrary to any of the provisions of this chapter, he is liable in like manner. [R. S. § 3288.]

Hist. (See '85, p. 148, § 19) R. S. § 3288, reen. R. C. § 3354, reen. C. L. ib. Comp. leg.—Cal. Similar: Civ. C. 1872, § 2501; Kerr's C. ib.

§ 5776. [3355] **Same: Liability for unintentional act.** When a special partner has unintentionally done any of the acts mentioned in the

last section he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice. [R. S. § 3289.]

Hist. (See '85, p. 148, § 20) R. S. § 3289, reen. R. C. § 3355, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2502; Kerr's C. ib.

§ 5777. [3356] **Defective creation not to enlarge liability.** One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special, and giving the names of the special partners, can not afterward charge the persons thus named as general partners upon that contract, by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by this chapter. [R. S. § 3290.]

Hist. (See '85, p. 148, § 21) R. S. § 3290, reen. R. C. § 3356, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2503; Kerr's C. ib.

§ 5778. [3357] **Special partnership becomes general.** A special partnership becomes general if, within 10 days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business or in its name, a certificate of such fact duly verified and signed by one or more of the partners is not filed with the county recorder with whom the original certificate of the partnership was filed, and notice thereof published as is provided in this chapter for the publication of the certificate. [R. S. § 3291.]

Hist. (See '85, p. 148, § 22) R. S. § 3291, reen. R. C. § 3357, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2507; Kerr's C. ib.

§ 5779. [3358] **Admission of new special partners.** New special partners may be admitted into a special partnership upon a certificate stating the names, residences and contributions to the common stock of each of such partners, signed by each of them, and by the general partners, verified, acknowledged or proved, according to the provisions of this chapter, and filed with the county recorder with whom the original certificate of partnership was filed. [R. S. § 3292.]

Hist. (See '85, p. 148, § 23) R. S. § 3292, reen. R. C. § 3358, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2508; Kerr's C. ib.

§ 5780. [3359] **Dissolution of partnership.** A special partnership is subject to dissolution in the same manner as a general partnership, except that no dissolution by the act of the partners is complete until a notice thereof has been filed and recorded in the office of the county recorder, with whom the original certificate was recorded, and published once in each week for four successive weeks, in a newspaper printed in each county where the partnership has a place of business. [R. S. § 3293.]

Hist. (See '85, p. 148, § 24) R. S. § 3293, reen. R. C. § 3359, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2509; Kerr's C. ib.

§ 5781. [3360] **Use of special partner's name.** The name of a special partner must not be used in the firm name of partnership, unless it be accompanied with the word "limited." [R. S. § 3294.]

Hist. (See '85, p. 158, § 25) R. S. § 3294, reen. R. C. § 3360, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2510; Kerr's C. ib.

CHAPTER 228.

LIMITED PARTNERSHIP LAW.

Note: This act was recommended to the states for adoption by the conference of commissioners on uniform state laws in August, 1916. In 1918 it had been adopted by four jurisdictions in the United States.

Hist. The act was adopted in Idaho '19, c. 151, p. 474, effective Jan. 1, 1920.

A prior law on this subject is found in §§ 5757-81. As the act herein contained repealed these sections in part only, they have been retained in this compilation.

§ 5782. Limited partnership defined. A limited partnership is a partnership formed by two or more persons under the provisions of section 5783, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. ['19, c. 151, § 1, p. 474.]

§ 5783. Formation. 1. Two or more persons desiring to form a limited partnership shall

a. Sign and swear to a certificate, which shall state.

(1) The name of the partnership.

(2) The character of the business.

(3) The location of the principal place of business.

(4) The name and place of residence of each member; general and limited partners being respectively designated.

(5) The term for which the partnership is to exist.

(6) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.

(7) The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made.

(8) The time, if agreed upon, when the contribution of each limited partner is to be returned.

(9) The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.

(10) The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution.

(11) The right, if given, of the partners to admit additional limited partners.

(12) The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority.

(13) The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

(14) The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

b. File for record the certificate in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection. If the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it is recorded, must be recorded in like manner in the office of the recorder in every such county.

2. A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph 1. ['19, c. 151, § 2, p. 474.]

Cross ref. Express references to this section: Limited partnership defined: § 5782; requirements for amendment and for cancellation of certificate: § 5806; provision for existing limited partnership: § 5811.

§ 5784. Business which may be carried on. A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking and insurance. ['19, c. 151, § 3, p. 475.]

§ 5785. Character of limited partner's contribution. The contributions of a limited partner may be cash or other property, but not services. ['19, c. 151, § 4, p. 476.]

§ 5786. A name not to contain surname of limited partner: Exceptions. 1. The surname of a limited partner shall not appear in the partnership name, unless

a. It is also the surname of a general partner, or

b. Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

2. A limited partner whose name appears in a partnership name contrary to the provisions of paragraph 1 is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. ['19, c. 151, § 5, p. 476.]

§ 5787. Liability for false statements in certificate. If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false.

a. At the time he signed the certificate, or

b. Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in section 5806, paragraph 3. ['19, c. 151, § 6, p. 476.]

Cross ref. Express reference to this section: Assignment of limited partner's interest: § 5800.

§ 5788. Limited partner not liable to creditors. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. ['19, c. 151, § 7, p. 476.]

§ 5789. Admission of additional limited partners. After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section 5806. ['19, c. 151, § 8, p. 476.]

§ 5790. Rights, powers and liabilities of a general partner. A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

1. Do any act in contravention of the certificate.

2. Do any act which would make it impossible to carry on the ordinary business of the partnership.

3. Confess a judgment against the partnership.

4. Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

5. Admit a person as a general partner.

6. Admit a person as a limited partner, unless the right so to do is given in the certificate.

7. Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the rights so to do is given in the certificate. ['19, c. 151, § 9, p. 476.]

§ 5791. Rights of a limited partner. 1. A limited partner shall have the same right as a general partner to

a. Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them.

b. Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

c. Have dissolution and winding up by decree of court.

2. A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections 5796 and 5797. ['19, c. 151, § 10, p. 477.]

§ 5792. Status of person erroneously believing himself a limited partner. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. ['19, c. 151, § 11, p. 477.]

§ 5793. One person both general and limited partner. 1. A person may be a general partner and a limited partner in the same partnership at the same time.

2. A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner. ['19, c. 151, § 12, p. 477.]

§ 5794. Loans and other business transactions with limited partner. 1. A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claims

a. Receive or hold as collateral security any partnership property, or

b. Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

2. The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph 1 is a fraud on the creditors of the partnership. ['19, c. 151, § 13, p. 478.]

§ 5795. Relation of limited partners interested. Where there are several limited partners the members may agree that one or more of

the limited partners shall have priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. ['19, c. 151, § 14, p. 478.]

§ 5796. Compensation of limited partner. A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate: *Provided,* That after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. ['19, c. 151, § 15, p. 478.]

Cross ref. Express reference to this section: Rights of limited partner: § 5791.

§ 5797. Withdrawal or reduction of limited partner's contribution. 1. A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

a. All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them.

b. The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph 2, and

c. The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

2. Subject to the provisions of paragraph 1 a limited partner may rightfully demand the return of his contribution.

a. On the dissolution of a partnership, or

b. When the date specified in the certificate for its return has arrived, or

c. After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

3. In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

4. A limited partner may have the partnership dissolved and its affairs wound up when

a. He rightfully but unsuccessfully demands the return of his contribution, or

b. The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph 1a and the limited partner would otherwise be entitled to the return of his contribution. ['19, c. 151, § 16, p. 478.]

Cross ref. Express reference to this section: Rights of limited partner: § 5791.

§ 5798. Liability of limited partner to partnership. 1. A limited partner is liable to the partnership.

a. For the difference between his contribution as actually made and that stated in the certificate as having been made, and

b. For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

2. A limited partner holds as trustee for the partnership

a. Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

b. Money or other property wrongfully paid or conveyed to him on account of his contribution.

3. The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

4. When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extend credit or whose claims arose before such return. ['19, c. 151, § 17, p. 479.]

Cross ref. Express reference to this section: Assignment of limited partner's interest: § 5800.

§ 5799. Nature of limited partner's interest in partnership. A limited partner's interest in the partnership is personal property. ['19, c. 151, § 18, p. 480.]

§ 5800. Assignment of limited partner's interest. 1. A limited partner's interest is assignable.

2. A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

3. An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

4. An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto impowered by the certificate, gives the assignee that right.

5. An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section 5806.

6. The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

7. The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections 5787 and 5798. ['19, c. 151, § 19, p. 480.]

§ 5801. Effect of retirement, death or insanity of a general partner. The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners:

1. Under a right so to do stated in the certificate, or
2. With the consent of all members. ['19, c. 151, § 20, p. 481.]

Cross ref. Express reference to this section: When certificate shall be cancelled or amended: § 5805.

§ 5802. Death of limited partner. 1. On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

2. The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. ['19, c. 151, § 21, p. 481.]

§ 5803. Rights of creditors of limited partner. 1. On due application to a court of competent jurisdiction by any creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of such claim; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

2. The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

3. The remedies conferred by paragraph 1 shall not be deemed exclusive of others which may exist.

4. Nothing in this act shall be held to deprive a limited partner of his statutory exemption. ['19, c. 151, § 22, p. 481.]

§ 5804. Distribution of assets. 1. In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

a. Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners.

b. Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions.

c. Those to limited partners in respect to the capital of their contributions.

d. Those to general partners other than for capital and profits.

e. Those to general partners in respect to profits.

f. Those to general partners in respect to capital.

2. Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims. ['19, c. 151, § 23, p. 481.]

§ 5805. When certificate shall be cancelled or amended. 1. The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

2. A certificate shall be amended when

a. There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner.

b. A person is substituted as a limited partner.

c. An additional limited partner is admitted.

d. A person is admitted as a general partner.

e. A general partner retires, dies, or becomes insane, and the business is continued under section 5801.

f. There is a change in the character of the business of the partnership.

g. There is a false or erroneous statement in the certificate.

h. There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution.

i. A time is fixed for the dissolution of the partnership or the return of a contribution, no time having been specified in the certificate or

j. The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. ['19, c. 151, § 24, p. 482.]

§ 5806. Requirements for amendment and for cancellation of certificate. 1. The writing to amend a certificate shall

a. Conform to the requirements of section 5783, paragraph 1a, as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

b. Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

2. The writing to cancel a certificate shall be signed by all members.

3. A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs 1 and 2 as a person who must execute the writing refuses to do so, may petition the district court to direct a cancellation or amendment thereof.

4. If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the county recorder in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

5. A certificate is amended or canceled when there is filed for record in the office of the county recorder where the certificate is recorded.

a. A writing in accordance with the provisions of paragraph 1, or 2 or

b. A certified copy of the order of court in accordance with the provisions of paragraph 4.

6. After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this chapter. ['19, c. 151, § 25, p. 482.]

Cross ref. Express references to this section: Liability for false statements in certificate: § 5787; admission of additional limited partners: § 5789; assignment of limited partner's interest: § 5800.

§ 5807. Parties to actions. A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. ['19, c. 151, § 26, p. 483.]

§ 5808. Name of act. This chapter may be cited as the uniform limited partnership law. ['19, c. 151, § 27, p. 483.]

§ 5809. Rules of construction. 1. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

2. This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

3. This chapter shall not be so construed as to impair the obligations of any contract existing when the chapter goes into effect, nor to affect any

action or procedings begun or right accrued before this chapter takes effect. ['19, c. 151, § 28, p. 483.]

§ 5810. Rules for cases not provided for in this chapter. In any case not provided for in this chapter the rules of law and equity, including the law merchant, shall govern. ['19, c. 151, § 29, p. 484.]

§ 5811. Provision for existing limited partnership. 1. A limited or special partnership formed under any statute of this state prior to the adoption of this chapter, may become a limited partnership under this chapter by complying with the provisions of section 5783; provided the certificate sets forth.

a. The amount of the original contribution of each limited partner, and the time when the contribution was made, and

b. That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

2. A limited or special partnership formed under any statute of this state prior to the adoption of this chapter, until or unless it becomes a limited partnership under this chapter, shall continue to be governed by the provisions of sections 5757 to 5781, inclusive, except that such partnership shall not be renewed unless so provided in the original agreement. ['19, c. 151, § 30, p. 484.]

§ 5812. Time when law takes effect. This law shall take effect on the first day of January one thousand nine hundred and twenty. ['19, c. 151, § 32, p. 484.]

CHAPTER 229.

UNIFORM PARTNERSHIP LAW.

Note: This act was recommended to the states for adoption by the conference of commissioners on uniform state laws in October, 1914. In 1918 it had been adopted by eight jurisdictions in the United States.

Hist. The act was adopted in Idaho '19, c. 154, p. 493, effective Jan. 1, 1920.

ARTICLE 1.

PRELIMINARY PROVISIONS.

§ 5813. Name of law. This law may be cited as uniform partnership law. ['19, c. 154, § 1, p. 493.]

§ 5814. Definition of terms. In this chapter "court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes bankrupt under the federal bankruptcy act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land. ['19, c. 154, § 2, p. 494.]

§ 5815. Interpretation of knowledge and notice. 1. A person has "knowledge" of a fact within the meaning of this chapter not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

2. A person has "notice" of a fact within the meaning of this chapter when the person who claims the benefit of the notice

a. States the fact to such person, or

b. Delivers through the mail, or by other means of communication, a

written statement of the fact to such person or to a proper person at his place of business or residence. ['19, c. 154, § 3, p. 494.]

§ 5816. Rules of construction. 1. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

2. The law of estoppel shall apply under this chapter.

3. The law of agency shall apply under this chapter.

4. This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

5. This chapter shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this chapter takes effect. ['19, c. 154, § 4, p. 494.]

§ 5817. Rules for cases not provided for in this chapter. In any case not provided for in this chapter, the rules of law and equity, including the law merchant, shall govern. ['19, c. 154, § 5, p. 494.]

ARTICLE 2.

NATURE OF A PARTNERSHIP.

§ 5818. Partnership defined. 1. A partnership is an association of two or more persons to carry on as coowners a business for profit.

2. But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith. ['19, c. 154, § 6, p. 494.]

§ 5819. Rules for determining the existence of a partnership. In determining whether a partnership exists, these rules shall apply:

1. Except as provided by section 5828 persons who are not partners as to each other are not partners as to third persons.

2. Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such coowners do or do not share any profits made by the use of the property.

3. The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

4. The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

a. As a debt by instalment or otherwise.

b. As wages of an employee or rent to a landlord.

c. As an annuity to a widow or representative of a deceased partner.

d. As interest on a loan, though the amount of payment vary with the profits of the business.

e. As the consideration for the sale of the good will of a business or other property by instalments or otherwise. ['19, c. 154, § 7, p. 495.]

§ 5820. Partnership property. 1. All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership is partnership property.

2. Unless the contrary intention appears, property acquired with partnership funds is partnership property.

3. Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

4. A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. ['19, c. 154, § 8, p. 495.]

ARTICLE 3.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP.

§ 5821. Partner agent of partnership as to partnership business. 1. Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

2. An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

3. Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

a. Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.

b. Dispose of the good will of the business.

c. Do any other act which would make it impossible to carry on the ordinary business of a partnership.

d. Confess a judgment.

e. Submit a partnership claim or liability to arbitration or reference.

4. No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. ['19, c. 154, § 9, p. 496.]

Cross ref. Express reference to this section: Conveyance of real property of the partnership: § 5822.

§ 5822. Conveyance of real property of the partnership. 1. Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph 1 of section 5821, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

2. Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph 1 of section 5821.

3. Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph 1 of section 5821, unless the purchaser or his assignee, is a holder for value, without knowledge.

4. Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph 1 of section 5821.

5. Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. ['19, c. 154, § 10, p. 496.]

§ 5823. Partnership bound by admission of partner. An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership. ['19, c. 154, § 11, p. 497.]

§ 5824. Partnerhip charged with knowledge of or notice to partner. Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. ['19, c. 154, § 12, p. 497.]

§ 5825. Partnership bound by partner's wrongful act. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. ['19, c. 154, § 13, p. 497.]

Cross ref. Express reference to this section: Nature of partner's liability: § 5827.

§ 5826. Partnership bound by partner's breach of trust. The partnership is bound to make good the loss:

1. Where one partner acting within the scope of his apparent authority received money or property of a third person and misapplies it; and

2. Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in custody of the partnership. ['19, c. 154, § 14, p. 498.]

Cross ref. Express reference to this section: Nature of partner's liability: § 5827.

§ 5827. Nature of partner's liability. All partners are liable:

1. Jointly and severally for everything chargeable to the partnership under sections 5825 and 5826.

2. Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract. ['19, c. 154, § 15, p. 498.]

§ 5828. Partner by estoppel. 1. When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in

a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

a. When a partnership liability results, he is liable as though he were an actual member of the partnership.

b. When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

2. When a person has been thus represented to be a partner in an existing partnership, or with one of [or] more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the represensation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. ['19, c. 154, § 16, p. 498.]

Hist. Bracketed word inserted to correct to original draft of uniform law.

Cross ref. Express reference to this section: Rules for determining the existence of a partnership: § 5819; power of partner to bind partnership to third persons after dissolution: § 5847.

§ 5829. Liability of incoming partner. A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. ['19, c. 154, § 17, p. 499.]

ARTICLE 4.

RELATIONS OF PARTNERS TO ONE ANOTHER.

§ 5830. Rules determining rights and duties of partners. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

1. Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

2. The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

3. A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

4. A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

5. All partners have equal rights in the management and conduct of the partnership business.

6. No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

7. No person can become a member of a partnership without the consent of all the partners.

8. Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. ['19, c. 154, § 18, p. 499.]

§ 5831. Partnership books. The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. ['19, c. 154, § 19, p. 500.]

§ 5832. Duty of partners to render information. Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. ['19, c. 154, § 20, p. 500.]

§ 5833. Partner accountable as a fiduciary. 1. Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

2. This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. ['19, c. 154, § 21, p. 500.]

Cross ref. Express reference to this section: Right to an account: § 5834.

§ 5834. Right to an account. Any partner shall have the right to a formal account as to partnership affairs:

1. If he is wrongfully excluded from the partnership business or possession of its property by his copartners.
2. If the right exists under the terms of any agreement.
3. As provided by section 5833.
4. Whenever other circumstances render it just and reasonable. ['19, c. 154, § 22, p. 500.]

§ 5835. Continuation of partnership beyond fixed term. 1. When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

2. A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. ['19, c. 154, § 23, p. 500.]

ARTICLE 5.

PROPERTY RIGHTS OF A PARTNER.

§ 5836. Extent of property rights of a partner. The property rights of a partner are:

1. His rights in specific partnership property.
2. His interest in the partnership.
3. His right to participate in the management. ['19, c. 154, § 24, p. 501.]

§ 5837. Nature of a partner's right in specific partnership property. 1. A partner is coowner with his partners of specific partnership property, holding as a tenant in partnership.

2. The incidents of this tenancy are such that:

a. A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

b. A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

c. A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

d. On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

e. A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. ['19, c. 154, § 25, p. 501.]

§ 5838. Nature of partner's interest in the partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. ['19, c. 154, § 26, p. 502.]

§ 5839. Assignment of partner's interest. 1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

2. In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. ['19, c. 154, § 27, p. 502.]

§ 5840. Partner's interest subject to charging order. 1. On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

2. The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

a. With separate property, by any one or more of the partners, or

b. With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

3. Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. ['19, c. 154, § 28, p. 502.]

Cross ref. Express reference to this section: Dissolution by decree of court: § 5844.

ARTICLE 6.

DISSOLUTION AND WINDING UP.

Cross ref. Settlement of partnership business: § 5554.

§ 5841. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. ['19, c. 154, § 29, p. 503.]

Cross ref. Express reference to this section: Dissolution by decree of court: § 5844.

§ 5842. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. ['19, c. 154, § 30, p. 503.]

§ 5843. Causes of dissolution. Dissolution is caused:

1. Without violation of the agreement between the partners.

a. By the termination of the definite term or particular undertaking specified in the agreement.

b. By the express will of any partner when no definite term or particular undertaking is specified.

c. By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

4. By the death of any partner.

5. By the bankruptcy of any partner or the partnership.

6. By decree of court under section 5844. ['19, c. 154, § 31, p. 503.]

§ 5844. Dissolution by decree of court. 1. On application by or for a partner the court shall decree a dissolution whenever:

a. A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.

b. A partner becomes in any other way incapable of performing his part of the partnership contract.

c. A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

d. A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

e. The business of the partnership can only be carried on at a loss.

f. Other circumstances render a dissolution equitable.

2. On the application of the purchaser of a partner's interest under sections 5840 or 5841:

a. After the termination of the specified term or particular undertaking.

b. At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued. ['19, c. 154, § 32, p. 503.]

Cross ref. Express reference to this section: Causes of dissolution: § 5843.

§ 5845. General effect of dissolution on authority of partner. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

1. With respect to the partners.

a. When the dissolution is not by the act, bankruptcy or death of a partner; or

b. When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 5846 so requires.

2. With respect to persons not partners, as declared in section 5847. ['19, c. 154, § 33, p. 504.]

§ 5846. Right of partner to contribution from copartners after dissolution. Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

a. The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

b. The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. ['19, c. 154, § 34, p. 504.]

Cross ref. Express reference to this section: Effect of dissolution on authority of partner: § 5845.

§ 5847. Power of partner to bind partnership to third persons after dissolution. 1. After dissolution a partner can bind the partnership except as provided in paragraph 3

a. By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.

b. By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(1) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(2) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

2. The liability of a partner under paragraph 1b shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

a. Unknown as a partner to the person with whom the contract is made; and

b. So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

3. The partnership is in no case bound by any act of a partner after dissolution

a. Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

b. Where the partner has become bankrupt; or

c. Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(1) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(2) Had not extended credit to the partnership prior to dissolution and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph 1b (2).

4. Nothing in this section shall affect the liability under section 5828 of any person who after dissolution represents himself or consents to another person representing him as a partner in a partnership engaged in carrying on business. ['19, c. 154, § 35, p. 504.]

Cross ref. Express reference to this section: Effect of dissolution on authority of partner: § 5845.

§ 5848. Effect of dissolution on partner's existing liability. 1. The dissolution of the partnership does not of itself discharge the existing liability of any partner.

2. A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

3. Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

4. The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. ['19, c. 154, § 36, p. 506.]

Cross ref. Express reference to this section: Rights of partners to application of partnership property: § 5850.

§ 5849. Right to wind up. Unless otherwise agreed the partners who have not wrongfully dissolved partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs: *Provided, however,* That any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. ['19, c. 154, § 37, p. 506.]

§ 5850. Rights of partners to application of partnership property. 1. When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all part-

nership liabilities, either by payment or agreement under section 5848, paragraph 2, he shall receive in cash only the net amount due him from the partnership.

2. When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

a. Each partner who has not caused dissolution wrongfully shall have

(1) All the rights specified in paragraph 1 of this section, and

(2) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

b. The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause 2a (2) of this section, and in like manner indemnify him against all present or future partnership liabilities.

c. A partner who has caused the dissolution wrongfully shall have

(1) If the business is not continued under the provisions of paragraph 2b all the rights of a partner under paragraph 1, subject to clause 2a (2), of this section.

(2) If the business is continued under paragraph 2b of this section the right as against his copartners and all claiming through them in respect to their interests in the partnership, to have the value of his interest in the partnership, less any damage caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered. ['19, c. 154, § 38, p. 506.]

Cross ref. Express references to this section: Liability of persons continuing the business in certain cases: § 5853. Rights of retiring partner or estate of deceased partner when business is continued: § 5854.

§ 5851. Rights where partnership is dissolved for fraud or misrepresentation. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled

a. To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

b. To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

c. To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. ['19, c. 154, § 39, p. 507.]

§ 5852. Rules for distribution. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

a. The assets of the partnership are:

(1) The partnership property.

(2) The contributions of the partners necessary for the payment of all the liabilities specified in clause *b* of this paragraph.

b. The liabilities of the partnership shall rank in order of payment, as follows:

(1) Those owing to creditors other than partners.

(2) Those owing to partners other than for capital and profits.

(3) Those owing to partners in respect of capital.

(4) Those owing to partners in respect of profits.

c. The assets shall be applied in the order of their declaration in clause a of this paragraph to the satisfaction of the liabilities.

d. The partners shall contribute, as provided by section 5830 the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

e. An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause d of this paragraph.

f. Any partner or his legal representative shall have the right to enforce the contributions specified in clause d of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

g. The individual property of a deceased partner shall be liable for the contributions specified in clause d of this paragraph.

h. When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

i. Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(1) Those owing to separate creditors.

(2) Those owing to partnership creditors.

(3) Those owing to partners by way of contribution. ['19, c. 154, § 40, p. 508.]

§ 5853. Liability of persons continuing the business in certain cases.

1. When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third person, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

2. When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

3. When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs 1 and 2 of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partner-

ship property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

4. When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

5. When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 5850, paragraph 2b, either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

6. When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

7. The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

8. When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

9. Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

10. The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. ['19, c. 154, § 41, p. 509.]

Cross ref. Express reference to this section: Rights of retiring partner or estate of deceased partner when business is continued: § 5854.

§ 5854. Rights of retiring or estate of deceased partner when the business is continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in section 5853, paragraphs 1, 2, 3, 5 and 6, or section 5850, paragraph 2b, without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership: *Provided*, That the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 5853, paragraph 8. ['19, c. 154, § 42, p. 510.]

§ 5855. Accrual of actions. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolutions, in the absence of any agreement to the contrary. ['19, c. 154, § 43, p. 511.]

CHAPTER 230.

MINING PARTNERSHIP.

§ 5856. [3361] **When mining partnership exists.** A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same. [R. S. § 3300.]

Hist. R. S. § 3300, reen. R. C. § 3361, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2511; Kerr's C. ib.

Mont. Civ. C. § 3350 identical. Madar v. Norman (1907) 13 I. 585, 589, 92 P. 572.

Definition: The term "mining claim" as used herein includes patented as well as unpatented mining ground. (Dis. op.) Salisbury v. Lane (1900) 7 I. 370, 63 P. 383.

Constitution of mining partnership: Parties who acquire a mine for the purpose of working it and actually engage in working the same, comprise a mining partnership although they do not own the same. Haskins v. Curran (1895) 4 I. 573, 43 P. 559. Nor is it necessary that all the coowners in the claim shall engage in working it, either together or separately, in order to constitute a mining partnership. Hawkins v. Spokane etc. Co. (1891) 3 I. 241, 28 P. 433.

To constitute a mining partnership it is essential that the coowners actually engage in working the mine or in the business of operating it; the cotenancy of two or more persons in a mining claim is not of itself sufficient to constitute such tenants mining partners. Madar v. Norman, supra.

It is not essential that all the tenants join in the working or business of mining in order to establish a mining partnership; that relation may be established among such coowners as have actually engaged in the working or mining operation; those not so engaged will be left to their right and be chargeable by their duties as cotenants only. Ib.

§ 5857. [3362] **Express agreement not necessary.** An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom. [R. S. § 3301.]

Hist. R. S. § 3301, reen. R. C. § 3362, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2512; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

Agreement unnecessary: A mining partnership exists without any agreement, either expressed or implied, and the relation differs in this from that of tenants in common. Hawkins v. Spokane etc. M. Co. (1891) 3 I. 241, 28 P. 433.

§ 5858. [3363] **Sharing profits and losses.** A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine, bears to the whole partnership capital or whole number of shares. [R. S. § 3302.]

Hist. R. S. § 3302, reen. R. C. § 3363, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2513; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. 1891) 3 I. 241, 28 P. 433; (1893) 3 I. 650, 33 P. 40.

§ 5859. [3364] **Lien of partners and creditors.** Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and for money advanced by him for its use. A lien exists in favor of the creditors notwithstanding there is an agreement among the partners that it must not. [R. S. § 3303.]

Hist. R. S. § 3303, reen. R. C. § 3364, reen. C. L. ib.

Cross ref. Protection of creditor's lien on unpatented claim pending foreclosure: §§ 5554, 5555.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2514; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

§ 5860. [3365] **Mine partnership property.** The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property. [R. S. § 3304.]

Hist. R. S. § 3304, reen. R. C. § 3365, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2515; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

Partnership property: The mining ground is partnership property, whether purchased with partnership or individual funds. Hawkins v. Spokane etc M. Co. (1891) 3 I. 241, 28 P. 433.

§ 5861. [3366] **Sale of interest by partner.** One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership. [R. S. § 3305.]

Hist. R. S. § 3305, reen. R. C. § 3366, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2516; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

§ 5862. [3367] **Liability of purchaser.** A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof, or advances made for the benefit of the partnership unless he purchased in good faith, for a valuable consideration, without notice of such lien. [R. S. § 3306.]

Hist. R. S. § 3306, reen. R. C. § 3367, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2517; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

§ 5863. [3368] **Same.** A purchaser of the interest of a partner in a mine when the partnership is engaged in working it, takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership. [R. S. § 3307.]

Hist. R. S. § 3307, reen. R. C. § 3368, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2518; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

§ 5864. [3369] **Members can not bind partnership.** No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership except by express authority derived from the members thereof. [R. S. § 3308.]

Hist. R. S. § 3308, reen. R. C. § 3369, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2519; Kerr's C. ib.

Cited: Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

§ 5865. [3370] **Majority of shares governs.** The decision of the members, owning a majority of the shares or interests in a mining partnership, binds it in the conduct of its business. [R. S. § 3309.]

Hist. R. S. § 3309, reen. R. C. § 3370, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2520; Kerr's C. ib.

Cited: Madar v. Norman (1907) 13 I. 585, 589, 92 P. 572.

Rights of majority: Those owning a majority of the shares or interests in a mining partnership have the right to control its methods of working; therefore, a majority owner of the shares in a mining partnership is entitled to an injunction to restrain the other partners from working a claim except in the manner directed by him. Hawkins v. Spokane etc. M. Co. (1891)

3 I. 241, 28 P. 433. The minority owner has the right to inspect the property to ascertain its value and the methods in use for working the same, so far as may be necessary for the protection of his interest and to enable him to dispose of the same, but he cannot work it against the protest of the majority owners. Hawkins v. Spokane etc. M. Co. (1893) 3 I. 650, 33 P. 40.

§ 5866. [3371] **Partnership contracts may be recorded.** Written contracts relating to prospecting or mining, or the formation of copartnership for that purpose, when signed by the parties thereto and indorsed by at least one witness, may be recorded in the office of the county recorder of the county wherein it is proposed to prosecute the business of said copartnership, or where the property affected by such contract is situated. ['99, p. 366, § 1.]

Hist. '99, p. 366, § 1, reen. R. C. § 3371, reen. C. L. ib.

§ 5867. [3372] **Record constructive notice.** Such record shall be constructive notice to all persons of the matters contained in such contract or copartnership agreement. ['99, p. 366, § 2.]

Hist. '99, p. 366, § 2, reen. R. C. § 3372, reen. C. L. ib.

TITLE XLVII. NEGOTIABLE INSTRUMENTS.

CHAPTER 231.

UNIFORM NEGOTIABLE INSTRUMENTS LAW.

Note: This law recommended by the national conference of commissioners on uniform state laws has been adopted in 50 states, territories and federal districts. In 1917 the only jurisdictions which had not adopted it were Georgia, Porto Rico and Texas.

As codified in Compiled Laws the original enactment of '03, p. 380, S. B. 86, which contained a great many clerical errors and variant readings from the uniform act, was corrected to conform to that act. This was in harmony with the original purpose of the enactment, as shown by its title: "An act relating to negotiable instruments (being an act to establish a law uniform with the laws of other states on that subject)."

Interpretation: The later uniform acts drafted subsequent to the negotiable instruments act contain a provision that: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." While the uniform negotiable instruments act does not contain this section, yet the courts have interpreted it in harmony with the principles of this section. Rockfield v. First Nat. Bk. of Springfield, 77 Ohio St. 311; Downey v. O'Keefe, 26 R. I. 571; Thorpe v. White, 188 Mass. 333; Toole v. Crafts, 193 Mass. 110; Gibbs v. Guaraglia (N. J.) 67 Atlantic Rep. 81; Baumeister v. Kuntz (Fla.) 42 South. Rep. 886; Farquahar Co. v. Hingham (N. D.) 112 N. W. Rep. 557; Vander Ploeg v. Van Zunk (Iowa) 112 N. W. 807; in Rockfield v. First Nat. Bk., supra, Mr. Justice Spear said (pp. 329-331): "It is so much a matter of common knowledge as to make it proper to take judicial notice of the fact, that the act herein considered was enacted because of an effort on the part of the bar of many, if not all of the states of the union, to bring about a uniform system of law respecting negotiable instruments. . . . . That this purpose was prominent in the minds of the members of our general assembly in the enactment of the Ohio act is shown by the title of the act itself which is, 'An act to establish a law uniform with the laws of other states on negotiable instruments.' The desirability of such legislation had been long felt by commercial people of our state as well as by the judiciary and the bar at large. . . . . The purpose of the act is to bring Ohio into harmony with the other states of the union on so important a branch of the law as the relation of parties to commercial paper."

ARTICLE 1.

FORM AND INTERPRETATION.

Cross ref. Uniform bills of lading law: c. 233.

§ 5868. [3458] **Requirements of negotiable instruments.** An instrument to be negotiated must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to the order of a specified person or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. ['03, p. 380, § 1.]

Hist. '03, p. 380, § 1, reen. R. C. § 3458, reen. C. L. ib.

Instruments held nonnegotiable: A promissory note containing a stipulation whereby the sureties, guarantors, indorsers and makers waive notice of the granting of any extension of time for payment and waive the right of defense on the ground that extension has been made without notice to them or either of them, is not a "negotiable promissory note." Union Stock Yards Nat. Bk. v. Bolan (1908) 14 I. 87, 93 P. 508, 125 A. S. R. 146.

A recital in a title-retaining note that the title to the property for which it is given shall remain in the payee and that he shall have the right to take possession of it whenever he may deem himself insecure, even before maturity of the note, renders such instrument nonnegotiable under the provisions of this and § 5872. Kimpton v. Studebaker Bros. (1908) 14 I. 522, 94 P. 1039, 125 A. S. R. 185, 14 Ann. Cas. 1126.

County warrants are not negotiable paper in the sense that a transferee for value is protected from a defense available against the original payee. Dexter Horton T. & S. Bk. v. Clearwater Co. (1916) 235 F. 743.

§ 5869. When sum payable is a sum certain. The sum payable is a sum certain within the meaning of this chapter; although it is to be paid:

1. With interest; or,
2. By stated instalments; or,
3. By stated instalments, with a provision that upon default in payment of any instalment, or of interest, the whole shall become due; or,
4. With exchange, whether at a fixed rate or at the current rate; or,
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [C. L. § 3459.]

Hist. '03, p. 380, § 2, reen. R. C. § 3459; compiled and reen. C. L. ib.

Option to declare due: Where it is stipulated in a promissory note that "the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of the note" if payment of interest and principal instalments are not made when due, such stipulation is a penalty, and will not be enforced as to the interest not yet earned on the principal. Tipton v. Ellsworth (1910) 18 I. 207, 109 P. 134.

Attorney's fees: Subd. 5 provides that costs of collection or attorney's fees in case payment shall not be made at maturity may be stipulated for. That may be done in an interest note as well as in a principal note. Such provision does not constitute usury. Tipton v. Ellsworth, supra.

§ 5870. [3460] **When promise is unconditional.** An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or,
2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. ['03, p. 380, § 3.]

Hist. '03, p. 380, § 3, reen. R. C. § 3460, reen. C. L. ib.

§ 5871. [3461] **Determinable future time: What constitutes.** An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

1. At a fixed rate period after date or sight; or,
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. ['03, p. 380, § 4.]

Hist. '03, p. 380, § 4, reen. R. C. § 3461, reen. C. L. ib.

§ 5872. [3462] **Provisions which do not affect negotiability.** An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or,
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or,
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or,
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. ['03, p. 380, § 5.]

Hist. '03, p. 380, § 5, reen. R. C. § 3462, reen. C. L. ib.

When not negotiable: A recital in a title-retaining note that the title to the property for which it is given shall remain in the payee and that he shall have the right to take possession of it whenever he may deem himself insecure, even before maturity of the note, renders such instrument nonnegotiable under the provisions of this and § 5868. Kimpton v. Studebaker Bros. (1908) 14 I. 522, 94 P. 1039, 125 A. S. R. 185, 14 Ann. Cas. 1126.

§ 5873. [3463] **Facts which do not affect validity.** The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or,
2. Does not specify the value given, or that any value has been given therefor; or,
3. Does not specify the place where it is drawn or the place where it is payable; or,
4. Bears a seal; or,
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. ['03, p. 380, § 6.]

Hist. '03, p. 380, § 6, reen. R. C. § 3463, reen. C. L. ib.

§ 5874. [3464] **When payable on demand.** An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or,
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. ['03, p. 380, § 7.]

Hist. '03, p. 380, § 7, reen. R. C. § 3464, reen. C. L. ib.

Cited: Sheffield v. Cleland (1911) 19 I. 612, 115 P. 20.

§ 5875. [3465] **When payable to order.** The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or,
2. The drawer or maker; or,

3. The drawee; or,
4. Two or more payees jointly; or,
5. One or some of several payees; or,
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. ['03, p. 380, § 8.]

Hist. '03, p. 380, § 8, reen. R. C. § 3465, reen. C. L. ib.

§ 5876. [3466] **When payable to bearer.** The instrument is payable to bearer:

1. When it is expressed to be so payable; or,
2. When it is payable to a person named therein or bearer; or,
3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or,
4. When the name of the payee does not purport to be the name of any person; or,
5. When the only or last indorsement is an indorsement in blank. ['03, p. 380, § 9.]

Hist. '03, p. 380, § 9, reen. R. C. § 3466, reen. C. L. ib.

Cited: (In brief of counsel) Mellen v. Garrett (1913) 25 I. 102.

§ 5877. Language of instrument: What terms sufficient. The instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. [C. L. § 3467.]

Hist. '03, p. 380, § 10, reen. R. C. § 3467; compiled and reen. C. L. ib.

§ 5878. Presumption as to date. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be. [C. L. § 3468.]

Hist. '03, p. 380, § 11, reen. R. C. § 3468; compiled and reen C. L. ib.

§ 5879. [3469] **Effect of antedating and postdating.** The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. ['03, p. 380, § 12.]

Hist. '03, p. 380, § 12, reen. R. C. § 3469, reen. C. L. ib.

Cited: Smith v. Field (1911) 19 I. 558, 114 P. 668, Ann. Cas. 1912C 354.

§ 5880. [3470] **Blank date may be filled by holder.** When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. ['03, p. 380, § 13.]

Hist. '03, p. 380, § 13, reen. R. C. § 3470, reen. C. L. ib.

§ 5881. Completion of instrument by holder. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instru-

ment operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [C. L. § 3471.]

Hist. '03, p. 380, § 14, reen. R. C. § 3471; compiled and reen. C. L. ib.

§ 5882. [3472] **Incomplete instrument not delivered.** Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. ['03, p. 380, § 15.]

Hist. '03, p. 380, § 15, reen. R. C. § 3472, reen. C. L. ib.

§ 5883. [3473] **Necessity for delivery: Presumption of: When effectual: When presumed.** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.

But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. ['03, p. 380, § 16.]

Hist. '03, p. 380, § 16, reen. R. C. § 3473, reen. C. L. ib.

Cited: (In brief of counsel) Citizens' S. Bk. v. Thomason (1917) 30 I. 460.

Parol evidence: When admissible: Parol evidence is admissible in a suit between the original parties to show that the note was never delivered as a present contract. Barker v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 S. Ct. 816, reversing 2 I. 719.

"Delivery" defined: "Delivery" imports such a transfer of the instrument to another as will enable the latter to hold it for himself. If the maker has only put the paper into the hands of his agent to hold as such, he has not delivered it. Lewis Co. v. S. Bk. of Peck (1918) 31 I. 244, 170 P. 98.

§ 5884. [3474] **Construction where instrument is ambiguous.** Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. ['03, p. 380, § 17.]

Hist. '03, p. 380, § 17, reen. R. C. § 3474, reen. C. L. ib.

Cited: (In brief of counsel) Miller v. Del Rio M. & M. Co. (1913) 25 I. 83.

Applied to guaranty: A contract of guaranty indorsed upon the back of a promissory note in the following words: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof," is a several as well as a joint obligation of each person who executes such contract. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

§ 5885. [3475] **Liability of person signing trade or assumed name.** No person is liable on the instrument whose signature does not appear thereon except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. ['03, p. 380, § 18.]

Hist. '03, p. 380, § 18, reen. R. C. § 3475, reen. C. L. ib.

§ 5886. [3476] **Signature by agent: Authority: How shown.** The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. ['03, p. 380, § 19.]

Hist. '03, § 380, § 19, reen. R. C. § 3476, reen. C. L. ib.

§ 5887. [3477] **Liability of person signing as agent.** Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability. ['03, p. 380, § 20.]

Hist. '03, p. 380, § 20, reen. R. C. § 3477, reen. C. L. ib.

§ 5888. Signature by procuration: Effect of. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [C. L. § 3478.]

Hist. '03, p. 380, § 21, reen. R. C. § 3478; compiled and reen. C. L. ib.

§ 5889. [3479] **Effect of indorsement by corporation or infant.** The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. ['03, p. 380, § 22.]

Hist. '03, p. 380, § 22, reen. R. C. § 3479, reen. C. L. ib.

§ 5890. [3480] **Forged signature: Effect of.** Where a signature is forged or made without the authority of the person whose signature it

purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. ['03, p. 380, § 23.]

Hist. '03, p. 380, § 23, reen. R. C. § 3480, reen. C. L. ib.

ARTICLE 2.

CONSIDERATION.

§ 5891. [3481] **Presumption of consideration.** Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. ['03, p. 380, § 24.]

Hist. '03, p. 380, § 24, reen. R. C. § 3481, reen. C. L. ib.

Cited: (In brief of counsel) Coe v. McGran (1913) 23 I. 582.

Woman's separate contracts: The presumption of this section does not affect the rule that a married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use or benefit or for the use or benefit of her separate estate. McFarland v. Johnson (1912) 22 I. 694, 127 P. 911.

§ 5892. [3482] **Value defined.** Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time. ['03, p. 380, § 25.]

Hist. '03, p. 380, § 25, reen. R. C. § 3482, reen. C. L. ib.

Cited: Redfield v. Wells, 31 I. 415, 173 P. 640.

Applied: An existing debt may be represented by the maker's own note and the surrender of such note will be a good consideration for a new obligation. Fidelity S. Bk. v. Miller (1916) 29 I. 777, 162 P. 244.

§ 5893. [3483] **Holder for value defined.** Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. ['03, p. 380, § 26.]

Hist. '03, p. 380, § 26, reen. R. C. § 3483, reen. C. L. ib.

§ 5894. Lienor a holder for value: To what extent. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [C. L. § 3484.]

Hist. '03, p. 380, § 27, reen. R. C. § 3484; compiled and reen. C. L. ib.

§ 5895. Effect of want of consideration. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. [C. L. § 3485.]

Hist. '03, p. 380, § 28, reen. R. C. § 3485; compiled and reen. C. L. ib.

Cited: (In brief of counsel) Daniels v. Englehart (1910) 18 I. 548.

Fraud a necessary element to constitute defense: Inadequacy of consideration is no defense to an action on a promissory note unless there was fraud also on the part of the promisee. Harshbarger v. Eby (1916) 28 I. 753, 156 P. 619.

§ 5896. [3486] **Accommodation party defined: Liability.** An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such

holder at the time of taking the instrument knew him to be only an accommodation party. ['03, p. 380, § 29.]

Hist. '03, p. 380, § 29, reen. R. C. § 3486, reen. C. L. ib.

ARTICLE 3.

NEGOTIATION.

§ **5897.** [3487] **What constitutes negotiation.** An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. ['03, p. 380, § 30.]

Hist. '03, p. 380, § 30, reen. R. C. § 3487, reen. C. L. ib.

§ **5898.** [3488] **Indorsement: How made.** The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. ['03, p. 380, § 31.]

Hist. '03, p. 380, § 31, reen. R. C. § 3488, reen. C. L. ib.

Cited: Frontier Milling etc. Co. v. Roy White etc. Co. (1914) 25 I. 485, 138 P. 825.

§ **5899.** [3489] **Indorsement must be of entire instrument.** The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue. ['03, p. 380, § 32.]

Hist. '03, p. 380, § 32, reen. R. C. § 3489, reen. C. L. ib.

§ **5900.** [3490] **Kinds of indorsement.** An indorsement may be either in blank or special; and it may also be either restrictive or qualified or conditional. ['03, p. 380, § 33.]

Hist. '03, p. 380, § 33, reen. R. C. § 3490, reen. C. L. ib.

§ **5901.** [3491] **Special and blank indorsements defined.** A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. ['03, p. 380, § 34.]

Hist. '03, p. 380, § 34, reen. R. C. § 3491, reen. C. L. ib.

Applied to forgery: A check indorsed in blank by the payee can pass from hand to hand without further indorsement, and so the cashing of a check on which the payee's name has been forged raises no presumption that the person so cashing it was the forger. S. v. Miles (1912) 22 I. 166, 124 P. 786.

§ **5902.** [3492] **Blank indorsement converted into special.** The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. ['03, p. 380, § 35.]

Hist. '03, p. 380, § 35, reen. R. C. § 3492, reen. C. L. ib.

§ **5903.** [3493] **Restrictive indorsement defined.** An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or,
2. Constitutes the indorsee the agent of the indorser; or,

3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. ['03, p. 380, § 36.]

Hist. '03, p. 380, § 36, reen. R. C. § 3493, reen. C. L. ib.

§ 5904. [3494] **Effect of restrictive indorsement: Rights of indorsee.** A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. ['03, p. 380, § 37.]

Hist. '03, p. 380, § 37, reen. R. C. § 3494, reen. C. L. ib.

§ 5905. [3495.] **Qualified indorsement.** A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "Without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. ['03, p. 380, § 38.]

Hist. '03, p. 380, § 38, reen. R. C. § 3495, reen. C. L. ib.

§ 5906. Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [C. L. § 3496.]

Hist. '03, p. 380, § 39, reen. R. C. § 3496; compiled and reen. C. L. ib.

§ 5907. Indorsement of instrument payable to bearer. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. [C. L. § 3497.]

Hist. '03, p. 380, § 40, reen. R. C. § 3497; compiled and reen. C. L. ib.

§ 5908. [3498] **Indorsement where payable to two or more persons.** Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. ['03, p. 380, § 41.]

Hist. '03, p. 380, § 41, reen. R. C. § 3498, reen. C. L. ib.

§ 5909. [3499] **Instrument payable to cashier: Indorsement.** Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. ['03, p. 380, § 42.]

Hist. '03, p. 380, § 42, reen. R. C. § 3499, reen. C. L. ib.

§ 5910. [3500] **Misspelled names: Indorsement.** Where the name of the payee or indorsee is wrongly designated or misspelled, he may

indorse the instrument as therein described adding, if he think fit, his proper signature. ['03, p. 380, § 43.]

Hist. '03, p. 380, § 43, reen. R. C. § 3500, reen. C. L. ib.

§ 5911. [3501] **Indorsement in representative capacity.** Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. ['03, p. 380, § 44.]

Hist. '03, p. 380, § 44, reen. R. C. § 3501, reen. C. L. ib.

§ 5912. [3502] **Presumption of negotiation before maturity.** Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. ['03, p. 380, § 45.]

Hist. '03, p. 380, § 45, reen. R. C. § 3502, reen. C. L. ib.

§ 5913. [3503] **Presumption as to place of indorsement.** Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated. ['03, p. 380, § 46.]

Hist. '03, p. 380, § 46, reen. R. C. § 3503, reen. C. L. ib.

§ 5914. [3504] **Continuation of negotiable character.** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. ['03, p. 380, § 47.]

Hist. '03, p. 380, § 47, reen. R. C. § 3504, reen. C. L. ib.

§ 5915. Striking out indorsement. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [C. L. § 3505.]

Hist. '03, p. 380, § 48, reen. R. C. § 3505; compiled and reen. C. L. ib.

§ 5916. Transfer without indorsement: Effect of. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [C. L. § 3506.]

Hist. '03, p. 380, § 49, reen. R. C. § 3506; compiled and reen. C. L. ib.

§ 5917. [3507] **When prior party may negotiate instrument.** Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same; but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. ['03, p. 380, § 50.]

Hist. '03, p. 380, § 50, reen. R. C. § 3507, reen. C. L. ib.

ARTICLE 4.

RIGHTS OF HOLDER.

§ 5918. [3508] **Right of holder to sue: Payment.** The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument. ['03, p. 380, § 51.]

Hist. '03, p. 380, § 51, reen. R. C. § 3508, reen. C. L. ib.

Presumption of ownership: In the absence of a specific agreement or understanding that a negotiable instrument should be a pledge the holder thereof is presumed to be the owner and entitled to maintain his action thereon. Home Land Co. v. Osborn (1910) 19 I. 95, 112 P. 764.

Holder for collection may sue: This section was adopted long after the adoption of §§ 6634-5, and must be construed in connection with the latter expression of the legislative will; and, so construed, the holder of a negotiable instrument, may, notwithstanding §§ 6634-5, sue thereon in his own name, though he is only a holder for collection. Craig v. Palo Alto Stock Farm (1909) 16 I. 701, 102 P. 393; Anderson v. Coolin (1916) 28 I. 494, 155 P. 677; Utah Imp. Vehicle Co. v. Kenyon (1917) 30 I. 407, 164 P. 1176.

§ 5919. [3509] **Holder in due course defined.** A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. ['03, p. 380, § 52.]

Hist. '03, p. 380, § 52, reen. R. C. § 3509, reen. C. L. ib.

Cited: Union Stock Yards Nat. Bk. v. Bolan (1908) 14 I. 87, 93 P. 508, 125 A. S. R. 146; (in brief of counsel) Daniels v. Englehart (1910) 18 I. 548; Shellenberger v. Nourse (1911) 20 I. 323, 118 P. 508.

Applied: Facts held to show holder in due course. Nelson v. Hudgel (1913) 23 I. 327, 130 P. 85; S. W. Nat. Bk. v. Baker (1913) 23 I. 428, 130 P. 799; Burdell v. Nereson (1915) 28 I. 129, 152 P. 576; S. W. Nat. Bk. v. Lindsley (1916) 29 I. 343, 158 P. 1082.

A payee of a negotiable instrument may become a holder thereof in due course. Redfield v. Wells, 31 I. 415, 173 P. 640.

Facts held to show holder not to be in due course. Winter v. Nobs (1910) 19 I. 18, 112 P. 525, Ann. Cas. 1912C 302; Park v. Johnson (1911) 20 I. 548, 119 P. 52; Brown v. Miller (1912) 22 I. 307, 125 P. 981; Altschul v. Rogers (1912) 22 I. 512, 126 P. 1048.

Nonpayment of interest instalment: A mere failure to pay a periodical instalment of interest will not amount to a dishonor of a negotiable instrument and will not render the instrument overdue. But knowledge by the purchaser of overdue instalments of interest is a circumstance to be considered in determining his good faith in purchasing the note. Winter v. Nobs, supra.

Instructions: Instructions involving the law of this section held erroneous. Shellenberger v. Nourse, supra; Park v. Johnson, supra.

§ 5920. [3510] **When person not deemed holder in due course.** Where an instrument payable on demand is negotiated an unreasonable length of time after its issue the holder is not deemed a holder in due course. ['03, p. 380, § 53.]

Hist. '03, p. 380, § 53, reen. R. C. § 3510, reen. C. L. ib.

§ 5921. [3511] **Notice before full amount payment.** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. ['03, p. 380, § 54.]

Hist. '03, p. 380, § 54, reen. R. C. § 3511, reen. C. L. ib.

§ 5922. When title defective. The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [C. L. § 3512.]

Hist. '03, p. 380, § 55, reen. R. C. § 3512; compiled and reen. C. L. ib.

Cited: Shellenberger v. Nourse (1911) 20 I. 323, 329, 118 P. 508; Brown v. Miller (1912) 22 I. 307, 319, 125 P. 981; S. W. Nat. Bk. v. Lindsley (1916) 29 I. 343, 158 P. 1082.

§ 5923. [3513] **What constitutes notice of defect.** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. ['03, p. 380, § 56.]

Hist. '03, p. 380, § 56, reen. R. C. § 3513, reen. C. L. ib.

Nonpayment of interest instalment: Knowledge by the purchaser of overdue instalments of interest is a circumstance to be considered in determining his good faith in purchasing the note. Winter v. Nobs (1910) 19 I. 18, 112 P. 525, Ann. Cas. 1912C 302.

Good or bad faith: How shown: Mere suspicious circumstances are not sufficient to charge the purchaser of a promissory note with bad faith and notice of equities and defenses, but in order to charge the paper in his hands with prior equities and defenses his notice must be actual, either of the facts constituting the equities and defenses or of such circumstances that his action in taking the paper in the face of such knowledge amounts to bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative issues as to diligence or negligence. The good faith of a purchaser is a question of fact for the jury. Winter v. Nobs, supra.

An instruction which directs the jury that the presence of suspicious circumstances means bad faith is erroneous. The existence of suspicious circumstances alone will not destroy the good faith of a transaction, but it is such circumstances as would charge the purchaser of a note, as an ordinarily prudent man, with bad faith or notice of the infirmity in the instrument, or defect in the title of the person from whom he makes the purchase. Park v. Johnson (1911) 20 I. 548, 119 P. 52; Park v. Brandt (1911) 20 I. 660, 119 P. 877.

The purchaser of negotiable paper in due course and before maturity is under no duty to make inquiry as to the title to paper, fair and regular on its face, nor is he under any duty to inquire into the consideration given for the note or of the transaction out of which it arose. Vaughn v. Johnson (1911) 20 I. 669, 119 P. 879, 37 L. R. A. (N. S.) 816.

Whether the holder of the instrument had actual knowledge of the infirmity or defect or knowledge of such fact that his action in taking the instrument amounted to bad faith is an independent fact which must be determined upon evidence wholly independent of the original transaction in which the note was executed. Vaughn v. Johnson, supra.

The question as to the good faith of the purchaser of a negotiable promissory note, who claims to have purchased the same in due course before maturity and for a valuable consideration, is a question of fact to be determined by the jury in the light of all the facts and circumstances bearing upon the transaction. Winter v. Hutchins (1911) 20 I. 749, 119 P. 883.

In an action upon a negotiable promissory note procured by fraud, brought by an indorsee, a banking corporation, where the only evidence introduced to show that the plaintiff took the note in good faith and without notice was the testimony of the vice president and general manager of the bank, the credibility of his testimony is addressed to the jury, and not to the court as a matter of law. First Nat. Bk. v. Hall (1917) 31 I. 167, 169 P. 936.

This section is applicable in the case of one who knowingly receives partnership security in discharge of a separate claim against one of the partners. Redfield v. Wells, 31 I. 415, 173 P. 640.

§ 5924. [3514] **Rights of holder in due course.** A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. ['03, p. 380, § 57.]

Hist. '03, p. 380, § 57, reen. R. C. § 3514, reen. C. L. ib.

Applied: Rosnagle v. Armstrong (1909) 17 I. 246, 105 P. 216; Nelson v. Hudgel (1913) 23 I. 327, 130 P. 85; S. W. Nat. Bk. v. Baker (1913) 23 I. 428, 130 P. 799; Burdell v. Nereson (1915) 28 I. 129, 152 P. 576.

§ 5925. [3515] **When subject to original defenses.** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. ['03, p. 380, § 58.]

Hist. '03, p. 380, § 58, reen. R. C. § 3515, reen. C. L. ib.

Cited: Craig v. Palo Alto Stock Farm (1909) 16 I. 701, 102 P. 393; (in brief of counsel) Daniels v. Englehart (1910) 18 I. 548.

§ 5926. [3516] **Presumption as to holding in due course.** Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. ['03, p. 380, § 59.]

Hist. '03, p. 380, § 59, reen. R. C. § 3516, reen. C. L. ib.

Cited: (In brief of counsel) Mellen v. Garrett (1913) 25 I. 102.

Applied: Winter v. Nobs (1910) 19 I. 18, 112 P. 525, Ann. Cas. 1912C 302; Shellenberger v. Nourse (1911) 20 I. 323, 118 P. 508; Brown v. Miller (1912) 22 I. 307, 125 P. 981; S. W. Nat. Bk. v. Lindsley (1916) 29 I. 343, 158 P. 1082; First Nat. Bk. v. Hall (1917) 31 I. 167, 169 P. 936.

Weight of evidence for jury: Whether plaintiff has satisfactorily met the burden of proof to make good his claim to be an innocent purchaser is a question of fact for the jury, and is subject to the same rule as to its weight and sufficiency as any other fact in the case. Winter v. Nobs, supra. Save where the testimony is not only consistent with the good faith of the purchase, but is such that no fair-minded person could draw any other inference therefrom. S. W. Nat. Bk. v. Lindsley, supra.

Where the good faith of a party who claims to be the holder in due course is an issue upon which he has the burden of proof, the credibility of his testimony in support of that issue, though uncontradicted, is for the jury. First Nat. Bk. v. Hall, supra.

ARTICLE 5.

LIABILITIES OF PARTIES.

§ 5927. [3517] **Liability of maker.** The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. ['03, p. 380, § 60.]

Hist. '03, p. 380, § 60, reen. R. C. § 3517, reen. C. L. ib.

§ 5928. Liability of drawer. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. [C. L. § 3518.]

Hist. '03, p. 380, § 61, reen. R. C. § 3518; compiled and reen. C. L. ib.

§ 5929. [3519] **Liability of acceptor.** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and,

2. The existence of the payee and his then capacity to indorse. ['03, p. 380, § 62.]

Hist. '03, p. 380, § 62, reen. R. C. § 3519, reen. C. L. ib.

§ 5930. [3520] **When person deemed indorser.** A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. ['03, p. 380, § 63.]

Hist. '03, p. 380, § 63, reen. R. C. § 3520, reen. C. L. ib.

Applied: Bk. of Montpelier v. Montpelier L. Co. (1909) 16 I. 730, 102 P. 685.

§ 5931. [3521] **Liability of irregular indorser.** Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. ['03, p. 380, § 64.]

Hist. '03, p. 380, § 64, reen. R. C. § 3521, reen. C. L. ib.

§ 5932. [3522] **Warranty where negotiation by delivery or qualified indorsement.** Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.
2. That he has a good title to it.
3. That all prior parties had capacity to contract.
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision 3 of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. ['03, p. 380, § 65.]

Hist. '03, p. 380, § 65, reen. R. C. § 3522, reen. C. L. ib.

§ 5933. [3523] **Liability of general indorser.** Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions 1, 2 and 3 of the next preceding section; and,
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. ['03, p. 380, § 66.]

Hist. '03, p. 380, § 66, reen. R. C. § 3523, reen. C. L. ib.

Liability of indorser: The undertaking of an indorser is conditional; that is, his promise is that he will pay provided payment shall first have been properly demanded of the maker and due notice of the maker's neglect or refusal shall have been given. Ankeny v. Henry (1869) 1 I. 229.

§ 5934. [3524] **Liability of indorser of bearer paper.** Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. ['03, p. 380, § 67.]

Hist. '03, p. 380, § 67, reen. R. C. § 3524, reen. C. L. ib.

§ 5935. [3525] **Order of liability of indorsers.** As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees

who indorse are deemed to indorse jointly and severally. ['03, p. 380, § 68.]

Hist. '03, p. 380, § 68, reen. R. C. § 3525, reen. C. L. ib.

§ 5936. [3526] Liability of agent or broker. Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section 5932 unless he discloses the name of his principal, and the fact that he is acting only as agent. ['03, p. 380, § 69.]

Hist. '03, p. 380, § 69, reen. R. C. § 3526, reen. C. L. ib.

ARTICLE 6.

PRESENTMENT FOR PAYMENT.

§ 5937. [3527] When necessary. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. ['03, p. 380, § 70.]

Hist. '03, p. 380, § 70, reen. R. C. § 3527, reen. C. L. ib.

Demand unnecessary: Demand of payment from the maker of a promissory note at maturity is unnecessary in order to bring suit against him. Sabin v. Burke (1894) 4 I. 28, 37 P. 352.

§ 5938. [3528] When to be made. When the instrument is not payable on demand, presentment must be made on the day it falls due.

Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. ['03, p. 380, § 71.]

Hist. '03, p. 380, § 71, reen. R. C. § 3528, reen. C. L. ib.

Cited: Sheffield v. Cleland (1911) 19 I. 612, 115 P. 20; Miller v. Del Rio M. & M. Co. (1913) 25 I. 83, 136 P. 448.

§ 5939. [3529] What constitutes a sufficient presentment. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. ['03, p. 380, § 72.]

Hist. '03, p. 380, § 72, reen. R. C. § 3529, reen. C. L. ib.

Cross ref. Express reference to this section: Applied to presentment for acceptance of bills of exchange: § 6013.

§ 5940. Place of presentment. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.
2. Where no place of payment is specified but the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [C. L. § 3530.]

Hist. '03, p. 380, § 73, reen. R. C. § 3530; compiled and reen. C. L. ib.

§ 5941. [3531] **Instrument must be exhibited.** The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. ['03, p. 380, § 74.]

Hist. '03, p. 380, § 74, reen. R. C. § 3531, reen. C. L. ib.

§ 5942. [3532] **Presentment where instrument payable at bank.** Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. ['03, p. 380, § 75.]

Hist. '03, p. 380, § 75, reen. R. C. § 3532, reen. C. L. ib.

§ 5943. [3533] **Presentment where principal debtor is dead.** Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. ['03, p. 380, § 76.]

Hist. '03, p. 380, § 76, reen. R. C. § 3533, reen. C. L. ib.

§ 5944. [3534] **Presentment to partners.** Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. ['03, p. 380, § 77.]

Hist. '03, p. 380, § 77, reen. R. C. § 3534, reen. C. L. ib.

§ 5945. [3535] **Presentment to joint debtors.** Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. ['03, p. 380, § 78.]

Hist. '03, p. 380, § 78, reen. R. C. § 3535, reen. C. L. ib.

§ 5946. Presentment to drawer: When unnecessary. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. [C. L. § 3536.]

Hist. '03, p. 380, § 79, reen. R. C. § 3536; compiled and reen. C. L. ib.

§ 5947. [3537] **Presentment to indorser: When unnecessary.** Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. ['03, p. 380, § 80.]

Hist. '03, p. 380, § 80, reen. R. C. § 3537, reen. C. L. ib.

§ 5948. [3538] **When delay in making presentment is excused.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence.

When the cause of delay ceases to operate, presentment must be made with reasonable diligence. ['03, p. 380, § 81.]

Hist. '03, p. 380, § 81, reen. R. C. § 3538, reen. C. L. ib.

Cross ref. Express reference to this section: Applicable to delay in presentment to acceptor for honor or referee in case of need: § 6036.

§ 5949. [3539] **When presentment is unnecessary.** Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this title can not be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied. ['03, p. 380, § 82.]

Hist. '03, p. 380, § 82, reen. R. C. § 3539, reen. C. L. ib.

Construed with § 5978: Presentment for payment is waived by waiver of protest and notice of protest under this and § 5978. Bk. of Montpelier v. Montpelier L. Co. (1909) 16 I. 730, 102 P. 685.

§ 5950. [3540] **Dishonor by nonpayment.** The instrument is dishonored by nonpayment when:

1. It is duly presented for payment and payment is refused or can not be obtained; or,
2. Presentment is excused and the instrument is overdue and unpaid. ['03, p. 380, § 83.]

Hist. '03, p. 380, § 83, reen. R. C. § 3540, reen. C. L. ib.

§ 5951. [3541] **Right of recourse to parties secondarily liable.** Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. ['03, p. 380, § 84.]

Hist. '03, p. 380, § 84, reen. R. C. § 3541, reen. C. L. ib.

§ 5952. Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday. [C. L. § 3542.]

Hist. '03, p. 380, § 85, reen. R. C. § 3542; compiled and reen. C. L. ib.

Cross ref. Express reference to this section: Applied to presentment for acceptance of bills of exchange: § 6013.

§ 5953. [3543] **Date of payment: How determined.** Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. ['03, p. 380, § 86.]

Hist. '03, p. 380, § 86, reen. R. C. § 3543, reen. C. L. ib.

§ 5954. [3544] **Rule where instrument payable at bank.** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. ['03, p. 380, § 87.]

Hist. '03, p. 380, § 87, reen. R. C. § 3544, reen. C. L. ib.

§ 5955. [3545] **What constitutes payment in due course.** Payment is made in due course when it is made at or after the maturity of the in-

strument to the holder thereof in good faith and without notice that his title is defective. [C. L. § 3545.]

Hist. '03, p. 380, § 88, reen. R. C. § 3545; compiled and reen. C. L. ib.

ARTICLE 7.

NOTICE OF DISHONOR.

§ **5956.** [3546] **To whom given.** Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. ['03, p. 380, § 89.]

Hist. '03, p. 380, § 89, reen. R. C. § 3546, reen. C. L. ib.

Cited: (In brief of counsel) Bk. of Montpelier v. Montpelier L. Co. (1909) 16 I. 730.

§ **5957.** [3547] **By whom given.** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. ['03, p. 380, § 90.]

Hist. '03, p. 380, § 90, reen. R. C. § 3547, reen. C. L. ib.

§ **5958.** [3548] **Same: By agent.** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. ['03, p. 380, § 91.]

Hist. '03, p. 380, § 91, reen. R. C. § 3548, reen. C. L. ib.

§ **5959.** [3549] **Effect of notice given on behalf of holder.** Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. ['03, p. 380, § 92.]

Hist. '03, p. 380, § 92, reen. R. C. § 3549, reen. C. L. ib.

§ **5960.** [3550] **Effect where notice is given by party entitled thereto.** Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given. ['03, p. 380, § 93.]

Hist. '03, p. 380, § 93, reen. R. C. § 3550, reen. C. L. ib.

§ **5961.** [3551] **When agent may give notice.** Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. ['03, p. 380, § 94.]

Hist. '03, p. 380, § 94, reen. R. C. § 3551, reen. C. L. ib.

§ **5962.** [3552] **Sufficiency of notice.** A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. ['03, p. 380, § 95.]

Hist. '03, p. 380, § 95, reen. R. C. § 3552, reen. C. L. ib.

§ **5963. Form and service of notice.** The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. [C. L. § 3553.]

Hist. '03, p. 380, § 96, reen. R. C. § 3553; compiled and reen. C. L. ib.

§ **5964.** [3554] **To whom notice may be given.** Notice of dishonor may be given either to the party himself or to his agent in that behalf. ['03, p. 380, § 97.]

Hist. '03, p. 380, § 97, reen. R. C. § 3554, reen. C. L. ib.

§ **5965. Notice where party is dead.** When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. [C. L. § 3555.]

Hist. '03, p. 380, § 98, reen. R. C. § 3555; compiled and reen. C. L. ib.

§ **5966.** [3556] **Notice to partners.** Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. ['03, p. 380, § 99.]

Hist. '03, p. 380, § 99, reen. R. C. § 3556, reen. C. L. ib.

§ **5967.** [3557] **Notice to joint parties.** Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. ['03, p. 380, § 100.]

Hist. '03, p. 380, § 100, reen. R. C. § 3557, reen. C. L. ib.

§ **5968.** [3558] **Notice to bankrupt.** Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. ['03, p. 380, § 101.]

Hist. '03, p. 380, § 101, reen. R. C. § 3558, reen. C. L. ib.

§ **5969.** [3559] **Time within which notice must be given.** Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter. ['03, p. 380, § 102.]

Hist. '03, p. 380, § 102, reen. R. C. § 3559, reen. C. L. ib.

§ **5970.** [3560] **Where parties reside in same place.** Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post office in time to reach him in the usual course on the day following. ['03, p. 380, § 103.]

Hist. '03, p. 380, § 103, reen. R. C. § 3560, reen. C. L. ib.

§ **5971.** [3561] **Where parties reside in different places.** Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision. ['03, p. 380, § 104.]

Hist. '03, p. 380, § 104, reen. R. C. § 3561, reen. C. L. ib.

Cited: Hudson v. Carlson (1918) 31 I. 196, 170 P. 100.

Cross ref. Express reference to this section: Applicable to presentment for payment to acceptor for honor: § 6035.

§ 5972. [3562] **When sender deemed to have given due notice.** Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. ['03, p. 380, § 105.]

Hist. '03, p. 380, § 105, reen. R. C. § 3562, reen. C. L. ib.

Cited: Hudson v. Carlson (1918) 31 I. 196, 170 P. 100.

§ 5973. [3563] **Deposit in post office: What constitutes.** Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department. ['03, p. 380, § 106.]

Hist. '03, p. 380, § 106, reen. R. C. § 3563, reen. C. L. ib.

§ 5974. [3564] **Notice to antecedent party: Time of.** Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. ['03, p. 380, § 107.]

Hist. '03, p. 380, § 107, reen. R. C. § 3564, reen. C. L. ib.

§ 5975. Where notice must be sent. Where a party has added an address to his signature notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or,

2. If he lives in one place, and has his place of business in another, notice may be sent to either place; or,

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section. [C. L. § 3565.]

Hist. '03, p. 380, § 108, reen. R. C. § 3565; compiled and reen. C. L. ib.

§ 5976. Waiver of notice. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied. [C. L. § 3566.]

Hist. '03, p. 380, § 109, reen. R. C. § 3566; compiled and reen. C. L. ib.

Cited: Bk. of Montpelier v. Montpelier L. Co. (1909) 16 I. 730, 735, 102 P. 685.

§ 5977. [3567] **Parties affected by waiver.** Where the waiver is embodied in the instrument itself, it is binding upon all parties, but where it is written above the signature of an indorser, it binds him only. ['03, p. 380, § 110.]

Hist. '03, p. 380, § 110, reen. R. C. § 3567, reen. C. L. ib.

§ 5978. Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor. [C. L. § 3568.]

Hist. '03, p. 380, § 111, reen. R. C. § 3568; compiled and reen. C. L. ib.

"Protest" defined: The word "protest" in its popular sense, as generally and ordinarily used in commercial transactions, covers and includes all those acts and things necessary to be done in order to bind the indorser for the payment of the debt evidenced by the paper indorsed. Bk. of Montpelier v. Montpelier L. Co. (1909) 16 I. 730, 735, 102 P. 685.

§ 5979. [3569] **When notice dispensed with.** Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to, or does not reach, the parties sought to be charged. ['03, p. 380, § 112.]

Hist. '03, p. 380, § 112, reen. R. C. § 3569, reen. C. L. ib.

§ 5980. [3570] **Delay in giving notice: How excused.** Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. ['03, p. 380, § 113.]

Hist. '03, p. 380, § 113, reen. R. C. § 3570, reen. C. L. ib.

§ 5981. [3571] **When notice need not be given to drawer.** Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment. ['03, p. 380, § 114.]

Hist. '03, p. 380, § 114, reen. R. C. § 3571, reen. C. L. ib.

§ 5982. [3572] **When notice need not be given to indorser.** Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted, for his accommodation. ['03, p. 380, § 115.]

Hist. '03, p. 380, § 115, reen. R. C. § 3572, reen. C. L. ib.

§ 5983. [3573] **Notice of nonpayment where acceptance refused.** Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted. ['03, p. 380, § 116.]

Hist. '03, p. 380, § 116, reen. R. C. § 3573, reen. C. L. ib.

§ 5984. [3574] **Effect of omission to give notice of nonacceptance.** An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. ['03, p. 380, § 117.]

Hist. '03, p. 380, § 117, reen. R. C. § 3574, reen. C. L. ib.

§ 5985. [3575] **Protest: When necessary.** Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be; but protest is not required, except in the case of foreign bills of exchange. ['03, p. 380, § 118.]

Hist. '03, p. 380, § 118, reen. R. C. § 3575, reen. C. L. ib.

ARTICLE 8.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

§ 5986. [3576] **How instrument discharged.** A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.
4. By any other act which will discharge a simple contract for the payment of money.
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. ['03, p. 380, § 119.]

Hist '03, p. 380, § 119, reen. R. C. § 3576, reen. C. L. ib.

Cited: Fidelity S. Bk. v. Miller (1916) 29 I. 777, 162 P. 244.

§ 5987. [3577] **Discharge of person secondarily liable.** A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. ['03, p. 380, § 120.]

Hist. '03, p. 380, § 120, reen. R. C. § 3577, reen. C. L. ib.

Construed: This section does not apply to a case where there is default in the payment of a note by the original debtor, and by reason thereof the guarantor's liability becomes absolute; the section refers to discharges of persons secondarily liable on the instrument guaranteed, and not to persons whose contract of guaranty has become absolute by reason of default. Frost v. Harbert (1911) 20 I. 336, 118 P. 1095, 36 L. R. A. (N. S.) 875, 38 L. R. A. (N. S.) 875.

§ 5988. [3578] **Payment by party secondarily liable.** Where the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and had been paid by the drawer; and,
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. ['03, p. 380, § 121.]

Hist. '03, p. 380, § 121, reen. R. C. § 3578, reen. C. L. ib.

§ 5989. [3579] **Renunciation by holder.** The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. ['03, p. 380, § 122.]

Hist. '03, p. 380, § 122, reen. R. C. § 3579, reen. C. L. ib.

§ 5990. [3580] **Cancellation by mistake: Burden of proof.** A cancellation made unintentionally or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority. ['03, p. 380, § 123.]

Hist. '03, p. 380, § 123, reen. R. C. § 3580, reen. C. L. ib.

§ 5991. [3581] **Alteration of instruments: Effect of.** Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. ['03, p. 380, § 124.]

Hist. '03, p. 380, § 124, reen. R. C. § 3581, reen. C. L. ib.

§ 5992. [3582] **Material alteration defined.** Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number or the relations of the parties.
5. The medium of currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. ['03, p. 380, § 125.]

Hist. '03, p. 380, § 125, reen. R. C. § 3582, reen. C. L. ib.

Cited: Murphy v. Bartsch (1890) 2 I. 636, 23 P. 82.

ARTICLE 9.

BILLS OF EXCHANGE: FORM AND INTERPRETATION.

§ 5993. [3583] **Bill of exchange defined.** A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer. ['03, p. 380, § 126.]

Hist. '03, p. 380, § 126, reen. R. C. § 3583, reen. C. L. ib.

Cited: McCallum v. McClarren (1908) 15 I. 374, 378, 98 P. 200.

§ 5994. [3584] **Bill not an assignment of funds in hands of drawee.** A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee

is not liable on the bill unless and until he accepts the same. ['03, p. 380, § 127.]

Hist. '03, p. 380, § 127, reen. R. C. § 3584, reen. C. L. ib.

§ **5995.** [3585] **Bill addressed to more than one drawee.** A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession. ['03, p. 380, § 128.]

Hist. '03, p. 380, § 128, reen. R. C. § 3585, reen. C. L. ib.

§ **5996.** [3586] **Inland and foreign bills of exchange.** An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill. ['03, p. 380, § 129.]

Hist. '03, p. 380, § 129, reen. R. C. § 3586, reen. C. L. ib.

§ **5997.** [3587] **When bill may be treated as promissory note.** Where in a bill, drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. ['03, p. 380, § 130.]

Hist. '03, p. 380, § 130, reen. R. C. § 3587, reen. C. L. ib.

§ **5998.** [3588] **Referee in case of need.** The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. ['03, p. 380, § 131]

Hist. '03, p. 380, § 131, reen. R. C. § 3588, reen. C. L. ib.

ARTICLE 10.

ACCEPTANCE OF BILLS OF EXCHANGE.

§ **5999. Acceptance: How made: Form of.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. [C. L. § 3589.]

Hist. '03, p. 380, § 132, reen. R. C. § 3589; compiled and reen. C. L. ib.

Application: This section is not applicable in a suit upon an express agreement to pay claims evidenced by certain written orders which though honored and paid were not accepted in writing. Amonson v. Stone (1917) 30 I. 656, 167 P. 1029.

§ **6000.** [3590] **Holder entitled to acceptance on face of bill.** The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. ['03, p. 380, § 133.]

Hist. '03, p. 380, § 133, reen. R. C. § 3590, reen. C. L. ib.

§ **6001.** [3591] **Acceptance by separate instrument.** Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. ['03, p. 380, § 134.]

Hist. '03, p. 380, § 134, reen. R. C. § 3591, reen. C. L. ib.

§ **6002.** [3592] **Promise to accept before drawing.** An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. ['03, p. 380, § 135.]

Hist. '03, p. 380, § 135, reen. R. C. § 3592, reen. C. L. ib.

§ **6003.** [3593] **Time in which to accept.** The drawee is allowed 24 hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation. ['03, p. 380, § 136.]

Hist. '03, p. 380, § 136, reen. R. C. § 3593, reen. C. L. ib.

§ **6004.** [3594] **Liability of drawee retaining or destroying bill.** Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within 24 hours after such delivery, or within such other period as the holder may allow to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same. ['03, p. 380, 137.]

Hist. '03, p. 380, § 137, reen. R. C. § 3594, reen. C. L. ib.

§ **6005.** [3595] **Acceptance of incomplete bill.** A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. ['03, p. 380, § 138.]

Hist. '03, p. 380, § 138, reen. R. C. § 3595, reen. C. L. ib.

§ **6006.** [3596] **General and qualified acceptances.** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. ['03, p. 380, § 139.]

Hist. '03, p. 380, § 139, reen. R. C. § 3596, reen. C. L. ib.

§ **6007.** [3597] **When acceptance is general.** An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. ['03, p. 380, § 140.]

Hist. '03, p. 380, § 140, reen. R. C. § 3597, reen. C. L. ib.

§ **6008.** [3598] **When acceptance is qualified.** An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local, that is to say, an acceptance to pay only at a particular place.
4. Qualified as to time.
5. The acceptance of some one or more of the drawees, but not of all. ['03, p. 380, § 141.]

Hist. '03, p. 380, § 141, reen. R. C. § 3598, reen. C. L. ib.

§ **6009.** [3599] **Rights of parties as to qualified acceptance.** The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-

acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. ['03, p. 380, § 142.]

Hist. '03, p. 380, § 142, reen. R. C. § 3599, reen. C. L. ib.

ARTICLE 11.

PRESENTMENT FOR ACCEPTANCE.

§ 6010. [3600] **Presentment for acceptance: When necessary.** Presentment for acceptance must be made:

1. When the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or,

2. Where the bill expressly stipulates that it shall be presented for acceptance; or,

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable. ['03, p. 380, § 143.]

Hist. '03, p. 380, § 143, reen. R. C. § 3600, reen. C. L. ib.

§ 6011. [3601] **When failure to present releases drawer and indorser.** Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged. ['03, p. 380, § 144.]

Hist. '03, p. 380, § 144, reen. R. C. § 3601, reen. C. L. ib.

§ 6012. Presentment: How made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and,

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. [C. L. § 3602.]

Hist. '03, p. 380, § 145, reen. R. C. § 3602; compiled and reen. C. L. ib.

§ 6013. [3603] **On what days presentment may be made.** A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 5939 and 5952 of this chapter. When Saturday is not otherwise a holiday, presentment for acceptance may be made before 12 o'clock noon on that day. ['03, p. 380, § 146.]

Hist. '03, p. 380, § 146, reen. R. C. § 3603, reen. C. L. ib.

§ 6014. [3604] **Presentment where time insufficient.** Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers. ['03, p. 380, § 147.]

Hist. '03, p. 380, § 147, reen. R. C. § 3604, reen. C. L. ib.

§ 6015. When presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases:

1. Where the drawee is dead, or has absconded or is a fictitious person or a person not having capacity to contract by bill.
2. Where after the exercise of reasonable diligence, presentment can not be made.
3. Where although presentment has been irregular, acceptance has been refused on some other ground. [C. L. § 3605.]

Hist. '03, p. 380, § 148, reen. R. C. § 3605; compiled and reen. C. L. ib.

§ 6016. When dishonored by nonacceptance. A bill is dishonored by nonacceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this chapter is refused or can not be obtained; or,
2. When presentment for acceptance is excused and the bill is not accepted. [C. L. § 3606.]

Hist. '03, p. 380, § 149, reen. R. C. § 3606; compiled and reen. C. L. ib.

§ 6017. [3607] **Duty of holder where bill not accepted.** Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance, or he loses the right of recourse against the drawer and indorsers. ['03, p. 380, § 150.]

Hist. '03, p. 380, § 150, reen. R. C. § 3607, reen. C. L. ib.

§ 6018. Rights of holder where bill not accepted. When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. [C. L. § 3608.]

Hist. '03, p. 380, § 151, reen. R. C. § 3608; compiled and reen. C. L. ib.

ARTICLE 12.
PROTEST.

§ 6019. [3609] **In what cases protest necessary.** Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof, in case of dishonor, is unnecessary. ['03, p. 380, § 152.]

Hist. '03, p. 380, § 152, reen. R. C. § 3609, reen. C. L. ib.

§ 6020. Protest: How made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
4. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. [C. L. § 3610.]

Hist. '03, p. 380, § 153, reen. R. C. § 3610; compiled and reen. C. L. ib.

§ 6021. [3611] **Who may make protest.** Protest may be made by:

1. A notary public; or,
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more creditable witnesses. ['03, p. 380, § 154.]

Hist. '03, p. 380, § 154, reen. R. C. § 3611, reen. C. L. ib.

§ 6022. When protest must be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [C. L. § 3612.]

Hist. '03, p. 380, § 155, reen. R. C. § 3612; compiled and reen. C. L. ib.

§ 6023. Place of protest. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. [C. L. § 3613.]

Hist. '03, p. 380, § 156, reen. R. C. § 3613; compiled and reen. C. L. ib.

§ 6024. [3614] **Protest for nonacceptance and for nonpayment.** A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. ['03, p. 380, § 157.]

Hist. '03, p. 380, § 157, reen. R. C. § 3614, reen. C. L. ib.

§ 6025. [3615] **Protest where acceptor is insolvent.** Where the acceptor has been adjudged bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. ['03, p. 380, § 158.]

Hist. '03, p. 380, § 158, reen. R. C. § 3615, reen. C. L. ib.

§ 6026. [3616] **When protest dispensed with.** Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. ['03, p. 380, § 159.]

Hist. '03, p. 380, § 159, reen. R. C. § 3616, reen. C. L. ib.

§ 6027. [3617] **Protest of lost bill.** Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. ['03, p. 380, § 160.]

Hist. '03, p. 380, § 160, reen. R. C. § 3617, reen. C. L. ib.

ARTICLE 13.

ACCEPTANCE FOR HONOR.

§ 6028. [3618] **When bill may be accepted for honor.** Where a bill of exchange has been protested for dishonor by nonacceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. ['03, p. 380, § 161.]

Hist. '03, p. 380, § 161, reen. R. C. § 3618, reen. C. L. ib.

§ 6029. [3619] **Acceptance for honor: How made.** An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. ['03, p. 380, § 162.]

Hist. '03, p. 380, § 162, reen. R. C. § 3619, reen. C. L. ib.

§ 6030. [3620] **When deemed to be an acceptance for honor of the drawer.** Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. ['03, p. 380, § 163.]

Hist. '03, p. 380, § 163, reen. R. C. § 3620, reen. C. L. ib.

§ 6031. [3621] **Liability of acceptor for honor.** The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted it. ['03, p. 380, § 164.]

Hist. '03, p. 380, § 164, reen. R. C. § 3621, reen. C. L. ib.

§ 6032. [3622] **Agreement of acceptor for honor.** The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance: *Provided,* It shall not have been paid by the drawee: And, *Provided also,* That it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. ['03, p. 380, § 165.]

Hist. '03, p. 380, § 165, reen. R. C. § 3622, reen. C. L. ib.

§ 6033. Maturity of bill payable after sight and accepted for honor. Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. [C. L. § 3623.]

Hist. '03, p. 380, § 166, reen. R. C. § 3623; compiled and reen. C. L. ib.

§ 6034. [3624] **Protest of bill accepted for honor or containing reference.** Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non payment before it is presented for payment to the acceptor for honor or referee in case of need. ['03, p. 380, § 167.]

Hist. '03, p. 380, § 167, reen. R. C. § 3624, reen. C. L. ib.

§ 6035. Presentment for payment to acceptor for honor: How made. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 5971. [C. L. § 3625.]

Hist. '03, p. 380, § 168, reen. R. C. § 3625; compiled and reen. C. L. ib.

§ 6036. [3626] **When delay in making presentment is excused.** The provisions of section 5948 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. ['03, p. 380, § 169.]

Hist. '03, p. 380, § 169, reen. R. C. § 3626, reen. C. L. ib.

§ 6037. [3627] **Dishonor of bill by acceptor for honor.** When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. ['03, p. 380, § 170.]

Hist. '03, p. 380, § 170, reen. R. C. § 3627, reen. C. L. ib.

ARTICLE 14.

PAYMENT FOR HONOR.

§ 6038. Who may make payment for honor. Where a bill has been protested for nonpayment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [C. L. § 3628.]

Hist. '03, p. 380, § 171, reen. R. C. § 3628; compiled and reen. C. L. ib.

§ 6039. [3629] **Payment for honor: How made.** The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. ['03, p. 380, § 172.]

Hist. '03, p. 380, § 172, reen. R. C. § 3629, reen. C. L. ib.

§ 6040. Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [C. L. § 3630.]

Hist. '03, p. 380, § 173, reen. R. C. § 3630; compiled and reen. C. L. ib.

§ 6041. [3631] **Preference of parties offering to pay for honor.** Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. ['03, p. 380, § 174.]

Hist. '03, p. 380, § 174, reen. R. C. § 3631, reen. C. L. ib.

§ 6042. [3632] **Effect on subsequent parties where bill is paid for honor.** Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. ['03, p. 380, § 175.]

Hist. '03, p. 380, § 175, reen. R. C. § 3632, reen. C. L. ib.

§ 6043. [3633] **Where holder refuses to receive payment supra protest.** Where the holder of a bill refuses to receive payment supra protest

he loses his right of recourse against any party who would have been discharged by such payment. ['03, p. 380, § 176.]

Hist. '03, p. 380, § 176, reen. R. C. § 3633, reen. C. L. ib.

§ 6044. [3634] **Rights of payer for honor.** The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. ['03, p. 380, § 177.]

Hist. '03, p. 380, § 177, reen. R. C. § 3634, reen. C. L. ib.

ARTICLE 15.

BILLS IN A SET.

Cross ref. Uniform bills of lading law: c. 233.

§ 6045. [3635] **Bills in set constitute one bill.** Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. ['03, p. 380, § 178.]

Hist. '03, p. 380, § 178, reen. R. C. § 3635, reen. C. L. ib.

§ 6046. [3636] **Right of holders where different parts are negotiated.** Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. ['03, p. 380, § 179.]

Hist. '03, p. 380, § 179, reen. R. C. § 3636, reen. C. L. ib.

§ 6047. [3637] **Liability of holder who indorses two or more parts of a set to different persons.** Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. ['03, p. 380, § 180.]

Hist. '03, p. 380, § 180, reen. R. C. § 3637, reen. C. L. ib.

§ 6048. [3638] **Acceptance of bills drawn in sets.** The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. ['03, p. 380, § 181.]

Hist. '03, p. 380, § 181, reen. R. C. § 3638, reen. C. L. ib.

§ 6049. [3639] **Payment by acceptor of bills drawn in sets.** When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. ['03, p. 380, § 182.]

Hist. '03, p. 380, § 182, reen. R. C. § 3639, reen. C. L. ib.

§ 6050. [3640] **Effect of discharging one of a set.** Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. ['03 p. 380, § 183.]

Hist. '03, p. 380, § 183, reen. R. C. § 3640, reen. C. L. ib.

ARTICLE 16.

PROMISSORY NOTES AND CHECKS.

§ 6051. [3641] **Promissory note defined.** A negotiable promissory note, within the meaning of this chapter, is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. ['03, p. 380, § 184.]

Hist. '03, p. 380, § 184, reen. R. C. § 3641, reen. C. L. ib.

Cited: Union Stock Yards Nat. Bk. v. Bolan (1908) 14 I. 87, 93, 93 P. 508, 125 A. S. R. 146.

§ 6052. [3642] **Check defined.** A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check. ['03, p. 380, § 185.]

Hist. '03, p. 380, § 185, reen. R. C. § 3642, reen. C. L. ib.

Cited: Redfield v. Wells, 31 I. 415, 173 P. 640.

§ 6053. [3643] **When check must be presented for payment.** A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. ['03, p. 380, § 186.]

Hist. '03, p. 380, § 186, reen. R. C. § 3643, reen. C. L. ib.

§ 6054. [3644] **Certification equivalent to acceptance.** Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. ['03, p. 380, § 187.]

Hist. '03, p. 380, § 187, reen. R. C. § 3644, reen. C. L. ib.

Cited: Smith v. Field (1911) 19 I. 558, 563, 114 P. 668, Ann. Cas. 1912C 354.

§ 6055. [3645] **Certification discharges parties.** Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. ['03, p. 380, § 188.]

Hist. '03, p. 380, § 188, reen. R. C. § 3645, reen. C. L. ib.

§ 6056. [3646] **Check not an assignment until accepted.** A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. ['03, p. 380, § 189.]

Hist. '03, p. 380, § 189, reen. R. C. § 3646, reen. C. L. ib.

Cited: Smith v. Field (1911) 19 I. 558, 114 P. 668, Ann. Cas. 1912C 354; Kaesemeyer v. Smith (1912) 22 I. 1, 13, 123 P. 943, 43 L. R. A. (N. S.) 100.

ARTICLE 17.

GENERAL PROVISIONS.

§ 6057. Short title. This title shall be cited as the uniform negotiable instruments law. [C. L. § 3647.]

Hist. '03, p. 380, § 190, reen. R. C. § 3647; compiled and reen. C. L. ib.

§ 6058. [3648] **Definitions.** In this chapter unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print. ['03, p. 380, § 191.]

Hist. '03, p. 380, § 191, reen. R. C. § 3648, reen. C. L. ib.

Holder: An assignee for the purpose of collection is a holder within the meaning of the section. Craig v. Palo Alto Stock Farm (1909) 16 I. 701, 102 P. 393.

The law raises the presumption that title has passed to the holder. Home Land Co. v. Osborn (1910) 19 I. 95, 112 P. 764.

Any person is authorized to bring an action on a promissory note who holds it under proper authority and for the real owner thereof. Anderson v. Coolin (1916) 28 I. 494, 155 P. 677.

An indorsee who is in possession of a promissory note is the holder thereof and may sue thereon in his own name. Utah Imp. etc. Co. v. Kenyon (1917) 30 I. 407, 164 P. 1176.

§ 6059. [3649] **Primary and secondary liability.** The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable. ['03, p. 380, § 192.]

Hist. '03, p. 380, § 192, reen. R. C. § 3649, reen. C. L. ib.

§ 6060. [3650] **Reasonable time: How determined.** In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. ['03, p. 380, § 193.]

Hist. '03, p. 380, § 193, reen. R. C. § 3650, reen. C. L. ib.

Cited: (In brief of counsel) Miller v. Del Rio M. & M. Co. (1913) 25 I. 83.

Question of fact: What is a reasonable time under this section is one of fact to be determined by the circumstances of each particular case. Sheffield v. Cleland (1911) 19 I. 612, 115 P. 20.

§ 6061. Last day falling on holiday. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [C. L. § 3651.]

Hist. '03, p. 380, § 194, reen. R. C. § 3651; compiled and reen. C. L. ib.

§ 6062. Law merchant to govern omitted cases. In any case not provided for in this chapter, the rules of law and equity including the law merchant shall govern. [C. L. § 3653.]

Hist. '03, p. 380, § 196, reen. R. C. § 3653; compiled and reen. C. L. ib.

CHAPTER 232.

INSTRUMENTS MADE NEGOTIABLE BY INDORSEMENT.

§ 6063. [3654] **Indorsement of written contract.** A nonnegotiable written contract for the payment of money or personal property may be

transferred by indorsement, in like manner with negotiable instruments. Such indorsement transfers all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement. [R. S. § 3600.]

Hist. R. S. § 3600, reen. R. C. § 3654, reen. C. L. ib.

Cited: Carstensen & Anson Co. v. Wright (1914) 25 I. 492, 138 P. 830.

Application: This and the following sections refer only to written evidences of debt sold and transferred for value, and not to those deposited as collateral security. Murphy v. Bartsch (1890) 2 I. 636, 23 P. 82.

§ 6064. [3655] **Liability of indorser.** Every assignor, his heirs, executors or administrators, of every such instrument in writing, is liable to the action of the assignee thereof, his executors, or administrators, if such assignee has used diligence, by the institution and prosecution of a suit against the maker of such instrument, or against his heirs, executors or administrators, for recovery of the money or property due thereon, or damages in lieu thereof; but if the institution of such suit would have been unavailing, or the maker had absconded or left, or was absent from the state when such assigned instrument became due, or absconds within 20 days thereafter, such assignee, his heirs, executors or administrators, may recover against the assignor, or his heirs, executors or administrators, as if due diligence by suit had been used. By "due diligence" shall be understood the institution of suit within 60 days after the maturity of the obligation. [R. S. § 3601.]

Hist. R. S. § 3601, reen. R. C. § 3655, reen. C. L. ib.

TITLE XLVIII.

CHAPTER 233.

UNIFORM BILLS OF LADING ACT.

Note: In 1905 the conference of commissioners on uniform state laws retained Prof. Samuel Williston of Harvard university law school to prepare an act to make uniform the law of bills of lading, successive drafts of which were submitted to the conference at its meetings in 1906, 1907, 1908 and 1909, when the fourth tentative draft with numerous corrections was approved and recommended for adoption in the various states. Since that time it has been adopted in 22 jurisdictions as follows: Alaska, California, Connecticut, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin. The changes made by this act in the common law are pointed out in the article on bills of lading, 4 R. C. L. 1.

Hist. The act was adopted in Idaho '15, c. 16, p. 53, and is here given as adopted except § 54 of the original relating to then existing bills, now obsolete, and § 55, repealing inconsistent legislation, are omitted.

Cross ref. Not repealed by uniform sales law: § 5750.

ARTICLE 1.

THE ISSUE OF BILLS OF LADING.

§ 6065. Bills governed by this act. Bills of lading issued by any common carrier shall be governed by this chapter. ['15, c. 16, § 1, p. 54.]

Hist. '15, c. 16, § 1, p. 54, reen. C. L. 254:1.

§ 6066. Form of bills: Essential terms. Every bill must embody within its written or printed terms:

1. The date of its issue.

2. The name of the person from whom the goods have been received.

3. The place where the goods have been received.

4. The place to which the goods are to be transported.

5. A statement whether the goods received will be delivered to a specified person, or to the order of a specified person.

6. A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in section 6087; and

7. The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section. ['15, c. 16, § 2, p. 54.]

Hist. '15, c. 16, § 2, p. 54, reen. C. L. 254:2.

§ 6067. Form of bills: What terms may be inserted. A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

1. Be contrary to law or public policy; or,

2. In any wise impair his obligation to exercise at least that degree of care in the transportation and safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. ['15, c. 16, § 3, p. 55.]

Hist. '15, c. 16, § 3, p. 55, reen. C. L. 254:3.

Liability for damage by fire: A bill of lading stating that the carrier shall not be liable for any loss or damage by fire is void as against the shipper unless it be shown by other evidence that there was a consideration for such exemption. McIntosh v. O. R. & N. Co. (1909) 17 I. 100, 105 P. 66.

§ 6068. Definition of nonnegotiable or straight bill. A bill in which it is stated that the goods are consigned or destined to a specified person is a nonnegotiable or straight bill. ['15, c. 16, § 4, p. 55.]

Hist. '15, c. 16, § 4, p. 55, reen. C. L. 254:4.

§ 6069. Definition of negotiable or order bill. A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is a negotiable or order bill. Any provision in such a bill that it is nonnegotiable shall not affect its negotiability within the meaning of this chapter. ['15, c. 16, § 5, p. 55.]

Hist. '15, c. 16, § 5, p. 55, reen. C. L. 254:5.

§ 6070. Negotiable bills must not be issued in sets. Negotiable bills issued in this state for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets.

If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. ['15, c. 16, § 6, p. 55.]

Hist. '15, c. 16, § 6, p. 55, reen. C. L. 254:6.

§ 6071. Duplicate negotiable bills must be so marked. When more than one negotiable bill is issued in this state for the same goods to be

transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. ['15, c. 16, § 7, p. 55.]

Hist. '15, c. 16, § 7, p. 55, reen. C. L. 254:7.

Cross ref. Express reference to this section: Penalty for violation: § 6110.

§ 6072. Nonnegotiable bills shall be so marked. A nonnegotiable bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable." This section shall not apply, however, to memoranda or acknowledgments of an informal character. ['15, c. 16, § 8, p. 56.]

Hist. '15, c. 16, § 8, p. 56, reen. C. L. 254:8.

§ 6073. Insertion of name of person to be notified. The insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. ['15, c. 16, § 9, p. 56.]

Hist. '15, c. 16, § 9, p. 56, reen. C. L. 254:9.

§ 6074. Acceptance of bill indicates assent to its terms. Except as otherwise provided in this chapter, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy. ['15, c. 16, § 10, p. 56.]

Hist. '15, c. 16, § 10, p. 56, reen. C. L. 254:10.

ARTICLE 2.

OBLIGATIONS AND RIGHTS OF CARRIERS UPON THEIR BILLS OF LADING.

§ 6075. Obligation of carrier to deliver. A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by

1. An offer in good faith to satisfy the carrier's lawful lien upon the goods.

2. An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable; and,

3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. ['15, c. 16, § 11, p. 56.]

Hist. '15, c. 16, § 11, p. 56, reen. C. L. 254:11.

§ 6076. Justification of carrier in delivering. A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is:

1. A person lawfully entitled to the possession of the goods; or,
2. The consignee named in a nonnegotiable bill for the goods; or,
3. A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee. ['15, c. 16, § 12, p. 57.]

Hist. '15, c. 16, § 12, p. 57, reen. C. L. 254:12.

Cross ref. Express reference to this section: Excepted from provision of § 6086, providing that adverse title is no defense.

§ 6077. Carrier's liability for misdelivery. Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 1 and 2 of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he:

1. Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery; or,
2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. ['15, c. 16, § 13, p. 57.]

Hist. '15, c. 16, § 13, p. 57, reen. C. L. 254:13.

§ 6078. Negotiable bills must be cancelled when goods delivered. Except as provided in section 6091, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto. ['15, c. 16, § 14, p. 57.]

Hist. '15, c. 16, § 14, p. 57, reen. C. L. 254:14.

§ 6079. Negotiable bills must be cancelled or marked when parts of goods delivered. Except as provided in section 6091, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either:

1. To take up and cancel the bill; or,
2. To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. ['15, c. 16, § 15, p. 58.]

Hist. '15, c. 16, § 15, § 58, reen. C. L. 254:15.

§ 6080. Altered bills. Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. ['15, c. 16, § 16, p. 58.]

Hist. '15, c. 16, § 16, p. 58, reen. C. L. 254:16.

§ 6081. Lost or destroyed bills. Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. ['15, c. 16, § 17, p. 58.]

Hist. '15, c. 16, § 17, p. 58, reen. C. L. 254:17.

§ 6082. Effect of duplicate bills. A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. ['15, c. 16, § 18, p. 58.]

Hist. '15, c. 16, § 18, p. 58, reen. C. L. 254:18.

§ 6083. Carrier can not set up title in himself. No title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. ['15, c. 16, § 19, p. 59.]

Hist. '15, c. 16, § 19, p. 59, reen. C. L. 254:19.

§ 6084. Interpleader of adverse claimants. If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate. ['15, c. 16, § 20, p. 59.]

Hist. '15, c. 16, § 20, p. 59, reen. C. L. 254:20.

§ 6085. Carrier has reasonable time to determine validity of claims. If some other than the consignee or person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. ['15, c. 16, § 21, p. 59.]

Hist. '15, c. 16, § 21, p. 59, reen. C. L. 254:21.

§ 6086. Adverse title is no defense, except as above provided. Except as provided in the two preceding sections and in section 6076, no right or title of a third person unless enforced by legal process shall be a defense to an action brought by the consignee of a nonnegotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand. ['15, c. 16, § 22, p. 59.]

Hist. '15, c. 16, § 22, p. 59, reen. C. L. 254:22.

§ 6087. Liability for nonreceipt or misdescription of goods. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to:

1. The consignee named in a nonnegotiable bill; or,
2. The holder of a negotiable bill,

Who has given value in good faith relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill. ['15, c. 16, § 23, p. 59.]

Hist. '15, c. 16, § 23, p. 59, reen. C. L. 254:23.

Cross ref. Express reference to this section: General description herein prescribed an essential part of bill: § 6066.

§ 6088. Attachment or levy upon goods for which a negotiable bill has been issued. If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they can not thereafter, while in possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. ['15, c. 16, § 24, p. 60.]

Hist. '15, c. 16, § 24, p. 60, reen. C. L. 254:24.

§ 6089. Creditor's remedies to reach negotiable bills. A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is al-

lowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process. ['15, c. 16, § 25, p. 60.]

Hist. '15, c. 16, § 25, p. 60, reen. C. L. 254:25.

§ 6090. Negotiable bill must state charges for which lien is claimed. If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. ['15, c. 16, § 26, p. 60.]

Hist. '15, c. 16, § 26, p. 60, reen. C. L. 254:26.

§ 6091. Effect of sale. After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable. ['15, c. 16, § 27, p. 61.]

Hist. '15, c. 16, § 27, p. 61, reen. C. L. 254:27.

Cross ref. Express reference to this section: Excepted from provision requiring cancellation of bill before goods delivered: §§ 6078-9.

ARTICLE 3.

NEGOTIATION AND TRANSFER OF BILLS.

§ 6092. Negotiation of negotiable bills by delivery. A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or subsequent indorsee of the bill has indorsed it in blank. ['15, c. 16, § 28, p. 61.]

Hist. '15, c. 16, § 28, p. 61, reen. C. L. 254:28.

§ 6093. Negotiation of negotiable bills by indorsement. A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. ['15, c. 16, § 29, p. 61.]

Hist. '15, c. 16, § 29, p. 61, reen. C. L. 254:29.

§ 6094. Transfer of bills. A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby.

A nonnegotiable bill can not be negotiated, and the indorsement of such bill gives the transferee no additional right. ['15, c. 16, § 30, p. 61.]

Hist. '15, c. 16, § 30, p. 61, reen. C. L. 254:30.

§ 6095. Who may negotiate a bill. A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotia-

tion the bill is in such form that it may be negotiated by delivery. ['15, c. 16, § 31, p. 61.]

Hist. '15, c. 16, § 31, p. 61, reen. C. L. 254:31.

§ 6096. Rights of person to whom a bill has been negotiated. A person to whom a negotiable bill has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and,

2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. ['15, c. 16, § 32, p. 62.]

Hist. '15, c. 16, § 32, p. 62, reen. C. L. 254:32.

§ 6097. Rights of person to whom a bill has been transferred. A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferror, the title to the goods, subject to the terms of any agreement with the transferror. If the bill is nonnegotiable such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferror of the bill immediately before the notification.

Prior to the notification of the carrier by the transferror or transferee of a nonnegotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferror, or by a notification to the carrier by the transferror or a subsequent purchaser from the transferror of a subsequent sale of the goods by the transferror.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods. ['15, c. 16, § 33, p. 62.]

Hist. '15, c. 16, § 33, p. 62, reen. C. L. 254:33.

§ 6098. Transfer of negotiable bill without indorsement. Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferror is essential for negotiation, the transferee acquires a right against the transferror to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. ['15, c. 16, § 34, p. 62.]

Hist. '15, c. 16, § 34, p. 62, reen. C. L. 254:34.

§ 6099. Warranties on sale of bill. A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants:

1. That the bill is genuine.

2. That he has a legal right to transfer it.

3. That he has knowledge of no fact which would impair the validity or worth of the bill; and,

4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim. ['15, c. 16, § 35, p. 63.]

Hist. '15, c. 16, § 35, p. 63, reen. C. L. 254:35.

§ 6100. Indorser not a guarantor. The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations. ['15, c. 16, § 36, p. 63.]

Hist. '15, c. 16, § 36, p. 63, reen. C. L. 254:36.

§ 6101. No warranty implied from accepting payment of a debt. A mortgagee or pledgee, or other holder of a bill for security, who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described. ['15, c. 16, § 37, p. 63.]

Hist. '15, c. 16, § 37, p. 63, reen. C. L. 254:37.

§ 6102. When negotiation not impaired by fraud, accident, mistake, duress or conversion. The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress or conversion. ['15, c. 16, § 38, p. 63.]

Hist. '15, c. 16, § 38, p. 63, reen. C. L. 254:38.

§ 6103. Subsequent negotiation. Where a person having sold, mortgaged or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. ['15, c. 16, § 39, p. 63.]

Hist. '15, c. 16, § 39, p. 63, reen. C. L. 254:39.

§ 6104. Form of the bill as indicating rights of buyer and seller. Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

1. Where by the bill the goods are deliverable to the buyer or to his

agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

2. Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

3. Where by the bill the goods are delivered to the order of the buyer or his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

4. Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein or of the goods, without notice of the facts making the transfer wrongful. ['15, c. 16, § 40, p. 64.]

Hist. '15, c. 16, § 40, p. 64, reen. C. L. 254:40.

§ 6105. Demand, presentation or sight draft must be paid, but draft on more than three days' time merely accepted before buyer is entitled to the accompanying bill. Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

1. If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

2. If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not the payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order. ['15, c. 16, § 41, p. 65.]

Hist. '15, c. 16, § 41, p. 65, reen. C. L. 254:41.

§ 6106. Negotiation defeats vendor's lien. Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subse-

quent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. ['15, c. 16, § 42, p. 65.]

Hist. '15, c. 16, § 42, p. 65, reen. C. L. 254:42.

§ 6107. When rights and remedies under mortgages and liens are not limited. Except as provided in section 6106, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them. ['15, c. 16, § 43, p. 65.]

Hist. '15, c. 16, § 43, p. 65, reen. C. L. 254:43.

ARTICLE 4.

CRIMINAL OFFENSES.

§ 6108. Issue of bill for goods not received. Any officer, agent or servant of a carrier who, with intent to defraud, issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5000, or by both. ['15, c. 16, § 44, p. 66.]

Hist. '15, c. 16, § 44, p. 66, reen. C. L. 254:44.

§ 6109. Issue of bill containing false statement. Any officer, agent or servant of a carrier who, with intent to defraud, issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime; and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1000, or by both. ['15, c. 16, § 45, p. 66.]

Hist. '15, c. 16, § 45, p. 66, reen. C. L. 254:45.

§ 6110. Issue of duplicate bills not so marked. Any officer, agent or servant of a carrier who, with intent to defraud, issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section 6071, knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncancelled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5000, or by both. ['15, c. 16, § 46, p. 66.]

Hist. '15, c. 16, § 46, p. 66, reen. C. L. 254:46.

§ 6111. Negotiation of bill for mortgaged goods. Any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterward negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1000, or by both. ['15, c. 16, § 47, p. 66.]

Hist. '15, c. 16, § 47, p. 66, reen. C. L. 254:47.

§ 6112. Negotiation of bill when goods are not in carrier's possession. Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill, are not in possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5000, or by both. ['15, c. 16, § 48, p. 66.]

Hist. '15, c. 16, § 48, p. 66, reen. C. L. 254:48.

§ 6113. Inducing carrier to issue bill when goods have not been received. Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5000, or by both. [C. L. 254:49.]

Hist. '15, c. 16, § 49, p. 67; compiled and reen. C. L. 254:49.

§ 6114. Issue of nonnegotiable bill not so marked. Any person who with intent to defraud issues or aids in issuing a nonnegotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding $5000, or by both. ['15, c. 16, § 50, p. 67.]

Hist. '15, c. 16, § 50, p. 67, reen. C. L. 254:50.

ARTICLE 5.

INTERPRETATION.

§ 6115. Rule for cases not provided for in this chapter. In any case not provided for in this chapter the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, accident, mistake, bankruptcy or other invalidating cause, shall govern. ['15, c. 16, § 51, p. 67.]

Hist. '15, c. 16, § 51, p. 67, reen. C. L. 254:51.

§ 6116. Interpretation shall give effect to purpose of uniformity. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. ['15, c. 16, § 52, p. 67.]

Hist. '15, c. 16, § 52, p. 67, reen. C. L. 254:52.

§ 6117. Definitions. 1. In this chapter, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

2. A thing is done "in good faith," within the meaning of this chapter, when it is in fact done honestly, whether it be done negligently or not. ['15, c. 16, § 53, p. 67.]

Hist. '15, c. 16, § 53, p. 67, reen. C. L. 254:53.

§ 6118. Name of chapter. This chapter may be cited as the uniform bills of lading law. ['15, c. 16, § 56, p. 68.]

Hist. '15, c. 16, § 56, p. 68, reen. C. L. 254:54.

TITLE XLIX.

CHAPTER 234.

UNIFORM WAREHOUSE RECEIPTS LAW.

Note: This act was recommended to the states for adoption by the conference of commissioners on uniform state laws in August, 1906. It was prepared by Prof. Samuel Williston of Harvard university law school and Barry Mohum, Esq., of the Washington bar. It has been adopted in every jurisdiction in the United States except Arizona, Hawaii Georgia, Indiana, Kentucky, Mississippi, New Hampshire, Oklahoma, Porto Rico, South Carolina and Texas.

Hist. The act was adopted in Idaho '15, c. 31, p. 85, reen. in C. L. c. 255, omitting § 59 of the original act relating to then existing receipts as obsolete, and § 60, the repealing clause; a few minor changes due to clerical errors having been made to conform to the uniform draft.

A prior law on the subject of warehouse receipts is found in R. C. §§ 1486-93, as a part of the state grain commission law, which was repealed by the public utilities law, '13, c. 61, § 79, p. 296. This former law was construed in Frontier Mill. etc. Co. v. Roy White etc. Co. (1914) 25 I. 478, 138 P. 825.

Cross ref. Not repealed by uniform sales law: § 5750.

ARTICLE 1.

THE ISSUE OF WAREHOUSE RECEIPTS.

§ 6119. Persons who may issue receipts. Warehouse receipts may be issued by any warehouseman. ['15, c. 31, § 1, p. 86.]

Hist. '15, c. 31, § 1, p. 86, reen. C. L. 255:1.

§ 6120. Form of receipts: Essential terms. Warehouse receipts need not be any particular form, but every such receipt must embody within its written or printed terms:

1. The location of the warehouse where the goods are stored.
2. The date of issue of the receipt.
3. The consecutive number of the receipt.
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
5. The rate of storage charges.
6. A description of the goods or of the packages containing them.
7. The signature of the warehouseman, which may be made by his authorized agent.
8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and
9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required. ['15, c. 31, § 2, p. 86.]

Hist. '15, c. 31, § 2, p. 86, reen. C. L. 255:2.

Cross ref. Receipts for agricultural products: § 6200.

§ 6121. Form of receipts: What terms may be inserted. A warehouseman may insert in a receipt issued by him, any other terms and conditions, provided that such terms and conditions shall not:

1. Be contrary to the provisions of this chapter:
2. In any wise impair his obligation to exercise that degree of care in the safe keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. ['15, c. 31, § 3, p. 87.]

Hist. '15, c. 31, § 3, p. 87, reen. C. L. 255:3.

§ 6122. Definition of nonnegotiable receipt. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. ['15, c. 31, § 4, p. 87.]

Hist. '15, c. 31, § 4, p. 87, reen. C. L. 255:4.

§ 6123. Definition of negotiable receipt. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void. ['15, c. 31, § 5, p. 87.]

Hist. '15, c. 31, § 5, p. 87, reen. C. L. 255:5.

§ 6124. Duplicate receipts must be so marked. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to anyone who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. [C. L. 255:6.]

Hist. '15, c. 31, § 6, p. 87; compiled and reen. C. L. 255:6.

§ 6125. Failure to mark "not negotiable." A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "nonnegotiable" or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgements of an informal character. ['15, c. 31, § 7, p. 88.]

Hist. '15, c. 31, § 7, p. 88, reen. C. L. 255:7.

ARTICLE 2.

OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS.

§ 6126. Obligation of warehouseman to deliver. A warehouseman, in the absence of some lawful excuse provided by this chapter, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

1. An offer to satisfy the warehouseman's lien.
2. An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. ['15, c. 31, § 8, p. 88.]

Hist. '15, c. 31, § 8, p. 88, reen. C. L. 255:8.

§ 6127. Justification of warehouseman in delivering. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is:

1. The person lawfully entitled to the possession of the goods, or his agent.
2. A person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or
3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. ['15, c. 31, § 9, p. 88.]

Hist. '15, c. 31, § 9, p. 88, reen. C. L. 255:9.

Cross ref. Express reference to this section: Excepted from provision that adverse title is no defense: § 6137.

§ 6128. Warehouseman's liability for misdelivery. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 1 and 2 of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either:

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. ['15, c. 31, § 10, p. 89.]

Hist. '15, c. 31, § 10, p. 89, reen. C. L. 255:10.

§ 6129. Negotiable receipts must be cancelled when goods delivered. Except as provided in section 6154, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. ['15, c. 31, § 11, p. 89.]

Hist. '15, c. 31, § 11, p. 89, reen. C. L. 255:11.

§ 6130. Negotiable receipts must be cancelled or marked when part of goods delivered. Except as provided in section 6154, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to anyone who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. ['15, c. 31, § 12, p. 89.]

Hist. '15, c. 31, § 12, p. 89, reen. C. L. 255:12

§ 6131. Altered receipts. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was:

1. Immaterial.
2. Authorized, or
3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took such receipt with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. ['15, c. 31, § 13, p. 89.]

Hist. '15, c. 31, § 13, p. 89, reen. C. L. 255:13.

§ 6132. Lost or destroyed receipts. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the

delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. ['15, c. 31, § 14, p. 90.]

Hist. '15, c. 31, § 14, p. 90, reen. C. L. 255:14.

Cross ref. Express reference to this section: Excepted from penalty for issuing duplicate receipts: § 6170.

§ 6133. Effect of duplicate receipts. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncancelled at the date of the issue of the duplicate, but shall impose upon him no other liability. ['15, c. 31, § 15, p. 90.]

Hist. '15, c. 31, § 15, p. 90, reen. C. L. 255:15.

§ 6134. Warehouseman can not set up title in himself. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. ['15, c. 31, § 16, p. 90.]

Hist. '15, c. 31, § 16, p. 90, reen. C. L. 255:16.

§ 6135. Interpleader of adverse claimants. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods, or as original suit, whichever is appropriate, require all known claimants to interplead. ['15, c. 31, § 17, p. 91.]

Hist. '15, c. 31, § 17, p. 91, reen. C. L. 255:17.

§ 6136. Warehouseman has reasonable time to determine validity of claims. If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. ['15, c. 31, § 18, p. 91.]

Hist. '15, c. 31, § 18, p. 91, reen. C. L. 255:18.

§ 6137. Adverse title is no defense except as above provided. Except as provided in the two preceding sections and in sections 6127 and 6154, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against

the warehouseman for failure to deliver the goods according to the terms of the receipt. ['15, c. 31, § 19, p. 91.]

Hist. '15, c. 31, § 19, p. 91, reen. C. L. 255:19.

§ 6138. Liability for nonexistence or misdescription of goods. A warehouseman shall be liable to the holder of a receipt for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like import, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. ['15, c. 31, § 20, p. 91.]

Hist. '15, c. 31, § 20, p. 91, reen. C. L. 255:20.

§ 6139. Liability for care of goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. ['15, c. 31, § 21, p. 91.]

Hist. '15, c. 31, § 21, p. 91, reen. C. L. 255:21.

§ 6140. Goods must be kept separate. Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. ['15, c. 31, § 22, p. 92.]

Hist. '15, c. 31, § 22, p. 92, reen. C. L. 255:22.

§ 6141. Fungible goods may be commingled if warehouseman authorized. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. ['15, c. 31, § 23, p. 92.]

Hist. '15, c. 31, § 23, p. 92, reen. C. L. 255:23.

Cross ref. Fungible agricultural products of different grades to be kept separate: § 6198. Sale of fungible goods: § 5676.

§ 6142. Liability of warehouseman to depositors of commingled goods. The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. ['15, c. 31, § 24, p. 92.]

Hist. '15, c. 31, § 24, p. 92, reen. C. L. 255:24.

§ 6143. Attachment or levy upon goods for which negotiable receipt has been issued. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a

purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they can not thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. ['15, c. 31, § 25, p. 92.]

Hist. '15, c. 31, § 25, p. 92, reen. C. L. 255:25.

§ 6144. Creditor's remedies to reach negotiable receipts. A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which can not readily be attached or levied upon by ordinary legal process. [C. L. 255:26.]

Hist. '15, c. 31, § 26, p. 92; compiled and reen. C. L. 255:26.

§ 6145. What claims are included in the warehouseman's lien. Subject to the provisions of section 6148, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. ['15, c. 31, § 27, p. 93.]

Hist. '15, c. 31, § 27, p. 93, reen. C. L. 255:27.

§ 6146. Against what property the lien may be enforced. Subject to the provisions of section 6148 a warehouseman's lien may be enforced:

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and,

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. ['15, c. 31, § 28, p. 93.]

Hist. '15, c. 31, § 28, p. 93, reen. C. L. 255:28.

§ 6147. How the lien may be lost. A warehouseman loses his lien upon goods:

1. By surrendering possession thereof; or,

2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this chapter. ['15, c. 31, § 29, p. 93.]

Hist. '15, c. 31, § 29, p. 93, reen. C. L. 255:29.

§ 6148. Negotiable receipt must state charges for which lien is claimed. If a negotiable receipt is issued for goods, the warehouseman

shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 6145, although the amount of charges so enumerated is not stated in the receipt. ['15, c. 31, § 30, p. 93.]

Hist. '15, c. 31, § 30, p. 93, reen. C. L. 255:30.

§ 6149. Warehouseman need not deliver until lien is satisfied. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. ['15, c. 31, § 31, p. 93.]

Hist. '15, c. 31, § 31, p. 93, reen. C. L. 255:31.

§ 6150. Warehouseman's lien does not preclude other remedies. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. ['15, c. 31, § 32, p. 93.]

Hist. '15, c. 31, § 32, p. 93, reen. C. L. 255:32.

§ 6151. Satisfaction of lien by sale. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

1. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due.
2. A brief description of the goods against which the lien exists.
3. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than 10 days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail; and
4. A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than 15 days from the time of the first publication. If there is no newspaper pub-

lished in such place, the advertisement shall be posted at least 10 days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this chapter, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. ['15, c. 31, § 33, p. 94.]

Hist. '15, c. 31, § 33, p. 94, reen. C. L. 255:33.

§ 6152. Perishable and hazardous goods. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner or to the person in whose name the goods are stored as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. ['15, c. 31, § 34, p. 95.]

Hist. '15, c. 31, § 34, p. 95, reen. C. L. 255:34.

§ 6153. Other methods of enforcing liens. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. ['15, c. 31, § 35, p. 95.]

Hist. '15, c. 31, § 35, p. 95, reen. C. L. 255:35.

§ 6154. Effect of sale. After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. ['15, c. 31, § 36, p. 95.]

Hist. '15, c. 31, § 36, p. 95, reen. C. L. 255:36.

Cross ref. Express reference to this section: Excepted from provisions requiring cancellation of bill when goods delivered: §§ 6129-30. Excepted from provision that adverse title is no defense: § 6137.

ARTICLE 3.

NEGOTIATION AND TRANSFER OF RECEIPTS.

§ 6155. Negotiation of negotiable receipts by delivery. A negotiable receipt may be negotiated by delivery:

1. Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer; or,

2. Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. ['15, c. 31, § 37, p. 96.]

Hist. '15, c. 31, § 37, p. 96, reen. C. L. 255:37.

§ 6156. Negotiation of negotiable receipts by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner. ['15, c. 31, § 38, p. 96.]

Hist. '15, c. 31, § 38, p. 96, reen. C. L. 255:38.

§ 6157. Transfer of receipts. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A nonnegotiable receipt can not be negotiated, and the indorsement of such a receipt gives the transferee no additional right. ['15, c. 31, § 39, p. 96.]

Hist. '15, c. 31, § 39, p. 96, reen. C. L. 255:39.

§ 6158. Who may negotiate a receipt. A negotiable receipt may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of such person, or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery. ['15, c. 31, § 40, p. 96.]

Hist. '15, c. 31, § 40, p. 96, reen. C. L. 255:40.

Full negotiability: Full negotiability is given by this section. An alternative reading of the uniform act adopted in some states is not so broad in its terms.

§ 6159. Rights of person to whom a receipt has been negotiated. A person to whom a negotiable receipt has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and,

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the

warehouseman had contracted directly with him. ['15, c. 31, § 41, p. 97.]

Hist. '15, c. 31, § 41, p. 97, reen. C. L. 255:41.

§ 6160. Rights of person to whom a receipt has been transferred. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor.

If the receipt is nonnegotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. ['15, c. 31, § 42, p. 97.]

Hist. '15, c. 31, § 42, p. 97, reen. C. L. 255:42.

§ 6161. Transfer of negotiable receipt without indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. ['15, c. 31, § 43, p. 97.]

Hist. '15, c. 31, § 43, p. 97, reen. C. L. 255:43.

§ 6162. Warranties on sale of receipts. A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants:

1. That the receipt is genuine.
2. That he has a legal right to negotiate or transfer it.
3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and,
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby. ['15, c. 31, § 44, p. 97.]

Hist. '15, c. 31, § 44, p. 97, reen. C. L. 255:44.

§ 6163. Indorser not a guarantor. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. ['15, c. 31, § 45, p. 98.]

Hist. '15, c. 31, § 45, p. 98, reen. C. L. 255:45.

§ 6164. No warranty implied from accepting payment of a debt. A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from

any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. ['15, c. 31, § 46, p. 98.]

Hist. '15, c. 31, § 46, p. 98, reen. C. L. 255:46.

§ 6165. When negotiation not impaired by fraud, mistake or duress. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake or duress. ['15, c. 31, § 47, p. 98.]

Hist. '15, c. 31, § 47, p. 98, reen. C. L. 255:47.

§ 6166. Subsequent negotiation. Where a person having sold, mortgaged or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. ['15, c. 31, § 48, p. 98.]

Hist. '15, c. 31, § 48, p. 98, reen. C. L. 255:48.

§ 6167. Negotiation defeats vendor's lien. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. ['15, c. 31, § 49, p. 99.]

Hist. '15, c. 31, § 49, p. 99, reen. C. L. 255:49.

ARTICLE 4.

CRIMINAL OFFENSES.

§ 6168. Issue of receipt for goods not received. A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5000, or by both. ['15, c. 31, § 50, p. 99.]

Hist. '15, c. 31, § 50, p. 99, reen. C. L. 255:50.

§ 6169. Issue of receipt containing false statement. A warehouseman, or any officer, agent or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon

conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1000, or by both. ['15, c. 31, § 51, p. 99.]

Hist. '15, c. 31, § 51, p. 99, reen. C. L. 255:51.

§ 6170. Issue of duplicate receipts not so marked. A warehouseman or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncancelled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section 6132, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5000, or by both. ['15, c. 31, § 52, p. 99.]

Hist. '15, c. 31, § 52, p. 99, reen. C. L. 255:52.

§ 6171. Issue for warehouseman's goods of receipts which do not state that fact. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents or servants, who knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1000, or by both. ['15, c. 31, § 53, p. 100.]

Hist. '15, c. 31, § 53, p. 100, reen. C. L. 255:53.

§ 6172. Delivery of goods without obtaining negotiable receipt. A warehouseman, or any officer, agent or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncancelled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections 6132 and 6154, be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1000, or by both. ['15, c. 31, § 54, p. 100.]

Hist. '15, c. 31, § 54, p. 100, reen. C. L. 255:54.

Defective receipt no defense: Where a party is charged with the unlawful sale of grain stored in his warehouse, he should not be heard in his defense to urge that a warehouse receipt issued by him for grain received and stored is not in form and substance as required to be issued by the provisions of the statute. S. v. Henzell (1910) 17 I. 725, 107 P. 67, 27 L. R. A. (N. S.) 159.

Intent not material: Under a former statute it was held in a prosecution of a warehouseman for unlawfully selling stored grain that the motive or intent with which the sale was made was immaterial and constituted no defense. S. v. Henzell, supra.

§ 6173. Negotiation of receipt for mortgaged goods. Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterward negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding $1000, or by both. ['15, c. 31, § 55, p. 100.]

Hist. '15, c. 31, § 55, p. 100, reen. C. L. 255:55.

ARTICLE 5.

INTERPRETATION.

§ 6174. Cases not provided for in chapter. In any case not provided for in this chapter the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. ['15, c. 31, § 56, p. 100.]

Hist. '15, c. 31, § 56, p. 100, reen. C. L. 255:56.

§ 6175. Interpretation shall give effect to purpose of uniformity. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. ['15, c. 31, § 57, p. 100.]

Hist. '15, c. 31, § 57, p. 100, reen. C. L. 255:57.

§ 6176. Definitions. 1. In this chapter, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off and suit in equity.

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

2. A thing is done "in good faith" within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not. ['15, c. 31, § 58, p. 101.]

Hist. '15, c. 31, § 58, p. 101, reen. C. L. 255:58.

§ 6177. Name of chapter. This chapter may be cited as the uniform warehouse receipts law. ['15, c. 31, § 61, p. 101.]

Hist. '15, c. 31, § 61, p. 101, reen. C. L. 255:59.

CHAPTER 235.

BONDED WAREHOUSE LAW.

§ 6178. Short title of act. This act shall be known by the short title of bonded warehouse law. ['19, c. 152, § 1, p. 485.]

§ 6179. Terms defined. The term "public warehouse" or "warehouse" as used in this chapter shall be deemed to mean every building, structure, or other protected inclosure in which any agricultural produce is received for storage or transfer for compensation; such warehouses are hereby declared to be public utilities.

The term "agricultural product" wherever used in this chapter shall be deemed to mean grains, leguminous seeds, hay, potatoes, fruit and wool or any of them.

The term "person" includes a corporation or partnership or two or more persons having a joint or common interest.

The term "warehouseman" means a person operating or controlling a public warehouse.

The term "receipt" means a warehouse receipt. ['19, c. 152, § 2, p. 485.]

§ 6180. License necessary to operate public warehouse. Before a person can lawfully operate a public warehouse in this state he must procure a license under this chapter. ['19, c. 152, § 3, p. 485.]

§ 6181. Penalty for operating without license. Any person operating a public warehouse without a license shall forfeit to the state for each day's operation $50, and such operation may be enjoined upon complaint of the commissioner of agriculture. ['19, c. 152, § 4, p. 485.]

§ 6182. Inspection and classification of warehouses, storage, warehousing, weighing and certification of products: Duties of warehousemen. Upon application by any person for license to conduct a warehouse under this chapter, the department of agriculture is authorized to investigate and determine whether the warehouse for which licenses are applied, or have been previously issued, under this chapter, are suitable for the proper storage of agricultural products, and the department of agriculture is authorized with or without application, to wit:

To inspect any warehouse licensed under this chapter; to investigate the storage, warehousing, classifying according to grade, and otherwise weighing and certification of agricultural products therein conducted; to classify warehouses, licensed or applying for license, in accordance with their ownership, location, surroundings, capacity, conditions and other qualities, and as to the kinds of licenses issued or that may be issued for them pursuant to this chapter; and to prescribe, within the limitations of this chapter, the duties of the warehousemen conducting warehouses licensed under this chapter with respect to their care of and responsibility for agricultural products. ['19, c. 152, § 5, p. 485.]

§ 6183. Licenses to warehousemen: Issue: Conditions precedent. The department of agriculture is authorized, upon application to it, to issue to any warehouseman a license for the conduct of a warehouse or warehouses in accordance with this chapter and such rules and regulations as may be made hereunder: *Provided,* That each such warehouse be found suitable for the proper storage of the particular agricultural product or products for which a license is applied for, and that such warehouseman agree, as a condition to the granting of the license, to comply with and abide by all the terms of this chapter and the rules and regulations prescribed hereunder. ['19, c. 152, § 6, p. 486.]

§ 6184. Term of license: Renewal. Each license issued under section 6183 shall be issued for a period not exceeding one year. All licenses shall terminate on June 30th following their issuance. ['19, c. 152, § 7, p. 486.]

§ 6185. Bond of applicant for license: Additional bond. Each warehouseman applying for a license to conduct a warehouse in accordance with this chapter shall, as a condition to the granting thereof, execute and file with the department of agriculture a good and sufficient bond other than personal security to the state to secure the faithful performance of his obligations as a warehouseman under all the laws of the state, and the rules and regulations prescribed hereunder, and of such additional obligations as a warehouseman as may be assumed by him under contracts with the respective depositors of agricultural products in such warehouse. Said bond shall be in such form and amount, shall have such surety or sureties, and shall contain such terms and conditions as the department of agriculture may prescribe to carry out the purposes of this chapter, including the requirements of fire insurance. Whenever the department of agriculture shall determine that a bond approved by it is, or for any cause has become, insufficient, it may require an additional bond or bonds to be given by the warehouseman concerned, conforming with the requirements of this section, and unless the same be given within the time fixed by a written demand therefor the license of such warehouseman may be suspended or revoked. ['19, c. 152, § 8, p. 486.]

§ 6186. Action on bond by persons injured. Any person injured by the breach of any obligation to secure which a bond is given, under the provisions of section 6185, shall be entitled to sue on the bond in his own name in a court of competent jurisdiction to recover the damages he may have sustained by such breach. ['19, c. 152, § 9, p. 487.]

§ 6187. Designation of warehouse as bonded warehouse. Upon the filing with and approval by the department of agriculture of a bond, in compliance with this chapter, for the conduct of a warehouse, such warehouse shall be designated as bonded hereunder; but no warehouse shall be designated as bonded under this chapter, and no name or description conveying the impression that it is so bonded, shall be used, until a bond, such as provided for in section 6185, has been filed with and approved by the department of agriculture, nor unless the license issued under this chapter for the conduct of such warehouse remains unsuspended and unrevoked. ['19, c. 152, § 10, p. 487.]

§ 6188. Fees of department. The department of agriculture shall charge, assess, and cause to be collected a reasonable fee for every examination or inspection of a warehouse under this chapter when such examination of inspection is made upon application of a warehouseman, and a fee not exceeding $2 per annum for each license or renewal thereof issued to a warehouseman under this chapter. All such fees shall be deposited and covered into the state treasury. ['19, c. 152, § 11, p. 487.]

§ 6189. Schedule of rates: Posting. Every public warehouseman shall annually, during the first week in July, publish by posting in a conspicuous place in his warehouse, a schedule of storage rates for the ensuing year, which schedule shall be kept posted in a conspicuous place in said warehouse. ['19, c. 152, § 12, p. 487.]

§ 6190. Privilege of examining products stored: Every person having an interest in any agricultural product stored in any such warehouse, and every state inspector, shall have the right to examine at all times during ordinary business hours any product so stored, and all parts of such

warehouses, provided warehouse or the agricultural products stored therein is not endangered by such inspection; and every warehouseman, his agents and servants shall furnish proper facilities for such examination. ['19, c. 152, § 13, p. 487.]

§ 6191. Employment of inspectors. The department of agriculture may employ such inspectors, samplers and weighers as it may deem necessary. ['19, c. 152, § 14, p. 488.]

§ 6192. Licenses to classify, grade or weigh products for storage. The department of agriculture may, upon presentation of satisfactory proof of competency, issue to any person a license to classify any agricultural product or products, stored or to be stored in a warehouse licensed under this chapter, according to grade or otherwise and to certificate the grade or other class thereof, or to weigh the same and certificate the weights thereof, or both to classify and weigh the same and to certificate the grade or other class and the weight thereof, upon condition that such person agree to comply with and abide by the terms of this chapter and of the rules and regulations prescribed hereunder so far as the same relate to him, and execute a sufficient bond to the state of Idaho in sum determined by the department of agriculture for the faithful discharge of his duties. ['19, c. 152, § 15, p. 488.]

§ 6193. Same: Suspension or revocation of license. Any license issued to any person to classify or to weigh any agricultural product or products under this chapter may be suspended or revoked by the department of agriculture whenever it is satisfied, after opportunity afforded to the licensee concerned for a hearing, that such licensee has failed to classify or to weigh any agricultural product or products correctly, or has violated any of the provisions of this chapter, or of the rules and regulations prescribed hereunder, so far as the same may relate to him, or that he has used his license or allowed it to be used for any improper purpose whatsoever. Pending investigation, the department of agriculture, whenever it deems necessary, may suspend a license temporarily without hearing. ['19, c. 152, § 16, p. 488.]

§ 6194. Fees for inspection. The department shall fix the fees for the inspection and weighing of agricultural products, such fees to be a lien upon such products. ['19, c. 152, § 17, p. 488.]

§ 6195. Warehousemen to receive products without discrimination. Every warehouseman conducting a warehouse licensed under this chapter shall receive for storage therein, so far as its capacity permits, any agricultural product of the kind customarily stored therein by him which may be tendered to him, bearing certificate, when required, of an official inspector showing suitable condition, for warehousing, in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities. ['19, c. 152, § 18, p. 488.]

§ 6196. Products for storage deemed deposited subject to law. Any person who deposits agricultural products for storage in a warehouse licensed under this chapter shall be deemed to have deposited the same subject to the terms of this chapter and the rules and regulations prescribed hereunder. ['19, c. 152, § 19, p. 489.]

§ 6197. Inspection and grading of fungible diseased or insect infected products. Any fungible diseased or insect infected agricultural product complained of by any person having interest in the warehouse or agricultural products stored in a warehouse licensed under this chapter shall be inspected and graded by a representative of the department of

agriculture or a person duly licensed to grade the same under this chapter, and if such inspection or grading shows such agricultural product to be in condition that its continued storing or retention would injure or damage the warehouse or other products stored therein the owner shall, by order of the inspector, forthwith remove such agricultural product. Providing the owner of such product is unknown to the inspector or warehouseman, the warehouseman shall proceed to remove or make disposition of such product in a manner that will tend to save and realize the values contained in such product by the owner, under such rules and regulations as may be prescribed under this chapter. ['19, c. 152, § 20, p. 489.]

§ 6198. Fungible products of different grades to be kept separate. Every warehouseman conducting a warehouse licensed under this chapter shall at no time while they are in his custody mix fungible agricultural products of different grades. ['19, c. 152, § 21, p. 489.]

Cross ref. Fungible goods may be commingled: § 6141.

§ 6199. Receipts for products stored. For all agricultural products stored in a warehouse licensed under this chapter original receipts shall be issued by the warehouseman conducting the same, but no receipts shall be issued except for agricultural products actually stored in the warehouse at the time of the issuance thereof. ['19, c. 152, § 22, p. 489.]

§ 6200. Same: Contents. Every receipt issued for agricultural products stored in a warehouse licensed under this chapter shall embody within its written or printed terms:

1. All the requirements of a receipt under the uniform warehouse receipts law.

2. A description of the agricultural products received, showing the quantity thereof, or, in case of agricultural products customarily put up in bales or packages, a description of such bales or packages by marks, numbers, or other means of identification and the weight of such bales or packages.

3. The grade or other class of the agricultural products received and the standard or description in accordance with which such classification has been made: *Provided,* That such grade or other class shall be stated according to the official standards of the state applicable to such agricultural products as the same may be fixed and promulgated under authority of law: *Provided further,* That until such official standards of the state for any agricultural product or products have been fixed and promulgated, the grade or other class thereof may be stated in accordance with any recognized standard: *Provided,* That unless otherwise required by law, when requested by the depositor of other than fungible agricultural products, a receipt omitting compliance with this subdivision may be issued if it have plainly and conspicuously embodied in its written or printed terms a provision that such receipt is not negotiable.

4. A statement that the receipt is issued subject to the state bonded warehouse act and the rules and regulations prescribed thereunder.

5. Such other terms and conditions within the limitations of this chapter as may be required by the department of agriculture. ['19, c. 152, § 23, p. 489.]

Cross ref. Form of warehouse receipts: §§ 6120-6121.

§ 6201. Standards for agricultural products. The department of agriculture is authorized, from time to time, to establish and promulgate standards for agricultural products in this chapter defined by which their quality or value may be judged or determined.

So far as practicable such standards shall conform to the official standards of the United States applicable to such agricultural products as the same may from time to time be fixed and promulgated.

No warehouseman in this state shall insert in any receipt issued by him any language in anywise limiting or modifying his liabilities, or responsibilities, as imposed by the laws of this state. ['19, c. 152, § 24, p. 490.]

§ 6202. Loss of receipts: Conditions of reissue. While an original receipt issued under this chapter is outstanding and uncancelled by the warehouseman issuing the same no other or further receipt shall be issued for the agricultural product covered thereby or for any part thereof, except that in the case of a lost or destroyed receipt a new receipt, upon the same terms and subject to the same conditions and bearing on its face the number and date of the receipt in lieu of which it is issued, may be issued upon the giving of satisfactory security in compliance with the rules and regulations made pursuant to this chapter. ['19, c. 152, § 25, p. 490.]

§ 6203. Records of products stored: Reports: Conduct of warehouses. Every warehouseman conducting a warehouse licensed under this chapter shall keep in a place of safety complete and correct records of all agricultural products stored therein and withdrawn therefrom, of all warehouse receipts issued by him, and of the receipts returned to and canceled by him, shall make reports to the department of agriculture concerning such warehouse and the condition, contents, operation, and business thereof, in such form and at such times as it may require, and shall conduct said warehouse in all other respects in compliance with this chapter and the rules and regulations made hereunder. ['19, c. 152, § 26, p. 491.]

§ 6204. Examination of products stored: Publication of findings. The department of agriculture is authorized to cause examinations to be made of any agricultural product stored in any warehouse licensed under this chapter. Whenever, after opportunity for hearing is given to the warehouseman conducting such warehouse, it is determined that he is not performing fully the duties imposed on him by this chapter and the rules and regulations made hereunder, the department may publish its findings. ['19, c. 152, § 27, p. 491.]

§ 6205. Suspension or revocation of license. The department of agriculture may, after opportunity for hearing has been afforded to the licensee concerned, suspend or revoke any license issued to any warehouseman conducting a warehouse under this chapter, for any violation of or failure to comply with any provision of this chapter or of the rules and regulations made hereunder or upon the ground that unreasonable or exorbitant charges have been made for services rendered. Pending investigation the department of agriculture, whenever it deems necessary, may suspend a license temporarily without hearing. ['19, c. 152, § 28, p. 491.]

§ 6206. Publication of reports: Names and locations of warehouses. The department of agriculture from time to time may publish the results of any investigations made under this chapter; and it shall publish the names and locations of warehouses licensed and bonded and the names and addresses of persons licensed under this chapter and a list of all licenses terminated under this chapter and the causes therefor. ['19, c. 152, § 29, p. 491.]

§ 6207. Examination of books. The department of agriculture is authorized through officials, employees, or agents of the department desig-

nated by it, to examine all books, records, papers, and accounts of warehouses relating thereto. ['19, c. 152, § 30, p. 492.]

§ 6208. Rules and regulations. The department of agriculture shall from time to time make such rules and regulations as it may deem necessary for the efficient execution of the provisions of this chapter. ['19, c. 152, § 31, p. 492.]

§ 6209. Cooperation. In the administration of this chapter the department is directed to cooperate with the state seed commissioner, with the federal departments and with official agencies in other states. ['19, c. 152, § 32, p. 492.]

§ 6210. Violation of law: Penalty. Every person who shall forge, alter, counterfeit, simulate, or falsely represent, or shall without proper authority use, any license issued by the department of agriculture under this chapter, or who shall violate or fail to comply with any provision of section 6185, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or imprisoned not more than six months, or both, in the discretion of the court. ['19, c. 152, § 33, p. 492.]

§ 6211. Rent of quarters: Employment of assistants. The department is authorized to rent such quarters and to employ such persons and means as it may deem necessary in the city of Boise and elsewhere, and it is authorized, in its discretion, to employ qualified persons not regularly in the service of the state for temporary assistance in carrying out the purposes of this chapter. ['19, c. 152, § 34, p. 492.]

§ 6212. Effect of partial invalidity of law. If any clause, sentence, paragraph, or part of this chapter shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered. ['19, c. 152, § 35, p. 492.]

TITLE L.

CHAPTER 236.

WORKMEN'S COMPENSATION LAW.

Hist. '19, c. 8, § 38, p. 65 (§ 351 herein) abolished the state insurance manager and § 28 of the same act (§ 284 herein) vested his powers in the department of commerce and industry. The section notes "Compiled upon authority '19, c. 8," etc., indicate that the substitutions of offices and officials authorized by that act have been made accordingly; the text of preexisting law not being changed except in so far as necessary in making substitutions.

Comp. leg. This law follows closely the uniform act recommended by the national conference of commissioners on uniform state laws.

ARTICLE 1.

SCOPE OF CHAPTER.

§ 6213. Employments covered. This chapter shall apply to all public employment as defined in section 6215 and to all private employment in a trade or occupation which is carried on by the employer for the sake of pecuniary gain, not expressly excepted by the provisions of section 6216. ['17, c. 81, § 1a, p. 254.]

Hist. '17, c. 81, § 1a, p. 254, reen. C. L. 256:1a. **Comp. leg.** See uniform act § 1.

§ 6214. Declaration of police power. The common law system governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modern industrial conditions. The administration of the common law system in such cases has produced the result that little of the cost to the employer has reached the injured workman, and that little at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such employments formerly occasional have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this chapter, and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this chapter provided. ['17, c. 81, § 1b, p. 254.]

Hist. '17, c. 81, § 1b, p. 254, reen. C. L. 256:1b. **Comp. leg.—Wash.** '11, c. 75, § 1, but limited to extra hazardous occupations.

Cross ref. Abolition of civil remedies: § 6219.

§ 6215. Public employment. This chapter shall apply to employees of the state and of all counties, cities, cities under special charter or commission form of government, villages, school districts, irrigation districts, drainage districts, highway districts, road districts and other public and municipal corporations within the state; but not to public officials who are elected by popular vote or who receive salaries exceeding $2400 a year. Policemen and firemen and others entitled to pensions shall be deemed employees within the meaning of this chapter.

If, however, any policeman or fireman or other person entitled to a pension claims compensation under this chapter there shall be deducted from such compensation any sum which such policeman or fireman or other person may be entitled to receive from any pension or other benefit fund to which the state or municipal body may contribute. ['17, c. 81, § 2, p. 255.]

Hist. '17, c. 81, § 2, p. 255, reen. C. L. 256:2.

Cross ref. Express references to this section: As defining public employment: § 6213; public bodies not required to secure compensation: § 6278; but must give state insurance fund the preference: § 6316.

Comp. leg. See uniform act § 2.

§ 6216. Employments not covered. None of the provisions of this chapter shall apply to:

1. Agricultural pursuits.
2. Household domestic service.
3. Casual employment.
4. Employment by charitable organizations; or,
5. Employment of outworkers; or of
6. Members of the employer's family dwelling in his house:

Unless the employer and employee expressly agree in writing filed with the board that the provisions of the chapter shall apply. Any such agreement may be terminated by either party upon 60 days' notice to the other and to the board in writing prior to any accident. ['17, c. 81, § 3, p. 255.]

Hist. '17, c. 81, § 3, p. 255, reen. C. L. 256:3.

Cross ref. Express references to this section: As defining excepted employments: § 6213; in definition of workman: § 6321; in definition of employment: § 6325.

Cited: Little v. Broxon (1918) 31 I. 303, 170 P. 918.

ARTICLE 2.

RIGHTS AND REMEDIES GRANTED AND AFFECTED.

§ 6217. Right to compensation for injury. If a workman receives personal injury by accident arising out of and in the course of any employment covered by this chapter his employer or the surety shall pay compensation in the amounts and to the person or persons hereinafter specified. ['17, c. 81, § 4, p. 256.]

Hist. '17, c. 81, § 4, p. 256, reen. C. L. 256:4.

Comp. leg. See uniform act § 1.

§ 6218. Injuries not covered. No compensation shall be allowed for an injury caused:

1. By the employee's wilful intention to injure himself or to injure another; or,
2. By his intoxication.

If the employer claims an exemption or forfeiture under this section the burden of proof shall be upon him. ['17, c. 81, § 5, p. 256.]

Hist. '17, c. 81, § 5, p. 256, reen. C. L. 256:5.

Comp. leg. See uniform act § 3.

§ 6219. Right to compensation exclusive. The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this chapter shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.

Employers, who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment; and

all contracts of hiring in this state shall be presumed to include such an agreement. ['17, c. 81, § 6, p. 256.]

Hist. '17, c. 81, § 6, p. 256, reen. C. L. 256:6.

Comp. leg. Uniform act § 4.

Repeal: This section is regarded as an implied repeal of the employer's liability act, '09, p. 34, H. B. 26.

Cross ref. Abolition of civil remedy: § 6214. As to injuries outside state: § 6275.

§ 6220. Liability of third persons. When an injury for which compensation is payable under this chapter shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this chapter or obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this chapter any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person: *Provided,* If the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this chapter, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action. ['17, c. 81, § 7, p. 256.]

Hist. '17, c. 81, § 7, p. 256, reen. C. L. 256:7.

Comp. leg. Uniform act § 5.

§ 6221. Contracting out forbidden. No contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter, other than as provided in sections 6222 and 6230. ['17, c. 81, § 8, p. 257.]

Hist. '17, c. 81, § 8, p. 257, reen. C. L. 256:8.

Comp. leg. Uniform act § 6.

Cross ref. Substitute systems: § 6222. Hospital contracts: § 6230.

§ 6222. Substitute systems of compensation. With the approval of the [industrial accident] board, an employer who is subject to the provisions of this chapter may enter into an agreement with his employees to provide a system of compensation or benefits in lieu of the compensation provided by this chapter, subject, however, to the following restrictions:

1. The benefits to injured employees shall be at least equivalent to those herein provided.

2. If contributions are required from employees the additional benefits shall be commensurate with such contributions.

3. If acceptance of such substitute system is made a condition of employment, equitable provision shall be made for the withdrawal of employees from it and the distribution of its assets. An employer who is authorized to substitute a plan under the provisions of this section shall give his employees notice thereof in the form prescribed by the board and a statement of the plan approved shall be filed with the board. Copies of settlements made under the provisions of this section shall be filed with the board. ['17, c. 81, § 9, p. 257.]

Hist. '17, c. 81, § 9, p. 257, reen. C. L. 256:9.

Cross ref. Express references to this section: Excepted from prohibition against contracting out: § 6221; excepted from prohibition against requiring contributions from employees: § 6287.

Comp. leg.—Conn. Similar: '13, c. 138, § 29.

ARTICLE 3.

COMPENSATION.

§ 6223. Death benefits. If death results from the injury within two years the employer or the surety shall pay to the person entitled to compensation, or, if there are none, then to the personal representative of the deceased employee, burial expenses not to exceed $100, and shall also pay to or for the following persons for the following periods, a weekly compensation equal to the following percentages of the deceased employee's average weekly wages as defined in section 6237:

1. To the dependent widow or widower, if there be no dependent children, 45 per centum.

2. To the dependent widow or widower, if there be a dependent child or children, 55 per centum for such widow or widower and children. Such compensation to the widow or widower shall be for the use and benefit of such widow or widower and of the dependent children, and the board may from time to time apportion such compensation between them in such way as it deems best. If a child has a guardian other than the surviving widow or widower, the compensation payable on account of such child shall be paid to such guardian.

3. If there be no dependent widow or widower, but a dependent child or children, 25 per centum for one child and 10 per centum for each additional child, not to exceed a total of 55 per centum, to be divided equally among such children if more than one.

4. To the parents, if one be wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, 25 per centum; if both are wholly dependent, 20 per centum to each; if one be or both are partly dependent, a proportionate amount in the discretion of the board.

The above percentages shall be paid if there be no dependent widow, widower or child. If there be a widow, widower or child, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower and children, will not exceed a total of 55 per centum.

5. To the brothers, sisters, grandparents and grandchildren, if one be wholly dependent upon the deceased employee for support at the time of his death, 20 per centum to such dependent; if more than one be wholly dependent, 30 per centum, divided among such dependents share and share alike; if there be no one of them wholly dependent, but one or more partly dependent, 10 per centum divided among such dependents share and share alike.

The above percentages shall be paid if there be no dependent widow, widower, child or parent. If there be a dependent widow, widower, child or parent, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower, children and dependent parents, will not exceed a total of 55 per centum.

6. In case there are two or more classes of persons entitled to compensation under this section and the apportionment of such compensation, above provided, would result in injustice, the board may, in its discretion, modify the apportionment to meet the requirements of the case.

7. In case there are no dependents of the deceased employee, the employer shall pay into the state treasury to be deposited in the industrial administration fund the sum of $1000. ['17, c. 81, § 10, p. 257.]

Hist. '17, c. 81, § 10, p. 257, reen. C. L. **Comp. leg.** Similar to uniform act § 7. 256:10.

§ 6224. **Dependents.** The following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of this chapter:

A child if under 18 years of age, or incapable of self support and unmarried, whether actually dependent upon the deceased or not.

The widow only if living with the deceased, or actually dependent wholly or partially, upon him.

The widower only if incapable of self support and actually dependent, wholly or partially, upon the deceased at the time of her injury.

A parent or grandparent only if actually dependent, wholly or partially, upon the deceased.

A grandchild, brother or sister only if under 18 years of age, or incapable of self support, and wholly dependent upon the deceased.

The relation of dependency must exist at the time of the injury. ['17, c. 81, § 11, p. 259.]

Hist. '17, c. 81, § 11, p. 259, reen. C. L. 256:11. **Comp. leg.** Uniform act § 8.

§ 6225. **Periods of compensation.** The compensation herein provided for shall be payable during the following periods:

To a widow, until death or remarriage, but in no case to exceed 400 weeks.

To a widower, during disability or until remarriage, but in no case to exceed 400 weeks.

To or for a child, until 18 years of age, but in the case of a child incapable of self support and unmarried as long as so incapable, but in no case to exceed 400 weeks beyond said age of 18 years.

To a parent or grandparent, during the continuation of a condition of actual dependency, but in no case to exceed 400 weeks.

To or for a grandchild, brother or sister, during dependency as hereinbefore defined, but in no case to exceed 400 weeks.

Upon the cessation of compensation under this section to or on account of any person, the compensation of the remaining persons entitled to compensation for the unexpired part of the period, during which their compensation is payable shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death. ['17, c. 81, § 12, p. 259.]

Hist. '17, c. 81, § 12, p. 259, reen. C. L. 256:12.

Cross ref. Express reference to this section: Periods of compensation reduced by period of disability, in event of death following disability: § 6228.

Comp. leg. Uniform act § 9.

§ 6226. **Nonresident alien dependents.** Except as otherwise provided by treaty, whenever under the provisions of this chapter compensation is payable to a dependent who is an alien not residing in the United States, the employer shall pay 50 per centum of the compensation herein otherwise provided to such dependent and the remaining 50 per centum into the state treasury to be deposited in the industrial administration fund. But if a nonresident alien dependent is a citizen of a government having a compensation law which excludes citizens of the United States either resident or nonresident, from partaking of the benefit of such law in as favorable a degree as herein extended to nonresident aliens, then all of the compensation which would otherwise be payable to such dependent shall be paid into the industrial administration fund. ['17, c. 81, § 13, p. 260.]

Hist. '17, c. 81, § 13, p. 260, reen. C. L. 256:13.

§ 6227. Certain words defined. As used in the foregoing sections the term "child" includes step-children, adopted children, posthumous children, and acknowledged illegitimate children, but does not include married children unless dependent. The terms "brother" and "sister" include step-brothers and step-sisters, half-brothers and half-sisters, and brothers and sisters by adoption, but do not include married brothers nor married sisters unless dependent. The term "grandchild" includes children of adopted children and children of step-children, but does not include step-children of children, step-children of step-children, step-children of adopted children, nor married grand-children, unless dependent. The term "parent" includes step-parents and parents by adoption. The term "grandparent" includes parents of parents by adoption, but does not include parents of step-parents, step-parents of parents, nor step-parents of step-parents. The words "adopted" and "adoption" as used in this chapter shall include cases where persons are treated as adopted as well as those of legal adoption. ['17, c. 81, § 14, p. 260.]

Hist. '17, c. 81, § 14, p. 260, reen. C. L. 256:14. **Comp. leg.** Uniform act § 10.

§ 6228. Sundry provisions as to death benefits. In computing death benefits the total weekly compensation shall be subject to a maximum of $12 per week and a minimum of $6 per week, but if at the time of the injury the employee received wages of less than $6 per week, then the compensation shall not exceed the full amount of such wages.

Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer unless and until such dependent or dependents prior in right shall have given him notice of his or their claim. In case the employer is in doubt as to the respective rights of rival claimants he may apply to the board to decide between them.

In case death occurs after a period of disability, either total or partial, the period of disability shall be deducted from the total periods of compensation respectively stated in section 6225.

The compensation of a person who is insane shall be paid to his or her guardian. ['17, c. 81, § 15, p. 261.]

Hist. '17, c. 81, § 15, p. 261, reen. C. L. 256:15. **Comp. leg.** Uniform act § 11.

§ 6229. Medical attendance. The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus, as may be required or be requested by the employee immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. All fees and other charges for such treatment and services and compensation therefor shall be subject to regulation by the board. The pecuniary liability of the employer for the treatment and other service herein required shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person. In determining what fees and charges are reasonable, the board shall consider the increased security of payment afforded by this chapter. ['17, c. 81, § 16, p. 261.]

Hist. '17, c. 81, § 16, p. 261, reen. C. L. 256:16.

Cross ref. Express reference to this section: This provision may be waived where hospital contracts are entered into: § 6230

§ 6230. Hospital contracts. Nothing in this chapter shall be construed as preventing employers and workmen from waiving the provisions of section 6229 and entering into mutual contracts or agreements providing for hospital benefits and accommodations to be furnished to the employee.

Such hospital contracts or agreements must provide for medical, hospital and surgical attendance for such employee for sickness contracted during the employment (except venereal diseases and sickness as a result of intoxication), as well as for injuries received arising out of and in the course of the employment.

No assessment of employee for such hospital contracts or benefits shall exceed $1 per month for each employee, except in cases where it shall appear to the satisfaction of the board, after a hearing had for that purpose, that the actual cost of such service exceeds the said sum of $1 per month, and any such finding of the board may be modified at any time when justified by a change of conditions, or otherwise, either upon the board's own motion or the application of any party in interest.

No profit, directly or indirectly, shall be made by any employer as a result of such hospital contract or assessment. It is the purpose and intent of this chapter to provide that each and every hospital maintained wholly or in part by payments from workmen, which furnishes treatment and services to employees for sickness and injury, as provided in this chapter, shall be under the supervision of the board as to services and treatment rendered such employees, and shall, from time to time make reports of such services, attendances, treatments, receipts and disbursments as the board may require. ['17, c. 81, § 17, p. 262.]

Hist. '17, c. 81, § 17, p. 262, reen. C. L. 256:17.

Cross ref. Express references to this section: Excepted from prohibition against contracting out: § 6221; excepted from prohibition against requiring contributions from employees: § 6287.

Comp. leg.—Mont. Identical: R. C. Supp. 14a, b, c, first sentence of d, and e, pp. 1076-7.

§ 6231. Total disability. Where the injury causes total disability for work the employer during such disability, but not including the first seven days thereof, shall pay the injured employee a weekly compensation equal to 55 per centum of his average weekly wages, but not more than $12 nor less than $6 a week for a period not exceeding 400 weeks, and thereafter a weekly compensation of $6 a week. In no case shall the weekly payments continue after the disability ends.

In case of an employee whose average monthly wages are less than $6 a week the weekly compensation shall be the full amount of such average weekly wages, but where the disability is permanent the weekly compensation in such cases shall be $6.

In case the total disability begins after a period of partial disability, the period of partial disability shall be deducted from such total period of 400 weeks. ['17, c. 81, § 18, p. 263.]

Hist. '17, c. 81, § 18, p. 263, reen. C. L. 256:18.

Comp. leg. Uniform act § 13.

§ 6232. Certain injuries deemed total disabilities. In the case of the following injuries in the absence of conclusive proof to the contrary the disability caused thereby shall be deemed total and permanent, to wit:

1. The total and permanent loss of sight in both eyes.
2. The loss of both feet at or above the ankle.
3. The loss of both hands at or above the wrist.
4. The loss of one hand and one foot.

5. An injury to the spine resulting in permanent and complete paralysis of both legs or arms or of one leg and one arm.

6. An injury to the skull resulting in incurable imbecility or insanity.

The above enumeration is not to be taken as exclusive. ['17, c. 81, § 19, p. 263.]

Hist. '17, c. 81, § 19, p. 263, reen. C. L. 256:19. Comp. leg. Uniform act § 13.

§ 6233. Partial disability. Where the injury causes partial disability for work, the employer, during such disability and for a period not exceeding 150 weeks beginning on the eighth day of disability, shall pay the injured workman a weekly compensation equal to 55 per centum of the difference between his average weekly wages before the accident and the weekly wages he is most probably able to earn thereafter, taking into account the nature of the physical injury or disfigurement, the occupation of the injured employee and his age at the time of the injury, not exceeding, however, the difference between the wages which the injured employee is most probably able to earn after the injury and the maximum compensation allowed in cases of total disability: *Provided,* That such a sum shall be paid as compensation in each case, which, when added to the wages which the injured employee is able to earn after the injury, will equal the minimum compensation allowed in cases of total disability. In no case shall the weekly payments continue after the disability ends, and in case the partial disability begins after a period of total disability the period of total disability shall be deducted from such total period of 150 weeks. ['17, c. 81, § 20, p. 263.]

Hist. '17, c. 81, § 20, p. 263, reen. C. L. 256:20. Comp. leg. Uniform act § 14.

§ 6234. Specific indemnities for certain injuries. In the case of the following injuries the compensation shall be 55 per centum of the average weekly wages, but not more than $12, to be paid weekly for the periods stated against such injuries respectively, to wit:

For the loss of:	For the following number of weeks:
One arm at or near the shoulder	200
One arm at the elbow	180
One arm between the wrist and elbow	160
One hand	150
One thumb and the metacarpal bone thereof	60
One thumb at the proximal joint	30
One thumb at the second distal joint	20
One first finger and the metacarpal bone thereof	30
One first finger at the proximal joint	20
One first finger at the second joint	15
One first finger at the distal joint	10
One second finger and the metacarpal bone thereof	30
One second finger at the proximal joint	15
One second finger at the second joint	10
One second finger at the distal joint	5
One third finger and the metacarpal bone thereof	20
One third finger at the proximal joint	12
One third finger at the second joint	8
One third finger at the distal joint	4
One fourth finger and the metacarpal bone thereof	12

One fourth finger at the proximal joint	9
One fourth finger at the second joint	6
One fourth finger at the distal joint	3
One leg at or so near the hip joint as to preclude use of an artificial limb	180
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb	150
One leg between the knee and ankle	140
One foot at the ankle	125
One great toe with the metatarsal bone thereof	30
One great toe at the proximal joint	15
One great toe at the second joint	10
One toe other than great toe with the metatarsal bone	12
One toe other than great toe at proximal joint	6
One toe other than great toe at second or distal joint	3
One eye by enucleation	120
Total blindness of one eye	100

In all other cases in this class compensation shall bear such relation to the amount stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. ['17, c. 81, § 21, p. 264.]

Hist. '17, c. 81, § 21, p. 264, reen. C. L. 256:21.

Comp. leg.—Mont. Number of weeks' compensation allowed identical: R. C. Supp. § 16(i), p. 1079.

§ 6235. Hernia. In all cases of hernia resulting from injury alleged to have been sustained in the course of and resulting from employee's employment, it must be proven:

1. That it was an injury resulting in hernia.
2. That the hernia appeared suddenly and immediately following the injury.
3. That the hernia did not exist in any degree prior to the injury for which compensation is claimed. ['17, c. 81, § 22, p. 265.]

Hist. '17, c. 81, § 22, p. 265, reen. C. L. 256:22.

Comp. leg.—Mont. Similar: R. C. Supp. first part of § 16(j), p. 1080.

§ 6236. Penalty for malingering. If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him, he shall not be entitled to any compensation. ['17, c. 81, § 23, p. 265.]

Hist. '17, c. 81, § 23, p. 265, reen. C. L. 256:23.

§ 6237. Computation of wages. Average weekly wages shall be computed in such a manner as is best calculated to give the average weekly earnings of the workman during the 12 months preceding his injury: *Provided,* That where by reason of the shortness of the time during which the workman has been in the employment, or the casual nature of the employment, it is impracticable to compute the rate of remuneration, regard may be had to the average weekly earnings which, during the 12 months previous to the injury, were being earned by a person in the same grade employed at the same work by the employer of the injured workman, or if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

If a workman at the time of the injury is regularly employed in a higher grade of work than formerly during the year and with large,

regular wages, only such larger wages shall be taken into consideration in computing his average weekly wages. ['17, c. 81, § 24, p. 266.]

Hist. '17, c. 81, § 24, p. 266, reen. C. L. 256:24.

Comp. leg. Uniform act § 15.

Cross ref. Express reference to this section: In computing death benefits: § 6223.

§ 6238. Voluntary payments. Any payments made by the employer or his insurer to the injured workman during the period of disability or to his dependents, which, by the terms of this chapter, were not due and payable when made, may, subject to the approval of the board be deducted from the amount to be paid as compensation: *Provided,* That in case of disability such deduction shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payments. ['17, c. 81, § 25, p. 266.]

Hist. '17, c. 81, § 25, p. 266, reen. C. L. 256:25.

Comp. leg. Uniform act § 16.

§ 6239. Periodical payments. The board, upon the application of either party, may in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. ['17, c. 81, § 26, p. 266.]

Hist. '17, c. 81, § 26, p. 266, reen. C. L. 256:26.

Comp. leg. Uniform act § 17.

§ 6240. Commutation of payments. Whenever the board determines that it is for the best interest of all parties, the liability of the employer for compensation may, on application to the board by any party interested, be discharged in whole or in part by the payment of one or more lump sums to be determined by or with the approval of the board.

Any such lump sum payment shall not exceed the present value of all future payments of compensation computed at 4 per centum true discount compounded annually. The probability of the beneficiary's death before the expiration of the period which he is entitled to compensation shall be determined according to the American experience table of mortality; but in the case of compensation to the widow or widower of the deceased employee, such lump sum shall not exceed 100 weeks' compensation. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded. The board shall not commute any payments to a widow or widower except at her or his request. ['17, c. 81, § 27, p. 266.]

Hist. '17, c. 81, § 27, p. 266, reen. C. L. 256:27.

Cross ref. Express references to this section: When payable to trustee: § 6241; modification of award not permitted after commutation: § 6269.

Comp. leg. Uniform act § 18.

§ 6241. Trustee in case of lump sum payment. Whenever for any reason the board deems it expedient, any lump sum which is to be paid as provided in section 6240 shall be paid by the employer to some suitable person or corporation appointed by the probate court as trustee to administer or apply the same for the benefit of the person or persons entitled thereto in the manner provided by the board. The receipt of such trustee for the amount so paid shall discharge the employer or anyone else who is liable therefor. ['17, c. 81, § 28, p. 267.]

Hist. '17, c. 81, § 28, p. 267, reen. C. L. 256:28.

Comp. leg. Uniform act § 19.

ARTICLE 4.

PRELIMINARY PROCEDURE IN OBTAINING COMPENSATION.

§ 6242. Medical examination. After an injury and during the period of disability, the workman, if so requested by his employer, or ordered by the board, shall submit himself to examination, at reasonable times and places, to a duly qualified physician or surgeon designated and paid by the employer. The workman shall have the right to have a physician or surgeon designated and paid by himself present at such examination, which right, however, shall not be construed to deny to the employer's physician the right to visit the injured workman at all reasonable times and under all reasonable conditions during total disability. If a workman refuses to submit himself to or in any way obstructs such examination, his right to take or prosecute any proceeding under this chapter shall be suspended until such refusal or obstruction ceases, and no compensation shall be payable for the period during which such refusal or obstruction continues. If an injured workman persists in insanitary, injurious or unreasonable practices which tend to imperil or retard his recovery, the board may, in its discretion, order the compensation of such workman to be suspended or reduced. ['17, c. 81, § 29, p. 267.]

Hist. '17, c. 81, § 29, p. 267, reen. C. L. **Comp. leg.**—Uniform act § 20. 256:29.

§ 6243. Notice of injury and claim for compensation. No proceedings under this chapter for compensation for any injury shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within one year after the date of the injury; or, in the case of death, then within one year after such death, whether or not a claim had been made by the employee himself for compensation. Such notice and such claim may be given or made by any person claiming to be entitled to compensation or by some one on his behalf. If payments of compensation have been made voluntarily the making of a claim within said period shall not be required. ['17, c. 81, § 30, p. 268.]

Hist. '17, c. 81, § 30, p. 268, reen. C. L. **Comp. leg.** Uniform act § 21. 256:30.

Cross ref. Express reference to this section: Sufficiency of notice: § 6246.

§ 6244. Form of notice and claim. Such notice and such claim shall be in writing, and such notice shall contain the name and address of the employee, and shall state in ordinary language the time, place, nature and cause of the injury, and shall be signed by him or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person on their behalf. The notice may include the claim. ['17, c. 81, § 31, p. 268.]

Hist. '17, c. 81, § 31, p. 268, reen. C. L. **Comp. leg.** Uniform act § 22. 256:31.

§ 6245. Giving of notice and making of claim. Any notice under this chapter shall be given to the employer, or, if the employer be a partnership, then to any one of the partners. If the employer be a corporation, then the notice may be given to any agent of the corporation upon whom process may be served, or to any officer of the corporation, or any agent in charge of the business at the place where the injury occurred. Such notice shall be given by delivering it or by sending it by mail by registered letter addressed to the employer at his or its last known

residence or place of business. The foregoing provisions shall apply to the making of a claim. ['17, c. 81, § 32, p. 268.]

Hist. '17, c. 81, § 32, p. 268, reen. C. L. **Comp. leg.** Uniform act: § 23. 256:32.

§ 6246. Sufficiency of notice. A notice given under the provisions of section 6243 of this chapter shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or otherwise, unless it is shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it be shown that the employer, his agent or representative, had knowledge of the accident, or that the employer has not been prejudiced by such delay or want of notice. ['17, c. 81, § 33, p. 269.]

Hist. '17, c. 81, § 33, p. 269, reen. C. L. **Comp. leg.** Uniform act § 24. 256:33.

§ 6247. Limitation of time as regards minors and insane. No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend. ['17, c. 81, § 34, p. 269.]

Hist. '17, c. 81, § 34, p. 269, reen, C. L. **Comp. leg.** Uniform act § 25. 256:34.

ARTICLE 5.

INDUSTRIAL ACCIDENT BOARD.

§ 6248. Creation of board. A board is hereby created to be known as the industrial accident board, consisting of three members, to be appointed by the governor, with the approval of the senate. The term of office of each member of said board shall be six years, excepting that of the members of said board first appointed, one shall be appointed to hold office until the second Monday of January, 1919, one until the second Monday of January, 1921, and one until the second Monday of January, 1923. Not more than one of the appointees to such board shall be a person who, on account of his previous vocations, employment or affiliations can be classed as a representative of employers, and not more than one of such appointees shall be a person who, on account of his previous vocation, employment or affiliations can be classed as a representative of workmen; not more than two of the members of the board shall belong to the same political party. Any vacancy during a term may be filled by appointment by the governor with the approval of the senate. If any appointment is made during the recess of the legislature it shall be subject to confirmation by the senate during its next ensuing session. After due notice and public hearing the governor may remove any member for cause and the good of the public service.

No person shall be eligible to appointment as a member of the board unless he shall be at least 30 years of age, a qualified elector of the state of Idaho and a resident of Idaho not less than three years consecutively next preceding his appointment, of good moral character and of a previous experience and training to qualify him to efficiently and justly discharge the duties of his office.

No person accepting appointment as a member of the board and qualifying as such shall be eligible to election or appointment to any public office during any calendar year which shall include any part of the term of membership on the board for which he may have been appointed and qualified and in which such election shall be held or

appointment made. Resignation from membership on the board shall not relieve such member from any of the provisions of this chapter, and the acceptance of appointment and qualification as a member of the board shall constitute a valid waiver of any and all statutory or constitutional rights to or eligibility for holding any other public office during such time. [C. L. 256:35.]

Hist. '17, c. 81, § 35, p. 269; compiled and reen. C. L. 256:35.

§ 6249. Salaries. The salary of each member of the board shall be $3000 per year. ['17, c. 81, § 36, p. 270.]

Hist. '17, c. 81, § 36, p. 270, reen. C. L. 256:36.

§ 6250. Quorum: Chairman: Vacancies: A majority of the board shall constitute a quorum for the transaction of business. The members of the board shall select one of their number as chairman. A vacancy on the board shall not impair the right of the remaining members to perform all the duties and exercise all the power and authority of the board. The act of a majority of the board, when in session as a board, shall be deemed to be the act of the board, but any investigation, inquiry or hearing which the board has power to undertake or to hold may be undertaken or held by or before any member thereof or any examiner or referee appointed by the board for that purpose. Every finding, order, decision or award made by any member, examiner or referee pursuant to such investigation, inquiry or hearing, when approved and confirmed by the board and ordered filed in its office shall be deemed to be the finding, order, decision or award of the board. [C. L. 256:37.]

Hist. '17, c. 81, § 37, p. 270; compiled and reen. C. L. 256:37.

§ 6251. Seal. The board shall have a seal bearing the following inscription, "Industrial accident board, state of Idaho, seal." The seal shall be affixed to all writs and authentications of copies of records and to such other instruments as the board shall direct. All courts shall take judicial notice of said seal. ['17, c. 81, § 38, p. 271.]

Hist. '17, c. 81, § 38, p. 271, reen. C. L. 256:38.

§ 6252. Office and supplies. The board shall keep its principal office in the capital of the state and shall be provided with suitable rooms, necessary office furniture, stationery and other supplies. For the purpose of holding sessions in other places the board shall have power to rent temporary quarters. ['17, c. 81, § 39, p. 271.]

Hist. '17, c. 81, § 39, p. 271, reen. C. L. 256:39.

§ 6253. Assistants. The board shall employ such assistance and other employees as it may deem necessary to carry out the provisions of this chapter. ['17, c. 81, § 40, p. 271.]

Hist. '17, c. 81, § 40, p. 271, reen. C. L. 256:40.

§ 6254. Same: Salaries. All officers and employees of the board shall receive such compensation for their services as may be fixed by the board, shall hold office at the pleasure of the board, and shall perform such duties as are imposed on them by law or by the board. ['17, c. 81, § 41, p. 271.]

Hist. '17, c. 81, § 41, p. 271, reen. C. L. 256:41.

§ 6255. Same: Salaries payable monthly. The salaries of every person holding office or employment under the board, as fixed by law or by the board, shall be paid monthly after being approved by the board upon claims therefor to be audited and approved by the state board of examiners. ['17, c. 81, § 42, p. 271.]

Hist. '17, c. 81, § 42, p. 271, reen. C. L. 256:42.

§ 6256. Payment of expenses. All expenses incurred by the board pursuant to the provisions of this chapter, including the actual and necessary traveling and other expenses and disbursements of the members thereof, its officers and employees incurred while on business of the board, either within or without the state, shall, unless otherwise provided in this chapter, be paid from the industrial administration fund after being approved by the board upon claims therefor to be audited and approved by the state board of examiners. ['17, c. 81, § 43, p. 271.]

Hist. '17, c. 81, § 43, p. 271, reen. C. L. 256:43.

§ 6257. Records and forms. The board shall cause to be printed such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this chapter. It shall provide a book in which shall be entered the minutes of all its proceedings, a book of record in which shall be recorded all awards made by the board and such other books or records as it shall deem requisite for the purpose and efficient administration of this chapter. All such records are to be kept in the office of the board. ['17, c. 81, § 44, p. 271.]

Hist. '17, c. 81, § 44, p. 271, reen. C. L. 256:44.

§ 6258. Reports. The board shall have the power and authority to publish and distribute at its discretion from time to time, in addition to its annual report, such further reports and bulletins covering its operations, proceedings and matters relative to its work as it may deem advisable. ['17, c. 81, § 45, p. 272.]

Hist. '17, c. 81, § 45, p. 272, reen. C. L. 256:45.

§ 6259. Fees. The board shall have power and authority to charge and collect the following fees:

1. For copies of papers and records not required to be certified or otherwise authenticated by the board, 15 cents for each folio; for certified copies of official documents and orders filed in its office or of the evidence taken at any hearing, 20 cents for each folio.
2. To fix and collect reasonable charges for publications issued under its authority.
3. The fees charged and collected under this section shall be paid monthly into the treasury of the state to the credit of the industrial administration fund and shall be accompanied by a detailed statement thereof. ['17, c. 81, § 46, p. 272.]

Hist. '17, c. 81, § 46, p. 272, reen. C. L. 256:46.

§ 6260. Duties of attorney general. The attorney general shall be the legal adviser of the board and shall represent it in all proceedings whenever so requested by the board or any member thereof. ['17, c. 81, § 47, p. 272.]

Hist. '17, c. 81, § 47, p. 272, reen. C. L. 256:47.

ARTICLE 6.

PROCEDURE BEFORE THE BOARD.

§ 6261. Procedure: Witnesses. Process and procedure under this chapter shall be as summary and simple as reasonably may be and as far as possible in accordance with the rules of equity. The board or any member thereof shall have the power to subpoena witnesses, administer oaths, and to examine such of the books and records of the parties to a proceeding as relate to the questions in dispute. The district court shall have power to enforce by proper proceedings the attendance and testimony of witnesses, and the production and examination of books, papers and records. Upon request of any party, a stenographic report of the testimony at any hearing shall be taken at the cost of such party.

Witnesses subpoenaed by the board or a member thereof shall be allowed such fees and traveling expenses as are allowed in civil actions, to be paid by the party in whose interest such witnesses are subpoenaed. ['17, c. 81, § 48, p. 272.]

Hist. '17, c. 81, § 48, p. 272, reen. C. L. **Comp. leg.** Uniform act § 28. 256:48.

§ 6262. Agreements. If the employer and the injured employee reach an agreement in regard to compensation under this chapter, a memorandum of the agreement shall be filed with the board and, if approved by it, thereupon the memorandum shall for all purposes be enforcible under the provisions of section 6271 unless modified as provided in section 6269. Such agreements shall be approved by the board only when the terms conform to the provisions of this chapter. ['17, c. 81, § 49, p. 273.]

Hist. '17, c. 81, § 49, p. 273, reen. C. L. **Comp. leg.** Uniform act § 29. 256:49.

§ 6263. Committee of arbitration. If the compensation is not settled by agreement, either party may make an application to the board for the formation of a committee of arbitration. Such committee shall consist of three members, one of whom shall be a member of the industrial accident board, or appointed by it, who shall act as chairman. The other two members shall be named, respectively, by the parties. If a vacancy occurs it shall be filled in the same way as the original appointment. ['17, c. 81, § 50, p. 273.]

Hist. '17, c. 81, § 50, p. 273, reen. C. L. **Comp. leg.** Uniform act § 30. 256:50.

§ 6264. Formation of committee. Immediately after such application the board shall designate one of its members, or a substitute, to act as chairman of the committee of arbitration, and shall request the parties to appoint their respective representatives. If within seven days after such request, or after a vacancy has occurred, either party does not appoint his representative, the board shall fill the vacancy and notify the parties to that effect. ['17, c. 81, § 51, p. 273.]

Hist. '17, c. 81, § 51, p. 273, reen. C. L. **Comp. leg.** Uniform act § 31. 256:51.

§ 6265. Hearings and awards. The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee, unless otherwise agreed, shall be held in the city or town where the injury occurred if within this state, and the award of the committee, together with a statement of its findings of fact, ruling of law, and any other matters pertinent to the questions

arising before it, shall be filed with the industrial accident board. A copy of the award shall be immediately sent to the parties. Unless a claim for a review is filed by either party within 30 days the award shall be enforcible under the provisions of section 6271. [C. L. 256:52.]

Hist. '17, c. 81, § 52, p. 273; compiled and reen. C. L. 256:52.

Cross ref. Express reference to this section: Arbitrators' expenses payable by state: § 6267.

Comp. leg. Uniform act § 32.

§ 6266. Examination by physician. The industrial accident board, or any member thereof, may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be $10 and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases. ['17, c. 81, § 53, p. 274.]

Hist. '17, c. 81, § 53, p. 274, reen. C. L. 256:53.

Cross ref. Express reference to this section: Physicians' fees payable by state: § 6267.

Comp. leg. Uniform act § 33.

§ 6267. Expenses of arbitrators and physicians. The fees and expenses of arbitrators under section 6265, and of physicians under section 6266 shall be paid by the state as the other expenses of the board are paid. ['17, c. 81, § 54, p. 274.]

Hist. '17, c. 81, § 54, p. 274, reen. C. L. 256:54.

Comp. leg. Uniform act § 34.

§ 6268. Review of award. If an application for review is made to the board, or if the committee fails to make an award within 30 days after its formation, the board shall allow a full trial and shall make an award which shall be filed with the record of proceedings and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. ['17, c. 81, § 55, p. 274.]

Hist. '17, c. 81, § 55, p. 274, reen. C. L. 256:55.

Comp. leg. Uniform act: § 35.

§ 6269. Modification of awards and agreements. On the application of any party on the ground of a change in conditions, the board may at any time, but not oftener than once in six months, review any agreement or award, and on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and immediately send to the parties a copy of the award, but this section shall not apply to a commutation of payments under section 6240. ['17, c. 81, § 56, p. 274.]

Hist. '17, c. 81, § 56, p. 274, reen. C. L. 256:56.

Cross ref. Express references to this section: Agreement of parties subject to modification: § 6262; award final until modified or unless reviewed: § 6270.

Comp. leg. Uniform act § 36.

§ 6270. Appeals from board. An award of the board in the absence of fraud, shall be final and conclusive between the parties except as provided in section 6269, unless within 30 days after a copy has been sent to the parties, either party appeals to the district court. On such appeal the jurisdiction of said court shall be limited to a review of questions of law. ['17, c. 81, § 57, p. 275.]

Hist. '17, c. 81, § 57, p. 275, reen. C. L. 256:57.

Cross ref. Express reference to this section: Appeal does not operate as stay: § 6273.

Comp. leg. Uniform act § 37.

§ 6271. Enforcement of award. Any party in interest may file in the district court for the county in which the injury occurred, if such

injury occurred within the state, otherwise in the district court for the county where the employer and employee reside, a certified copy of a decision of the board awarding compensation, from which no appeal has been taken within the time allowed therefor, or a certified copy of a decision of an arbitration committee awarding compensation from which no claim for review has been filed within the time allowed therefor, or a certified copy of a memorandum of agreement approved by the board, whereupon said court shall render a decree or judgment in accordance therewith and notify the parties thereof. Such decree or judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same, as though said decree or judgment had been rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom, and the same shall not constitute a lien upon the real property of the employer unless execution shall be levied thereon. [C. L. 256:58.]

Hist. '17, c. 81, § 58, p. 275; compiled and reen. C. L. 256:58.

Cross ref. Express reference to this section: Agreements of parties enforcible hereunder: § 6262. Arbitration awards enforcible hereunder: § 6265. Decisions of board enforcible hereunder: § 6273.

Comp. leg. Uniform act § 38.

§ 6272. Costs. If the committee of arbitration, the board or any court before whom any proceedings are brought under this chapter, determines that such proceedings have been brought, prosecuted or defended without reasonable ground, he or it may assess the whole cost of the proceedings upon the party who has so brought, prosecuted or defended them. ['17, c. 81, § 59, p. 275.]

Hist. '17, c. 81, § 59, p. 275, reen. C. L. 256:59.

Comp. leg. Uniform act § 39.

§ 6273. General powers of board. All questions arising under this chapter, if not settled by agreement of the parties interested therein, with the approval of the board, shall, except as otherwise herein provided, be determined by the board. The decisions of the board shall be enforcible by the district court under the provisions of section 6271. There shall be a right of appeal from decisions of the board to the district court as provided in section 6270, but in no case shall such an appeal, either under this section or under section 6270, operate as a supersedeas or stay unless the board or the district court shall so order. ['17, c. 81, § 60, p. 275.]

Hist. '17, c. 81, § 60, p. 275, reen. C. L. 256:60.

Comp. leg. Uniform act § 40.

§ 6274. Revision of decree. The district court, upon the filing with it of a certified copy of a decision of the board, ending, diminishing or increasing compensation previously awarded, shall revoke or modify its prior decree or judgment so it will conform to said decision. ['17, c. 81, § 61, p. 276.]

Hist. '17, c. 81, § 61, p. 276, reen. C. L. 256:61.

Comp. leg. Uniform act § 41.

§ 6275. Injuries outside the state. If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state.

If a workman who has been hired outside of this state is injured while engaged in his employer's business, and is entitled to compensation for such injury under the law of the state where he was hired, he shall be entitled to enforce against his employer his rights in this state if his

rights are such that they can reasonably be determined and dealt with by the board and the courts in this state. ['17, c. 81, § 62, p. 276.]

Hist. '17, c. 81, § 62, p. 276, reen. C. L. 256:62. **Comp leg.** Uniform act § 42.

ARTICLE 7.

PREFERENCES AND ASSIGNMENTS.

§ 6276. Preferences. All rights of compensation granted by this chapter shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. ['17, c. 81, § 63, p. 276.]

Hist. '17, c. 81, § 63, p. 276, reen. C. L. 256:63. **Comp. leg.** Uniform act § 43.

§ 6277. Assignments: Attorney's fees. No claims for compensation under this chapter shall be assignable, and all compensation and claims therefor shall be exempt from all claims by creditors. Claims of attorneys and of physicians for services under this chapter shall be subject to the approval of the board. ['17, c. 81, § 64, p. 276.]

Hist. '17, c. 81, § 64, p. 276, reen. C. L. 256:64. **Comp. leg.** Uniform act § 44.

ARTICLE 8.

SECURITY FOR COMPENSATION.

§ 6278. Security for payment of compensation. Employers, but not including the state or the municipal bodies mentioned in section 6215, shall secure compensation to their employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state insurance fund; or,

2. By depositing and maintaining with the department of commerce and industry security satisfactory to the board securing the payment by said employer of compensation according to the terms of this chapter. Such security may consist of a surety bond or guaranty contract with any company authorized to do surety or guaranty business in Idaho and having a sufficient deposit with the state treasurer upon which execution may lawfully be issued against said company on behalf of any workman secured under said bonds or contracts.

No company shall be permitted to write surety bonds or guarantee contracts covering the liability hereunder of employees of this state unless it shall have been authorized to do business under the laws of this state and until it shall have received the approval of the board. The board is hereby authorized to make and change such reasonable regulations as they may deem necessary with reference to the capital stock, surplus and reserves of such companies, to the end that the workmen secured under this chapter by any such company shall be adequately protected. The approval by the board of any such company may be withdrawn if it shall appear to the board that workmen secured therein under this chapter are not fully protected.

The board is also authorized to make and change such rules and regulations as they shall deem necessary to secure the prompt payment of compensation awards under this chapter, and shall withdraw their approval of any company, whenever it appears that such company unnecessarily delays the payment of such awards.

Hist. '17, c. 81, § 65, p. 277, reen. C. L. 256:65; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express references to this section: Posting of notice of security: § 6280; penalty for failure to procure security: § 6281; withdrawal from state fund: § 6308.

Comp. leg. Similar to uniform act: § 45.

§ 6279. Notice of security. If the security so affected is not with the state insurance fund, the employer shall forthwith file with the department of commerce and industry, in form prescribed by the board, a notice of his security.

Hist. '17, c. 81, § 66, p. 277, reen. C. L. 256:66; compiled upon authority '19, c. 8, § 28, p. 56.

Comp. leg. Similar to uniform act: § 46.

§ 6280. Posting of notice regarding insurance. Every employer who has complied with section 6278 shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the board, stating the fact that he has complied with the law as to securing the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter. ['17, c. 81, § 67, p. 278.]

Hist. '17, c. 81, § 67, p. 278, reen. C. L. 256:67.

Comp. leg. Similar to uniform act: § 47.

§ 6281. Effect of failure to secure compensation. If an employer subject to the provisions of this chapter fails to comply with the provisions of section 6278 he shall be liable to a penalty for every day during which such failure continues of $1 for every employee, to be recovered in an action brought by the department of commerce and industry in the name of the state or in its own name, and the amount so collected shall be paid into the state insurance fund.

The department of commerce and industry may, however, in its discretion, for good cause shown, remit any such penalty in whole or in part, provided the employer in default secures compensation, as provided in section 6278.

Furthermore, if any employer shall be in default under section 6278 for a period of 30 days, he may be enjoined by the district court from carrying on his business while such default continues.

Hist. '17, c. 81, § 68, p. 278, reen. C. L. 256:68; compiled upon authority '19, c. 8, § 28, p. 56.

Cited: Little v. Broxon (1918) 31 I. 303, 170 P. 918.

Comp. leg. Uniform act § 48.

§ 6282. The insurance contract. Every policy of insurance in the state insurance fund and every guarantee contract or surety bond covering the liability of the employer for compensation, shall cover the entire liability of the employer to his employees covered by the policy, bond or contract, and also shall contain a provision setting forth the right of the employees to enforce in their own names either by at any time filing a separate claim or by at any time making the surety a party to the original claim, the liability of the surety in whole or in part for the payment of such compensation: *Provided,* That payment in whole or in part of such compensation by either the employer or the surety shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid. ['17, c. 81, § 69, p. 278.]

Hist. '17, c. 81, § 69, p. 278, reen. C. L. 256:69.

Comp. leg. Uniform act § 49.

§ 6283. Knowledge of employer to affect surety. Every such policy and contract shall contain a provision that, as between the employee and the surety, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge as the case may be, on the part of the surety; that the jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the surety, and that the surety shall in all things be bound by and subject

to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter. ['17, c. 81, § 70, p. 279.]

Hist. '17, c. 81, § 70, p. 279, reen. C. L. 256:70. Comp. leg. Uniform act § 50.

§ 6284. Insolvency of employer not to release surety. Every such policy and contract shall contain a provision to the effect that the insolvency or bankruptcy of the employer and his discharge therein shall not relieve the surety from the payment of compensation for injuries or death sustained by an employee during the life of such policy or contract. ['17, c. 81, § 71, p. 279.]

Hist. '17, c. 81, § 71, p. 279, reen. C. L. 256:71. Comp. leg. Uniform act § 51.

§ 6285. Cancellation of surety contracts. No policy of insurance or guaranty contract or surety bond issued against liability arising under this chapter shall be cancelled within the time limited in such contract for its expiration until at least 10 days after notice of intention to cancel such contract on a date specified in such notice, shall have been filed in the office of the department of commerce and industry, and also served on the employer. ['17, c. 81, § 72, p. 279.]

Hist. '17, c. 81, § 72, p. 279, reen. C. L. 256:72; compiled upon authority '19, c. 8, § 28, p. 56. Comp. leg. Uniform act § 52.

§ 6286. Public corporations. Any sums necessary to be paid under the provisions of this chapter by any public corporation for premiums or compensation shall be considered to be ordinary and necessary expenses of such corporation, and the governing body of such public corporation shall make appropriation of and pay such sums whenever necessary, notwithstanding that such governing body may have failed to anticipate such ordinary and necessary expense in any budget, estimate of expenses, appropriation ordinance or otherwise. ['17, c. 81, § 73, p. 279.]

Hist. '17, c. 81, § 73, p. 279, reen. C. L. 256:73.

Cross ref. Public corporations defined: § 6215; not required to secure compensation: § 6278; but must give state insurance fund the preference: § 6316.

Comp. leg. Similar to uniform act: § 53.

Cal. Similar: '13, c. 176, § 46.

§ 6287. Employees not to pay for security. No agreement by an employee to pay any portion of the premiums paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer, except as authorized by section 6222 and 6230, or to the cost of other security maintained for or carried for the purpose of securing compensation as herein required shall be valid; and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor. ['17, c. 81, § 74, p. 280.]

Hist. '17, c. 81, § 74, p. 280, reen. C. L. 256:74. Comp. leg. Uniform act: § 54.

ARTICLE 9.

STATE INSURANCE FUND.

§ 6288. Creation of state insurance fund. There is hereby created a fund, to be known as the state insurance fund, for the purpose of insuring employers against liability for compensation under this workmen's compensation law and of assuring to the persons entitled thereto the compensation provided by said law. Such fund shall consist of all premiums and penalties received and paid into the fund, of property and

securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided.

Such fund shall be administered by the department of commerce and industry without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of compensation under the workmen's compensation law and of expenses of administering this article.

Hist. '17, c. 81, § 75, p. 280; compiled and reen. C. L. 256:75; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 55.

§ 6289. Powers and duties of department of commerce and industry concerning state insurance. It shall be the duty of the department of commerce and industry to conduct the business of the state insurance fund and the department is hereby vested with full authority over the said fund, and may do any and all things which are necessary or convenient in the administration thereof, or in connection with the insurance business to be carried on by the department under the provisions of this chapter.

Hist. '17, c. 81, § 77, p. 281, reen. C. L. 256:77; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 57.

§ 6290. Further statement of powers. The department of commerce and industry shall have full power to determine the rates to be charged for insurance in said fund, and to conduct all business in relation thereto, all of which business shall be conducted in the official name of the department.

Hist. '17, c. 81, § 78, p. 281, reen. C. L. 256:78; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 58.

§ 6291. Power to sue and be sued. The department of commerce and industry may in its official name sue and be sued in all the courts of the state, and before the industrial accident board in all actions or proceedings arising out of anything done or offered in connection with the state insurance fund or business relating thereto.

Hist. '17, c. 81, § 79, p. 281, reen. C. L. 256:79; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 59.

§ 6292. Contracts. The department of commerce and industry may make contracts of insurance as herein provided and such other contracts relating to the state insurance fund as are authorized or permitted under the provisions of this chapter.

Hist. '17, c. 81, § 80, p. 281, reen. C. L. 256:80; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 60.

§ 6293. Employment of assistants. The department of commerce and industry may employ such assistants, experts, statisticians, actuaries, accountants, inspectors, clerks and other employees as the department may deem necessary to carry out the provisions of this chapter or to perform the duties imposed upon it by this chapter.

Hist. '17, c. 81, § 81, p. 281, reen. C. L. 256:81; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 61.

§ 6294. Personal liability. The commissioner of commerce and industry shall not, nor shall any person employed by the department of commerce and industry, be personally liable in his private capacity for or on account of any act performed or contract entered into

in an official capacity in good faith and without intent to defraud, in connection with the administration of the state insurance fund or affairs relating thereto. ['19, c. 8, § 47, p. 68.]

Hist. '17, c. 81, § 82, p. 281, reen. C. L. 256:82; am. '19, c. 8, § 47, p. 68. **Comp. leg.** Uniform act: Similar: § 62.

§ 6295. Salaries, expenses, and payment of same. The salary of the director of the state industrial insurance fund and the salary or compensation of the employees in said bureau and all expenses incurred by said bureau shall be audited and paid in the first instance out of the state treasury in the manner prescribed for similar expenditures in other departments or branches of the state service. ['19, c. 8, § 48, p. 68.]

Hist. '17, c. 81, § 83, p. 282, reen. C. L. 256:83; am. '19, c. 8, § 48, p. 68. **Comp. leg.** Uniform act: Similar: § 63.

§ 6296. Delegation of powers. The department of commerce and industry as successor to the state insurance manager may act through proper deputies and may delegate to such deputies such powers as it deems necessary or convenient.

Among the powers which may be so delegated shall be the power to enter into contracts of insurance, insuring employers against liability for compensation under the workmen's compensation law, and insuring to employees the compensation fixed by said law; also the power to make agreements, subject to the approval of the industrial accident board having jurisdiction, for the settlement of claims against said fund for compensation for injuries in accordance with the provisions of said law; also the power to determine to whom and through whom payments of such compensation shall be made; and also the power to contract with physicians, surgeons and hospitals for medical and surgical treatment and care and nursing of injured persons entitled to compensation from said fund.

Hist. '17, c. 81, § 84, p. 282, reen. C. L. 256:84; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 64.

§ 6297. State treasurer custodian of fund. The state treasurer shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him upon warrants or vouchers authorized and signed by the commissioner of the department of commerce and industry, and also signed by the state auditor. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor, and with sureties approved by him, conditioned for the faithful performance of his duty as custodian of the state insurance fund. The state treasurer may deposit any portion of the said fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

Hist. '17, c. 81, § 86, p. 282, reen. C. L. 256:86; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 66.

§ 6298. Surplus and reserve. Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the department of commerce and industry for the creation of a surplus, until such surplus shall amount to the sum of $100,000, and thereafter 5 per centum of such premiums, until such time as in the judgment of the department such surplus shall be sufficiently large to cover the

catastrophe hazard and all other unanticipated losses. The department shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity.

Hist. '17, c. 81, § 87, p. 283, reen. C. L. 256:87; compiled upon authority '19, c. 8, § 28, p. 56; obsolete part omitted.

Comp. leg. Uniform act § 67.

§ 6299. Investment of surplus or reserve. The department of commerce and industry may invest any of the surplus or reserve funds belonging to the state insurance fund in the same securities and investments authorized for investments by savings banks. All such securities or evidences of indebtedness shall be placed in the hands of the state treasurer, who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all warrants or vouchers drawn on the state insurance fund for the making of such investments when signed by the commissioner of commerce and industry and by the state auditor. The department of commerce and industry, with the consent of the state auditor, may sell any of such securities, the proceeds thereof to be paid over to the state treasurer for said state insurance fund.

Hist. '17, c. 81, § 88, p. 283, reen. C. L. 256:88; compiled upon authority '19, c. 8, § 28, p. 56.

Comp. leg. Uniform act § 68.

§ 6300 Administration expenses. The entire expense of administering the state insurance fund shall be paid in the first instance by the state, out of moneys appropriated therefor. In the month of July, 1919, and semiannually thereafter, the department of commerce and industry shall ascertain the just amount of expense incurred by it during the preceding half year in the administration of the state insurance fund, including expense incurred for the examination, determination and payment of losses and claims, and shall refund such amount to the state treasury.

Hist. '17, c. 81, § 89, p. 284; compiled and reen. C. L. 256:89; compiled upon authority '19, c. 8, § 28, p. 56.

Cross ref. Express reference to this section: Appropriation to be refunded hereunder: § 6335.

Comp. leg. Uniform act § 69.

§ 6301. Classification of risks and adjustment of premiums. Employments insured in the state insurance fund shall be divided by the department of commerce and industry, for the purposes of the said fund, into classes. Separate accounts shall be kept of the amounts collected and expended in respect to each such class for convenience in determining equitable rates; but for the purpose of paying compensation the state insurance fund shall be deemed one and indivisible. The department of commerce and industry shall have power to rearrange any of the classes by withdrawing any employment embraced in it and transferring it wholly or in part to any other class, and from such employments to set up new classes in its discretion. The department shall determine the hazards of the different classes and fix the rates of premiums therefor based upon the total pay roll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

Hist. '17, c. 81, § 90, p. 284; compiled and reen. C. L. 256:90; compiled upon authority '19, c. 8, § 28, p. 56.

Comp. leg. Uniform act § 70.

§ 6302. Accounts. The department of commerce and industry shall keep an account of the money paid in premiums by each of the several classes of employments, and the expense of administering the state insurance fund and the disbursements on account of injuries and deaths of employees in each of said classes, including the setting up of reserves adequate to meet anticipated and unexpected losses and to carry the claims to maturity; and also an account of the money received from each individual employer; and of the amount disbursed from the state insurance fund for expenses, and on account of injuries and death of the employees of such employer, including the reserves so set up.

Hist. '17, c. 81, § 91, p. 284, reen. C. L. 256:91; compiled upon authority '19, c. 8, § 28, p. 56.

Comp. leg. Uniform act § 71.

§ 6303. Dividends. At the end of every year, and at such other times as the department of commerce and industry in its discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the department of commerce and industry deems may be safely and properly divided, it may in its discretion credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six months or more, prior to the time of such readjustment, such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates.

Hist. '17, c. 81, § 92, p. 285, reen. C. L. 256:92; compiled upon authority '19, c. 8, § 28, p. 56.

Comp. leg. Uniform act § 72.

§ 6304. Assessments. If the premiums fixed for any class and collected from its members are subsequently found by the department of commerce and industry to have been too small for any period, it may determine what additional premiums are required from said class for said period, and may make assessments accordingly, and each of the members of such class shall be liable to the said department to pay such assessment so made upon him within 30 days after notice thereof.

Hist. '17, c. 81, § 93, p. 285, reen. C. L. 256:93; compiled upon authority '19, c. 8, § 28, p. 56.

Comp. leg. Uniform act § 73.

§ 6305. Readjustment of payrolls. If the amount of premium collected from any employer at the beginning of any period is ascertained by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such period and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such period, such employer shall immediately upon being advised of the true amount of such premium due, forthwith pay to the department of commerce and industry

an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such period.

Hist. '17, c. 81, § 94, p. 285, reen. C. L. 256:94; compiled upon authority '19, c. 8, § 28, p. 56. Comp. leg. Uniform act § 74.

§ 6306. Policies and payment of premiums. 1. Every employer insuring in the state insurance fund shall receive from the department of commerce and industry a contract or policy of insurance.

2. Except as otherwise provided in this chapter, all premiums shall be paid by every employer who elects to insure with the state insurance fund to the department of commerce and industry semiannually or at such times as may be prescribed by the department. Receipts shall be given for such payments and the money shall be paid over to the state treasurer to the credit of the state insurance fund.

Hist. '17, c. 81, § 95, p. 286, reen. C. L. 256:95; compiled upon authority '19, c. 8, § 28, p. 56. Comp. leg. Uniform act § 75.

§ 6307. Actions for collection in case of default: Penalty. If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the state or of the department of commerce and industry, and it shall be the duty of the department forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due; and the same, when collected by the department, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected to the department.

An employer who is in default for 10 days in payment of any premium shall also be liable to a penalty for every day during which such failure continues of $1 for every employee, to be recovered in an action brought by the department of commerce and industry in the name of the state, or in the name of the department and the amounts so collected shall be paid into the state insurance fund.

The department may, however, in its discretion for good cause shown, remit any such penalty in whole or in part, provided the employer in default subsequently pays the premium.

Hist. '17, c .81, § 96, p. 286, reen. C. L. 256:96; compiled upon authority '19, c. 8, § 28, p. 56. Comp. leg. Uniform act § 76.

§ 6308. Withdrawal from fund. Any employer may, upon complying with subdivision 2 of section 6278 withdraw from the fund by turning in his insurance contract or policy for cancellation, provided he is not in arrears for premiums due to the fund and has given to the department of commerce and industry written notice of his intention to withdraw 30 days before the expiration of the period for which he has elected to insure in said fund; and also provided that in case any employer so withdraws, his liability to assessments shall continue after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal.

Any employer so withdrawing may, however, terminate his entire liability by paying to the department such sum as said department may deem sufficient to cover such liabilities.

Hist. '17, c. 81, § 97, p. 287, reen. C. L. 256:97; compiled upon authority '19, c. 8, § 28, p. 56. Comp. leg. Uniform act § 77.

§ 6309. Reinsurance. The department of commerce and industry may reinsure any risk, or any part thereof, and may enter into agreements of reinsurance in the same way and to the same extent as other insurance carriers.

Hist. '17, c. 81, § 98, p. 287, reen. C. L. 256:98; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 78.

§ 6310. Audit of payrolls. Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish to the department of commerce and industry, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the department shall require to verify the number of employees and the amount of payroll.

Hist. '17, c. 81, § 99, p. 287, reen. C. L. 256:99; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 79.

§ 6311. Falsification of payroll. An employer who shall wilfully misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund are to be based shall be liable to the state in 10 times the amount of the difference between the premiums paid and the amount the employer should have paid had his payroll been correctly computed; and the liability to the state under this section shall be enforced in a civil action by the department of commerce and industry in the name of the state, or in the name of the department, and any amount so collected shall become a part of the state insurance fund.

Hist. '17, c. 81, § 100, p. 288, reen. C. L. 256:100; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 80.

§ 6312. Wilful misrepresentation. Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor. ['17, c. 81, § 101, p. 288.]

Hist. '17, c. 81, § 101, p. 288, reen. C. L. 256:101. **Comp. leg.** Uniform act § 81.

§ 6313. Inspections. The department of commerce and industry shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the department shall have free access to such premises during regular working hours, and at other reasonable times.

Hist. '17, c. 81, § 102, p. 288, reen. C. L. 256:102; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 82.

§ 6314. Disclosures prohibited. Information acquired by the department of commerce and industry from employers or employees pursuant to this chapter shall not be open to public inspection, and any officer or employee of the department of commerce and industry who without authority of the department or pursuant to its rules, or as otherwise required by law, shall disclose the same, shall be guilty of a misdemeanor.

Hist. '17, c. 81, § 103, p. 288, reen. C. L. 256:103; compiled upon authority '19, c. 8, § 28, p. 56. **Comp. leg.** Uniform act § 83.

§ 6315. Payment of compensation. The department of commerce and industry shall submit each month to the state board of examiner

n estimate of the amount necessary to meet the current disbursements or insurance losses and workmen's compensation from the state insurance fund, during each succeeding calendar month, and when such stimate shall be approved by the state board of examiners, the state reasurer is authorized to pay the same out of the state insurance fund. At the end of each calendar month the department shall account to he state board of examiners for all money so received, furnishing roper vouchers therefor.

Hist. '17, c. 81, § 105, p. 289, reen. C. L. 56:105; compiled upon authority '19, c. 8, 28, p. 56. **Comp. leg.** Uniform act § 85.

§ 6316. Insurance by public corporations. A public corporation nay insure against its liability for compensation with the state insurnce fund and not with any other insurance carrier, unless such fund hall refuse to accept the risk when the application for insurance is nade. ['17, c. 81, § 107, p. 289.]

Hist. '17, c. 81, § 107, p. 289, reen. C. L. 56:107.

Cross ref. Public corporations defined: § 6215; need not secure compensation: § 6278; may pay compensation out of current expense: § 6286.

ARTICLE 10.

REPORTS, DEFINITIONS AND GENERAL PROVISIONS.

§ 6317. Reports of accidents by employers. Every employer shall ereafter keep a record of all injuries, fatal or otherwise, received by is employees in the course of their employment. Within 48 hours, ot counting Sundays and legal holidays, after the occurrence of an njury causing absence from work for one day or more, a report thereof shall be made in writing to the [industrial accident] board in the orm prescribed by the board.

Upon the termination of the disability of the injured employee the mployer shall make a supplemental report to the board, in form prescribed by the board. If the disability extends beyond a period of 60 ays, the employer shall report to the board at the end of such period hat the injured employee is still disabled, and upon the termination f the disability shall file a final supplemental report as provided above.

The said reports shall contain the name and nature of the business f the employer, the situation of the establishment, the name, age, sex, ages and occupation of the injured employee and shall state the date nd hour of the accident causing the injury, the nature and cause of he injury, and such other information as may be required by the oard.

Any employer who refuses or neglects to make the report required y this section shall be punished by a fine of not more than $500 for ach offense.

Within 60 days after the termination of the disability of the injured mployee, the employer or other party liable to pay the compensation rovided for by this chapter shall file with the board a statement howing the total payments made or to be made for compensation nd for medical services for such injured employee. [C. L. 256:108.]

Hist. '17, c. 81, § 108, p. 289; compiled nd reen. C. L. 256:108. **Comp. leg.** Uniform act § 87.

§ 6318. Interstate commerce. This chapter shall affect the liaility of employers to employees engaged in interstate or foreign commerce, or otherwise, only so far as the same is permissible under the aws of the United States. ['17, c. 81, § 109, p. 290.]

Hist. '17, c. 81, § 109, p. 290, reen. C. L. 56:109. **Comp. leg.** Uniform act § 88.

§ 6319. Definitions. In this chapter, unless the context otherwis requires, words and phrases shall have the meanings defined in th sections following. [C. L. 256:110.]

Hist. '17, c. 81, § 110, p. 290; compiled and reen. C. L. 256:110.

Comp. leg. This and the sections fo lowing are found in the uniform act, § 9

§ 6320. Employer. "Employer," unless otherwise stated, include any body of persons, corporate or unincorporated, public or private and the legal representative of a deceased employer. It includes th owner or lessee of premises, or other person who is virtually the propr etor or operator of the business there carried on, but who, by reason o there being an independent contractor, or for any other reason, is no the direct employer of the workmen there employed. If the employe is secured it includes his surety so far as applicable. ['17, c. 81, § 110a p. 290.]

Hist. '17, c. 81, § 110a, p. 290, reen. C. L. 256:110a.

§ 6321. Workman: Employee. "Workman" is used as synony mous with "employee" and means any person who has entered into th employment of, or works under contract of service or apprenticeshi with, an employer. It does not include any person engaged in any o the excepted employments enumerated in section 6216 unless a agreement as provided in said section is in force between employe and employee making the provisions hereof applicable, nor does it in clude a person whose remuneration exceeds $2400 a year. Any re erence to a workman who has been injured shall, where the workma is dead, include a reference to his dependents as herein defined, if th context so requires, or, where the employee is a minor or incompeten to his committee or guardian or next friend.

A minor working at an age legally permitted under the laws of th state shall be deemed sui juris for the purpose of this chapter, and n other person shall have any cause of action or right to compensatio for an injury to such minor workman except as expressly provided i this chapter, but in the event of a lump sum payment becoming du under this chapter to such minor workman, the management of th sum shall be within the probate jurisdiction of the courts the same a other property of minors. ['17, c. 81, § 110b, p. 291.]

Hist. '17, c. 81, § 110b, p. 291, reen. C. L. 256:110b.

§ 6322. Outworker. An "outworker" is a person to whom articl or materials are given to be treated in any way on premises not und the control or management of the person who gave them out. ['1 c. 81, § 110c, p. 291.]

Hist. '17, c. 81, § 110c, p. 291, reen. C. L. 256:110c.

§ 6323. Injury. "Injury" or "personal injury" includes death r sulting from injury within two years. ['17, c. 81, § 110d, p. 291.]

Hist. '17, c. 81, § 110d, p. 291, reen. C. L. 256:110d.

§ 6324. Personal injury by accident, etc. The words "personal i jury by accident arising out of and in the course of such employmen shall include an injury caused by the wilful act of a third person d rected against an employee because of his employment. They sha not include a disease except as it shall result from the injury. ['1 c. 81, § 110e, p. 291.]

Hist. '17, c. 81, § 110e, p. 291, reen. C. L. 256:110e.

§ 6325. Employment. "Employment," in the case of private employers, includes employment only in a trade or occupation which is carried on by the employer for the sake of a pecuniary gain. It shall also include any of the pursuits specified in section 6216 when the employer and employee shall have elected to come under the chapter as in said section provided. ['17, c. 81, § 110f, p. 291.]

Hist. '17, c. 81, § 110f, p. 291, reen. C. L. 56:110f.

§ 6326. Board. The word "board," whenever used in this chapter, unless the context shows otherwise, shall be taken to mean the industrial accident board. ['17, c. 81, § 110g, p. 292.]

Hist. '17, c. 81, § 110g, p. 292, reen. C. L. 56:110g.

§ 6327. "Partial disability." Diminished ability to obtain employment owing to disfigurement resulting from an injury may be held to constitute partial disability. ['17, c. 81, § 110h, p. 292.]

Hist. '17, c. 81, § 110h, p. 292, reen. C. L. 56:110h.

§ 6328. Wages. "Wages" shall include the market value of board, lodging, fuel and other advantages which can be estimated in money which the employee receives from the employer as a part of his remuneration. "Wages" shall not include any sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment. ['17, c. 81, § 110i, p. 292.]

Hist. '17, c. 81, § 110i, p. 292, reen. C. L. 256:110i.

§ 6329. Surety. "Surety" shall include the department of commerce and industry, representing the state insurance fund, and also any companies from any of which employers have obtained surety bonds or guaranty contracts in accordance with the provisions of this chapter.

Hist. '17, c. 81, § 110j, p. 292, reen. C. L. 56:110j; compiled upon authority '19, c. 8, § 28, p. 56.

§ 6330. Number and gender. Any terms shall include the singular and plural and both sexes where the context so requires. [C. L. 56:110k,]

Hist. '17, c. 81, § 110k, p. 292; compiled and reen. C. L. 256:110k.

§ 6331. Unconstitutional provisions. If any part or section of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole, or any part thereof which can be given effect without the part so decided to be unconstitutional or invalid. ['17, c. 81, § 111, p. 292.]

Hist. '17, c. 81, § 111, p. 292, reen. C. L. 56:111. **Comp. leg.** Uniform act § 91.

§ 6332. Penalties for false representations. If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or for any other person, any one wilfully makes a false statement or representation, he shall be guilty of a misdemeanor and he shall forfeit all right to compensation under this chapter after conviction for such offense. ['17, c. 81, § 112, p. 292.]

Hist. '17, c. 81, § 112, p. 292, reen. C. L. 56:112. **Comp. leg.** Uniform act § 92.

§ 6333. Prior injuries. The provisions of this chapter shall not apply to injuries sustained, or accidents which occur, prior to the taking effect hereof. ['17, c. 81, § 113, p. 292.]

Hist. '17, c. 81, § 113, p. 292, reen. C. L. 56:113. **Comp. leg.** Uniform act § 93.

§ 6334. Rule of construction to secure uniformity. This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it. ['17, c. 81, § 114, p. 293.]

Hist. '17, c. 81, § 114, p. 293, reen. C. L. **Comp. leg.** Uniform act § 94. 256:114.

§ 6335. Appropriation. For the purpose of carrying out article 9 of this chapter there is hereby appropriated out of the funds in the state treasury not otherwise appropriated, the sum of $20,000, or so much thereof as may be necessary, to be placed in the state insurance fund and to be refunded as provided in section 6300. There is also hereby appropriated out of the funds in the state treasury not otherwise appropriated the sum of $15,000, or so much thereof as may be necessary, to be placed in the industrial administration fund. ['17, c. 81, § 115, p. 293.]

Hist. '17, c. 81, § 115, p. 293, reen. C. L. 256:115.

§ 6336. Short title. This chapter may be cited as the workmen's compensation law. ['17, c. 81, § 116, p. 293.]

Hist. '17, c. 81, § 116, p. 293, reen. C. L. **Comp. leg.** Uniform act § 96. 256:116.

ARTICLE 11.

SAFETY PROVISIONS.

§ 6337. Board may prescribe. The board shall have the power, in addition to other powers herein granted by general rules or regulations

1. To declare and prescribe what safety devices, safeguards or other means or methods of protection are well adapted to render employees and places of employment safe.

2. To fix and order such reasonable standards for the construction, maintenance and repair of places of employment as shall render them safe.

3. To require the performance of any act necessary for the protection of the life, health and safety of employees. ['17, c. 81, § 118, p. 293.]

Hist. '17, c. 81, § 118, p. 293, reen. C. L. 256:117.

§ 6338. Board rules must be obeyed. Every employer, employee and other person shall obey and comply with each and every requirement of every order, direction or regulation made or prescribed by the board, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, direction or regulation. ['17, c. 81, § 119, p. 293.]

Hist. '17, c. 81, § 119, p. 293, reen. C. L. 256:118.

§ 6339. Penalty for violation of safety provisions. Every employer, employee or other person who, either individually or acting as an officer, agent or employee of a corporation or other person, violates any safety provision contained in this article, or any part of such provision, or who shall fail or refuse to comply with any such provision, or any part thereof, or who, directly or indirectly, knowingly induces another so to do is guilty of a misdemeanor. ['17, c. 81, § 120, p. 294.]

Hist. '17, c. 81, § 120, p. 294, reen. C. L. 256:119.

TITLE LI. LIENS.

CHAPTER 237.

LIENS IN GENERAL.

Cross ref. Warehousemen's lien: §§ 6145-51.

§ 6340. [3373] **Liens defined.** A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act. [R. S. § 3325.]

Hist. R. S. § 3325, reen. R. C. § 3373, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2872; same as amended: Kerr's C. ib.

Transfer in trust: The transfer in trust mentioned by this section is one which creates a trust and absolutely conveys title from the grantor, and not a deed of trust which hypothecates the property for the payment of the debt. Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

§ 6341. [3374] **General and special liens.** Liens are either general or special. [R. S. § 3326.]

Hist. R. S. § 3326, reen. R. C. § 3374, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2873; Kerr's C. ib.

§ 6342. [3375] **General lien defined.** A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property. [R. S. § 3327.]

Hist. R. S. § 3327, reen. R. C. § 3375, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2874; Kerr's C. ib.

Cited: Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

§ 6343. [3376] **Special lien defined.** A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto. [R. S. § 3328.]

Hist. R. S. § 3328, reen. R. C. § 3376, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2875; Kerr's C. ib.

Cited: Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

§ 6344. [3377] **Satisfaction of prior lien.** Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists. [R. S. § 3329.]

Hist. R. S. § 3329, reen. R. C. § 3377, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2876; Kerr's C. ib.

Cited: Law v. Spence (1897) 5 I. 244, 48 P. 282.

§ 6345. [3378] **Contracts subject to this chapter.** Contracts of mortgage and pledge are subject to all the provisions of this chapter. [R. S. § 3330.]

Hist. R. S. § 3330, reen. R. C. § 3378, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2877; Kerr's C. ib.

§ 6346. [3379] **Lien on future interest.** An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of said interest. [R. S. § 3331.]

Hist. R. S. § 3331, reen. R. C. § 3379, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2883; Kerr's C. ib.

§ 6347. [3380] **Lien for performance of future obligation.** A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence. [R. S. § 3332.]

Hist. R. S. § 3332, reen. R. C. § 3380, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2884; Kerr's C. ib.

§ 6348. [3381] **Lien transfers no title.** Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien. [R. S. § 3333.]

Hist. R. S. § 3333, reen. R. C. § 3381, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2888; Kerr's C. ib.

Cited: Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

Title not transferred: A provision in a contract for the lease of sheep whereby a lien is given on all increase to secure the payment of the rental therefor, conveys no title to such increase. Solomon v. Franklin (1900) 7 I. 316, 62 P. 1030.

§ 6349. [3382] **Contracts for forfeiture void.** All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void. [R. S. § 3334.]

Hist. R. S. § 3334, reen. R. C. § 3382, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2889; Kerr's C. ib.

Cited: Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

Forfeitures void: A provision in a contract for the lease of sheep declaring a forfeiture of all interests of the lessor in the sheep, wool, product, and increase thereof, in case of default in the payment of the rental thereof, is void. Solomon v. Franklin (1900) 7 I. 316, 62 P. 1030.

§ 6350. [3383] **Personal obligation not implied.** The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security. [R. S. § 3335.]

Hist. R. S. § 3335, reen. R. C. § 3383, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2890; Kerr's C. ib.

§ 6351. [3384] **Priority of purchase money mortgage.** A mortgage given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws. [R. S. § 3336.]

Hist. R. S. § 3336, reen. R. C. § 3384, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2898; Kerr's C. ib.

Purchase money mortgage: A mortgage on preempted public land made to procure money to make final payment for the land, is a purchase money mortgage within the meaning of this section, and has priority over subsequently accruing marital rights of the mortgagor's wife in the land, although she did not join in the mortgage. Kneen v. Halin (1899) 6 I. 621, 59 P. 14.

§ 6352. [3385] **Right to redeem from lien.** Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed. [R. S. § 3337.]

Hist. R. S. § 3337, reen. R. C. § 3385, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2903; amended: Kerr's C. ib.

Right of redemption absolute: This statute makes the right of redemption absolute, provided the redemption is sought after the debt becomes due and before the period of redemption on foreclosure expires. Hannah v. Vensel (1911) 19 I. 796, 116 P. 115.

§ 6353. [3386] **Rights of junior lienor.** One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,

2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests upon satisfying the claim secured thereby. [R. S. § 3338.]

Hist. R. S. § 3338, reen. R. C. § 3386, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2904; Kerr's C. ib.

Construed: "Creditors" is not limited to attaching creditors but includes any creditor who in some way connects himself with the property, as a trustee in bankruptcy in possession of the property and creditors whose claims he has allowed. Re Hickerson (1908) 162 F. 345.

§ 6354. [3387] **Restoration extinguishes lien.** The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith and for a good consideration. [R. S. § 3339.]

Hist. R. S. § 3339, reen. R. C. § 3387, reen. C. L. ib.

Comp. leg.—Cal. Civ. C. 1872, § 2913; same as amended: Kerr's C. ib.

CHAPTER 238.

MORTGAGES.

ARTICLE 1.

GENERAL PROVISIONS.

Cross ref. Foreclosure of mortgages: §§ 6949-52.

§ 6355. [3388] **Mortgage defined.** Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. [R. S. § 3350.]

Hist. R. S. § 3350, reen. R. C. § 3388, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2920; Kerr's C. ib.

Cited: Hannah v. Vensel (1911) 19 I. 796, 116 P. 115; Capital L. Co. v. Saunders (1914) 26 I. 408, 143 P. 1178.

Trust deed a mortgage: A trust deed given to secure a debt is a mortgage although it contains a power of sale. Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

Form of indebtedness: A debt for which a mortgage is given may consist in the faithful performance of a duty resting upon the mortgagor, if it is capable of being reduced to money value. Dover L. Co. v. Case (1918) 31 I. 276, 170 P. 108.

§ 6356. [3389] **Must be in writing.** A mortgage can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant or conveyance of real property. [R. S. § 3351.]

Hist. R. S. § 3351, reen. R. C. § 3389, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2922; Kerr's C. ib.

Cited: Rowe v. Stevens (1913) 25 I. 237, 137 P. 159; Keane v. Kibble (1915) 28 I. 274, 281, 154 P. 972.

Application: This section applies to all mortgages whether real or chattel. Willows v. Rosenstein (1897) 5 I. 305, 48 P. 1067.

Prohibited agreements: An agreement to hold a mortgage for an individual indebtedness when said mortgage has been included in a subsequent copartnership mortgage which has been satisfied, is contrary to the provisions of this section. Ib.

The lien of a mortgage cannot be extended beyond its terms so as to secure a debt not named therein, or to hypothecate property not covered by the mortgage, except by a compliance with the provisions of this section; but this does not preclude the mortgagor from waiving the statute of limitations as to the mortgage debt by indorsing an acknowledgment to pay the debt on the note and mortgage. Moulton v. Williams (1899) 6 I. 424, 55 P. 1019.

Parties to an usurious contract secured by a trust deed, cannot remove the usurious character of the transaction by an agreement between themselves, and thus make the trust deed a lien for interest and costs as against a junior mortgagee, who is not a party to the agreement and whose rights will be prejudiced thereby. Madsen v. Whitman (1902) 8 I. 762, 71 P. 152.

Estoppel: Where a stranger to a mortgage purchases the mortgaged property, and agrees that the mortgage shall stand as security for the purchase price, the provisions of this section have no application, and the purchaser is estopped to deny the validity of the agreement although it is not executed in conformity to this section. Burke Land etc. Co. v. Wells, Fargo Co. (1900) 7 I. 42, 60 P. 87.

§ 6357. [3390] **Lien of mortgage is special.** The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession. [R. S. § 3352.]

Hist. R. S. § 3352, reen. R. C. § 3390, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2923; Kerr's C. ib.

§ 6358. [3391] **Transfers deemed mortgages.** Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by an actual change of possession, in which case it is to be deemed a pledge. [R. S. § 3353.]

Hist. R. S. § 3353, reen. R. C. § 3391, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2924; same as amended: Kerr's C. ib.

Cited: Capital L. Co. v. Saunders (1914) 26 I. 408, 143 P. 1178.

Definition: The transfer in trust mentioned by this section is one which creates a trust and absolutely conveys title from the grantor, and not a deed of trust which hypothecates the property for the payment of the debt. Brown v. Bryan (1898) 6 I. 1, 51 P. 995.

What constitutes a mortgage: A deed absolute on its face and a separate agreement bearing the same date as the deed, for a reconveyance of the same tract of land to the grantor upon payment of the consideration named in the deed, by a specified time, constitute together a mortgage. Kelly v. Leachman (1892) 3 I. 392, 29 P. 849; (1893) 3 I. 629, 33 P. 44; Wilson v. Thompson (1896) 4 I. 679, 43 P. 557.

Where a deed, absolute on its face, has been executed to secure the payment of a debt, and it is clearly and satisfactorily established that the instrument was intended only as security and that it is therefore only a mortgage, the title to the property remained in the grantor. Hannah v. Vensel (1911) 19 I. 796, 116 P. 115.

Where an instrument in writing in the form of a deed of conveyance is executed and delivered as security for a debt, such instrument becomes a mortgage and not a deed notwithstanding the form of the instrument. Bergen v. Johnson (1912) 21 I. 619, 123 P. 484.

Equitable mortgage: Where a deed, absolute on its face, is taken to real property but is in effect an equitable mortgage, and the plaintiff prays to have the same so declared, and no application is made to foreclose said mortgage, the proper form of decree is that the plaintiff be allowed to redeem upon the payment of the sum found due within a reasonable time to be fixed by the decree, and that upon such payment the mortgage shall be adjudged to be satisfied, and that in default of such payment the title shall be quieted in the defendant. Machold v. Farnan (1911) 20 I. 80, 117 P. 408.

Cancellation of defeasance: A defeasance may be voluntarily surrendered or cancelled, and such action will render the mortgage, whether it was in form a mortgage, or whether it was in form a conveyance absolute with defeasance provable by parol, an absolute deed and conveyance. Smith v. Schultz (1912) 23 I. 144, 148, 129 P. 640.

Equity of redemption may be purchased from mortgagor, and debt thereby be extinguished, and transfer become absolute. Shaner v. Rathdrum S. Bk. (1916) 29 I. 576, 161 P. 90.

§ 6359. [3392] **Defeasance may be shown by parol.** The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice), though the fact does not appear by the terms of the instrument. [R. S. § 3354.]

Hist. R. S. § 3354, reen. R. C. § 3392, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2925; Kerr's C. ib.

Cited: Brown v. Bryan (1898) 6 I. 1, 51 P. 995; Thompson v. Burns (1908) 15 I. 572, 99 P. 111; Capital L. Co. v. Saunders (1914) 26 I. 408, 143 P. 1178.

Evidence must be convincing: A deed absolute on its face cannot be held to be a mortgage unless there is a debt to be secured thereby, and the evidence must be clear, that it was not a sale. Bergen v. Johnson (1912) 21 I. 619, 123 P. 484; Shaner v. Rathdrum S. Bk. (1916) 29 I. 576, 161 P. 90.

Question of intention: Whether instrument sued upon is a conditional sale note or a chattel mortgage, and whether or not respondent has mistaken his remedy, are questions which are dependent upon the agreement of parties at time transaction was entered into, and must be decided from all facts and circumstances which will tend to show the intent of parties. Keane v. Kibble (1915) 28 I. 274. 154 P. 972.

As applied to innocent third parties: Proof cannot be made against innocent purchasers and incumbrancers, that a deed absolute on its face was intended as a mortgage, unless that fact appears from the terms of the instrument itself. Hannah v. Vensel (1911) 19 I. 796, 116 P. 115.

§ 6360. [3393] **Extent of mortgage lien.** A mortgage is a lien upon everything that would pass by a grant or conveyance of the property. [R. S. § 3355.]

Hist. R. S. § 3355, reen. R. C. § 3393, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2926; Kerr's C. ib.

Cited: Kelly v. Leachman (1893) 3 I. 629, 33 P. 44.

Effect of mortgage lien: A mortgage, or any contract or instrument made only as security for the payment of a debt, merely creates a lien on the property therein described and leaves the legal title in the mortgagor or grantor, which title can only be divested by judicial sale in a suit or action under and in conformity with the statute. Hannah v. Vensel (1911) 19 I. 796, 116 P. 115.

§ 6361. [3394] **Subsequent title inures to mortgagee.** Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution. [R. S. § 3356.]

Hist. R. S. § 3356, reen. R. C. § 3394, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2930; same as amended: Kerr's C. ib.

§ 6362. [3395] **Power of attorney to mortgage.** A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged, or proved, certified and recorded in like manner as powers of attorney for grants of real property. [R. S. § 3357.]

Hist. R. S. § 3357, reen. R. C. § 3395, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2933; Kerr's C. ib.

§ 6363. [3396] **Recording assignment of mortgage.** An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor. [R. S. § 3358.]

Hist. R. S. § 3358, reen. R. C. § 3396, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2934; same as amended: Kerr's C. ib.

§ 6364. [3397] **Same: Not notice to mortgagor.** The record of the assignment of a mortgage is not of itself notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee. [R. S. § 3359.]

Hist. R. S. § 3359, reen. R. C. § 3397, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2935; similar as amended: Kerr's C. ib.

§ 6365. [3398] **Assignment of debt carries security.** The assignment of a debt secured by mortgage carries with it the security. [R. S. § 3360.]

Hist. R. S. § 3360, reen. R. C. § 3398, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2936; Kerr's C. ib.

§ 6366. [3399] **Marginal discharge of mortgage.** A recorded mortgage or chattel mortgage filed as provided by law, may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as follows:

"Signed and acknowledged before me this.....day of.....
in the year of.....

"A. B., Recorder."

['95, p. 54, § 1.]

Hist. (See '64, p. 528, § 36) R. S. § 3361; am. '95, p. 54, § 1, reen. '99, p. 249, § 1, reen. R. C. § 3399, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2938; Kerr's C. ib.

Discharge of lien: The lien of a mortgage which is not discharged by marginal entry, as provided by this section or on certificate as provided in the following section, or by decree of court, remains in force. Kelly v. Leachman (1893) 3 I. 629, 33 P. 44.

§ 6367. [3400] **Discharge of mortgage on certificate.** A recorded mortgage or chattel mortgage filed as provided by law, if not discharged

as provided in the preceding section, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representative or assigns, acknowledged or proved and certified as prescribed by the chapter on recording transfers, stating that the mortgage has been paid, satisfied or discharged. ['95, p. 54, § 2.]

Hist. (See '64, p. 528, § 37) R. S. § 3362; am. '95, p. 54, § 2, reen. '99, p. 249, § 2, reen. R. C. § 3400, reen. C. L. ib.

Cross ref. Recording transfers: §§ 5413-5427.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2939; Kerr's C. ib.

Cited Kelly v. Leachman (1893) 3 I. 629, 33 P. 44.

§ 6368. [3401] **Record of discharge.** A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the record book to the book and page where the mortgage is recorded and in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded. [R. S. § 3363.]

Hist. (See '64, p. 528, § 38) R. S. § 3363, reen. R. C. § 3401, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2940; Kerr's C. ib.

§ 6369. [3402] **Refusal to satisfy mortgage: Penalty.** When any mortgage has been satisfied, the mortgagee or his assignee must immediately, on the demand of the mortgagor, execute, acknowledge, and deliver to him a certificate of the discharge thereof so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage to be entered of record; and any mortgagee, or assignee of such mortgagee, who refuses to execute, acknowledge, and deliver to the mortgagor, the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, is liable to the mortgagor or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of $100. [R. S. § 3364.]

Hist. (See '64, p. 528, § 39) R. S. § 3364, reen. R. C. § 3402, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2941; same as amended: Kerr's C. ib.

Cited: Stevens v. Home Savings etc. Assn. (1897) 5 I. 741, 51 P. 779, 986; Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267; Portneuf Lodge v. Western etc. Savings Co. (1899) 6 I. 673, 59 P. 362; Later v. Haywood (1908) 14 I. 45, 93 P. 374; McDonald v. Challis (1912) 22 I. 749, 128 P. 570.

Applied: In an action to foreclose a mortgage, where it appears that the mortgage was fraudulent, or if not fraudulent has been fully paid, and demand was made for the release of the same, and the holder refuses to make release, a case is presented where the statute should be enforced. Blackfoot S. Bk. v. Crisler (1911) 20 I. 379, 118 P. 775.

Usurious mortgages: Satisfaction: A mortgage given to secure the payment of an usurious contract is satisfied upon the payment of the principal debt, whereupon the mortgagor is entitled to a satisfaction of such mortgage of record, and an action for such relief will lie under this section. Cleveland v. Western Loan & Savings Co. (1901) 7 I. 477, 63 P. 885; Anderson v. Or. Mtg. Co. (1902) 8 I. 418, 69 P. 130.

Accrual of action: The cause of action given by this section does not accrue until the mortgage debt has been fully paid and demand for a discharge of the mortgage has been made. Barnes v. Pitts etc. Works (1898) 6 I. 259, 55 P. 237.

Tender necessary: One who claims to have made a tender is not entitled to damages under this section, for the mortgagee's refusal to satisfy a mortgage, where the facts show that a sufficient tender was not made. Machold v. Farnan (1911) 20 I. 80, 117 P. 408.

Pleading: A complaint to recover the penalty prescribed by this section, must contain a direct and unequivocal allegation of payment of the amount secured by the mortgage; an allegation that plaintiff has fully paid and satisfied the notes and mortgage in so far as the holder of said notes and mortgage is concerned is insufficient. Gamble v. Canadian etc. Co. (1898) 6 I. 202, 55 P. 241.

ARTICLE 2.

MORTGAGE OF REAL PROPERTY.

§ 6370. [3403] **What may be mortgaged.** Any interest in real property which is capable of being transferred may be mortgaged. [R. S. § 3375.]

Hist. R. S. § 3375, reen. R. C. § 3403, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2947; Kerr's C. ib.

Cited: (In brief of counsel) Booth Merc. Co. v. Murphy (1908) 14 I. 212.

§ 6371. [3404] **Independent defeasance to be recorded.** When a grant of real property purports to be an absolute conveyance, but is intended to be defeasable on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, is recorded in the office of the county recorder of the county where the property is situated. [R. S. § 3376.]

Hist. R. S. § 3376, reen. R. C. § 3404, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2950; Kerr's C. ib.

§ 6372. [3405] **To be acknowledged and recorded as conveyances.** Mortgages of real property may be acknowledged or proved, certified and recorded, in like manner and with like effect as grants and conveyances thereof. [R. S. § 3377.]

Hist. R. S. § 3377, reen. R. C. § 3405, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2952; amended: Kerr's C. ib.

ARTICLE 3.

MORTGAGE OF PERSONAL PROPERTY.

§ 6373. [3406] **Property subject to mortgage.** Chattel mortgages may be made upon all property, goods or chattels, not defined by statute to be real estate, upon growing crops, and upon crops to be sown and grown in the future; but, should the persons executing mortgages upon crops to be afterwards sown, fail to sow or cause the same to be sown, no lien of such mortgages shall attach to crops sown by other persons upon the lands described in said mortgages, except in so far as the mortgagors in said mortgages have or retain interests in said crops. ['97, p. 7, § 1.]

Hist. (See '85, p. 74, § 1) R. S. § 3385; am. '97, p. 7, § 1, reen. '99, p. 292, § 1, reen. R. C. § 3406, reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. C. 1872, § 2955; as amended: Kerr's C. ib.

Cited: Martin v. Holloway (1909) 16 I. 513, 102 P. 3, 25 L. R. A. (N. S.) 110; Collins v. Brown (1911) 19 I. 360, 113 P. 671; (in brief of counsel) Hare v. Young (1915) 26 I. 682; (in brief of counsel) Hare v. Young (1915) 26 I. 691; Green v. Cons. Wagon & Mach. Co. (1917) 30 I. 359, 164 P. 1016.

What may be mortgaged: A valid chattel mortgage cannot be given on property other than that prescribed in this section, and an attempted chattel mortgage on a building affixed to land creates no lien thereon. Beeler v. C. C. Merc. Co. (1902) 8 I. 644, 70 P. 943.

§ 6374. [3407] **Mortgage on exempt property.** No personal property of either husband or wife, that is exempt by law from execution, shall be mortgaged by either husband or wife without the joint concurrence of both. ['99, p. 292, § 1.]

Hist. '99, p. 292, § 1, reen. R. C. § 3407, reen. C. L. ib.

Cited: Vollmer v. Estate of James W. Reid (1904) 10 I. 196, 77 P. 325.

Mortgage on exempt property: A chattel mortgage executed by the husband alone upon exempt property creates no lien on such property. Kindall v. Lincoln Hdw. & Imp. Co. (1902) 8 I. 664, 70 P. 1056.

§ 6375. [3408] **Affidavit and record of mortgage.** A mortgage of personal property is void as against creditors of the mortgagor and subse-

quent purchasers and incumbrancers of the property in good faith and for value, unless:

1. It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.

2. It is acknowledged or proven, as grants of real estate, and the mortgage, or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept. ['90-91, p. 181, § 1.]

Hist. R. S. § 3386; am. '90-91, p. 181, § 1, reen. '99, p. 121, § 1, reen. R. C. § 3408, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2957; Kerr's C. ib.

Cited: First Nat. Bk. of St. Anthony v. Steers (1904) 9 I. 519, 75 P. 225; (in brief of counsel) Martin v. Holloway (1909) 16 I. 513; Re Lane Lbr. Co. (1913) 210 F. 82; Equitable etc. Co. v. Great Shoshone etc. Co. (1917) 245 F. 697; (in brief of counsel) Smith v. Cons. Wagon & Mach. Co. (1917) 30 I. 148, 163 P. 609.

Necessity of affidavit: The affidavit required by this section is necessary only to sustain the validity of the mortgage as against creditors and purchasers, and does not affect it as between mortgagor and mortgagee. Marchand v. Ronaghan (1903) 9 I. 95, 72 P. 731.

A chattel mortgage although not accompanied by an affidavit that it is executed in good faith and without any design to hinder, delay or defraud creditors, is valid as between the mortgagor and the mortgagee. Hare v. Young (1915) 26 I. 691, 146 P. 107.

Unrecorded mortgages: Where a chattel mortgage is not filed for record as required by this section a subsequent purchaser of the property is not bound by the mortgage unless he is shown to have had actual notice of the same. Cowden v. Finney (1904) 9 I. 619, 75 P. 765; Cowden v. Mills (1904) 9 I. 626, 75 P. 766.

An agreement between mortgagor and mortgagee to withhold a chattel mortgage from record is evidence of a fraudulent intent. Re Hickerson (1908) 162 F. 345.

Power of sale in mortgagor: While a mortgagor may retain possession of the mortgaged property provided the mortgage is executed and recorded as required by law, yet, if the mortgagee permits the mortgagor not only to retain possession but to sell the property at retail without also requiring the proceeds of sale to be applied in reduction of the debt, the mortgage is void as against attaching creditors of the mortgagor. Lewiston Nat. Bk. v. Martin (1890) 2 I. 734, 23 P. 920.

While a mortgage on a stock of goods which permits the mortgagor to remain in the full and free use and enjoyment of the same, is void in that it permits him to sell the goods in the usual course of trade, yet such a mortgage is valid when it covers wood corded and standing in the forest where it has been cut. Meyer v. Munro (1903) 9 I. 46, 71 P. 969.

A mortgage upon a stock of goods remaining in the hands of the mortgagor with power to dispose of the same is void as to the third parties. Re Hickerson (1908) 162 F. 345.

Personal property defined: The property of a public service corporation necessary for the maintenance, repair and operation of its system is not to be regarded as "personal property" under this section but with the real property as constituting a single indissoluble unit. Equitable Trust Co. v. Great Shoshone etc. Power Co. (1915) 228 F. 516.

After-acquired property: A mortgage given upon chattels to be afterward acquired is valid and binding upon the parties thereto and all others having notice of it. Such notice may be given to creditors of mortgagor and incumbrancers of the property by conforming to this section. Dover L. Co. v. Case (1918) 31 I. 276, 170 P. 108.

§ 6376. [3409] **Filing and indexing of mortgage.** Upon the receipt of any such instrument the recorder shall indorse on the back the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested, and the recorder shall keep a book in which shall be entered a minute of all mortgages of personal property. Such book shall be ruled off into separate columns, with heads as follows: "Time of reception," "Name of mortgagor," "Date of instrument," "Amount secured," "When due," "Property mortgaged," "Before whom sworn to and acknowledged," and "Remarks." The proper entry shall be made under each of such heads, and the recorder shall receive the sum of 50 cents, and no more, for filing any such mortgage, which amount he may demand before filing any such mortgage: *Provided,* That property in transit from the possession of the mortgagee to the county in which the mortgagor resides, or to a location for use, shall, for a reasonable length of time for such transportation, be considered as located in the county to which the same is being removed: *Provided, further,* That if the mortgagee receive and retain actual possession of the property mortgaged, he may omit

the filing of his mortgage during the continuance of such actual possession. ['90-91, p. 181, § 2.]

Hist. R. S. § 3387; am. '90-91, p. 181, § 2, reen. '99, p. 121, § 2, reen. R. C. § 3409, reen. C. L. ib.

Cited: Beeler v. C. C. Merc. Co. (1902) 8 I. 644, 70 P. 943.

Possession equivalent to recording: If the mortgagee receive and retain actual possession of the mortgaged property, such possession is equivalent to the recording of such mortgage, and gives to the world the same notice that is given by the recording of such mortgage. Martin v. Holloway (1909) 16 I. 513, 102 P. 3, 25 L. R. A. (N. S.) 110; Equitable T. Co. v. Great Shoshone etc. Co. (1917) 245 F. 697.

Stipulation for possession by mortgagee: This section recognizes the right of a mortgagor to contract with the mortgagee for the possession by the latter of the mortgaged property, and a mortgage is not rendered invalid by reason of a clause authorizing the mortgagee upon named contingencies to take possession of the mortgaged property. First Nat. Bk. of St. Anthony v. Steers (1904) 9 I. 519, 75 P. 225.

Such an agreement may be made after the execution of the mortgage, and possession surrendered to the mortgagee. Martin v. Holloway, supra.

Same: Action by mortgagee: Where a chattel mortgage contains a stipulation authorizing the mortgagee to take possession of the property upon certain contingencies therein named, the mortgagee, upon the occurrence of such a contingency, may maintain an action of claim and delivery to recover possession of the property. First Nat. Bk. of St. Anthony v. Steers, supra.

Possession may cure void mortgage: Where a chattel mortgage is valid between the parties, though for some reason it be void as to creditors, yet, if the property be delivered to the mortgagee prior to the time any specific right or lien thereon is acquired by a creditor, the possession of such mortgagee is valid, and may be maintained, and the property sold under the provisions of the mortgage. Martin v. Holloway, supra.

§ 6377. [3410] **Removal from county.** When mortgaged personal property is thereafter removed from the county wherein it was situated at the time of the execution of the mortgage by the written consent of the mortgagee, it is, except as between the parties to the mortgage, exempt from the operations thereof, unless, either, (1) the mortgagee, within 10 days after such removal, cause the mortgage to be recorded in the county to which the property has been removed, or (2) the mortgagee, within 10 days after such removal, take possession of the mortgaged property. [R. S. § 3388.]

Hist. (See '85, p. 74, § 4) R. S. § 3388, reen. R. C. § 3410, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 2965; Kerr's C. ib.

Cited: (In brief of counsel) Hare v. Young (1915) 26 I. 682, 691.

§ 6378. [3411] **Attachment of mortgaged property.** All mortgaged personal property may be attached at the suit of any creditor of the mortgagor; such creditor, however, must pay or tender to the mortgagee, the amount due him on such mortgagee before the officer making such attachment is entitled to the actual possession of such property. When the property thus attached and redeemed by the creditor is sold by the officer under due legal proceedings, he must:

1. Pay to such creditor the amount advanced by him to pay the mortgage with lawful interest thereon.
2. Pay all costs appertaining to the judgment, execution and sale.
3. Pay the judgment creditor the amount of his judgment, and the surplus, if any, to the judgment debtor.

If the creditor of the mortgagor prefer he may cause to be attached the equity of redemption of the mortgagor. Such attachment is made by serving upon the mortgagor and the mortgagee a copy of the writ of attachment, together with a notice signed by the officer that the interest of the mortgagor in such property is attached. When the sale of such equity is made on execution obtained by such attaching creditor, the proceeds must be applied to the payment of the costs and the satisfaction of the judgment, and the remainder, if any, paid to the judgment debtor.

The purchaser at such sale is entitled to the possession of the property subject, however, to the rights of the mortgagee. [R. S. § 3389.]

Hist. (See '85, p. 74, § 5) R. S. § 3389, reen. R. C. § 3411, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 2968; Kerr's C. ib.

Payment by creditor: Effect: Where a creditor, in order to subject the mortgaged property of his debtor to the payment of his claim, pays the amount of the mortgage to the mortgagee, the mortgage is discharged and the creditor cannot thereafter enforce the same. Baumgartner v. Vollmer (1897) 5 I. 340, 49 P. 729.

§ 6379. [3412] **Modes of foreclosure.** Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as hereinafter provided, or it may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated. [R. S. § 3390.]

Hist. (See '85, p. 74, § 6) R. S. § 3390, reen. R. C. § 3412, reen. C. L. ib.

Cross ref. Foreclosure of mortgages by action: § 6949.

Comp. leg.—Cal. See Civ. C. 1872, § 2967; Kerr's C. ib.

Cited: Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575; Rein v. Callaway (1901) 7 I. 634, 65 P. 63; Beeler v. C. C. Merc. Co. (1902) 8 I. 644, 70 P. 943; Tappin v. McCabe (1915) 27 I. 402, 149 P. 460; Skeen v. District Court (1916) 29 I. 331, 158 P. 1072.

Constitutionality: This section is held constitutional. Givens v. Keeney (1900) 7 I. 335, 63 P. 110.

§ 6380. Summary foreclosure: Foreclosure by notice and sale: Affidavit. In proceeding to foreclose by notice and sale, the mortgagee, his agent or attorney, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged, and the amount due thereon. Such affidavit shall be sufficient authority to demand and receive possession of the property, if the same can be taken peaceably, but if it can not be so taken, then such affidavit must be placed in the hands of the sheriff of the county or the constable in the precinct where the property is located, together with a notice signed by the mortgagee, his agent or attorney, requiring such officer to take the mortgaged property into his possession and sell the same. ['09, p. 149, S. B. 42, § 1.]

Hist. (See '85, p. 74, § 7) R. S. § 3391; am. '05, p. 129, § 1, reen. R. C. § 3413; am. '09, p. 149, S. B. 42, § 1, reen. C. L. § 3413.

Construed: Before amendment: The mode of foreclosure prescribed by this section and the foreclosure by action authorized by R. S. § 4520, are the exclusive modes of foreclosure; a power of sale contained in a mortgage is void, and does not authorize the mortgagee to foreclose summarily by exercising such power. Rein v. Callaway (1901) 7 I. 634, 65 P. 63.

Same: After amendment: By the amendment of this section in 1909, the ruling in Rein v. Callaway, 7 I. 634, 65 P. 63, is modified, so that debtor may voluntarily surrender possession to mortgagee. Tappin v. McCabe (1915) 27 I. 402, 149 P. 460.

An action cannot be maintained against an officer for his neglect or refusal to take personal property into his possession under this section unless it is alleged and proved that the mortgagee has exhausted his statutory remedy by demanding and failing to secure possession of the chattels peaceably. Ib.

But the mortgagee is not required to make a demand upon the mortgagor to turn over the property peaceably before placing his affidavit in the hands of the proper officer, if the mortgagor cannot be found within the county. (Morgan, J. dissents) Hudson v. Carlson (1918) 31 I. 196, 170 P. 100.

The amendment to this section being for the benefit of the mortgagor, the mortgagee has not an election between the remedies therein provided, but must take possession of the property if it can be done peaceably. (Dis. op by Morgan, J.) Ib.

The amendment enlarges the remedy of the mortgagee by giving him the power to foreclose without requiring the services of an officer, if possession of the property can be obtained peaceably but does not deprive him of the right to require the proper officer to foreclose. (Con. op. by Rice, J.) Ib.

Sheriff protected: Where the affidavit and notice are regular in form, the sheriff is bound to execute the same, and will be protected in such execution without determining whether or not the mortgage on which the affidavit and notice are issued is valid. Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575.

§ 6381. Service of affidavit. The affidavit must be personally served upon the mortgagor and upon the person having possession of the mort-

gaged property, in the same manner as is provided by law for the service of a summons. At the time of the service of the affidavit, the person or officer making such service must also serve upon the same persons, a notice signed by himself setting forth a full description of the property, the amount claimed to be due by the mortgagee, and the time and place of sale: *Provided,* That if the mortgagor can not be found within the county wherein the mortgage is being foreclosed, the general notice of sale directed in the next section is sufficient service upon the mortgagor of both said affidavit and notice. ['09, p. 149, S. B. 42, § 2.]

Hist. (See '85, p. 74, §8) R. S. § 3392, reen. R. C. § 3414; am. '09, p. 149, S. B. 42, § 2, reen. C. L. § 3414.

Cross ref. Service of summons: § 6676.

Cited: Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575.

Demand upon mortgagor: This section and the one following do not require the mortgagee to make a demand upon the mortgagor to turn over the property peaceably before placing his affidavit in hands of officer, if mortgagor cannot be found within the county. (Morgan, J. dissents) Hudson v. Carlson (1918) 31 I. 196, 170 P. 100.

§ 6382. Notice of sale. The person or officer having such affidavit must take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in the case of the sale of like property on execution, and the sale must be conducted in the same manner. ['09, p. 149, S. B. 42, § 3.]

Hist. (See '85, p. 74, § 9) R. S. § 3393, reen. R. C. § 3415; am. '09, p. 149, S. B. 42, § 3, reen. C. L. § 3415.

Cross ref. Sales on execution: §§ 6922-29.

Cited: Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575; (Dis. op.) First Nat. Bk. of Pocatello v. Bunting & Co. (1900) 7 I. 387, 63 P. 694; Beeler v. C. C. Merc. Co. (1902) 8 I. 644, 70 P. 943; Hudson v. Carlson (1918) 31 I. 196, 170 P. 100.

§ 6383. Title of purchaser: Bill of sale. The purchaser at such sale takes all the interest which the mortgagor had in the mortgaged property at the time of the execution of the mortgage, and the person or officer selling must execute to him a bill of sale of the property, which must set forth the date of the mortgage, the names of the parties thereto, the date of sale, a description of the property, and the amount paid therefor. At all foreclosure sales of mortgaged personal property the mortgagee, by himself, his agent or attorney, shall have the right to bid for and purchase said property, or any portion thereof, and sales so made to him shall have the same effect as though made to other persons. ['09, p. 149, S. B. 42, § 4.]

Hist. (See '85, p. 74, § 10) R. S. § 3394, reen. R. C. § 3416; am. '09, p. 149, S. B. 42, § 4, reen. C. L. § 3416.

Cited: Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575.

§ 6384. Return of sale. The person or officer making such sale must make return upon the affidavit hereinbefore mentioned of all his proceedings, and must transmit the same, by mail or otherwise, to the clerk of the district court having jurisdiction in the county in which the sale was made, and the clerk must file such return in his office. ['09, p. 149, S. B. 42, § 5.]

Hist. (See '85, p. 74, § 11) R. S. § 3395, reen. R. C. § 3417; am. '09, p. 149, S. B. 42, § 5, reen. C. L. § 3417.

Cited: Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575.

Contest: Production of affidavit: In an action to contest the right to foreclose a chattel mortgage the court is not authorized to order the defendants to file the original affidavit in the mortgage foreclosure proceedings, unless it is made to appear that they have the affidavit in their possession, and fail or refuse to produce the same upon demand. Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421.

§ 6385. [3418] **Contest of foreclosure.** The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue if necessary. [R. S. § 3396.]

Hist. (See '85, p. 74, § 12) R. S. § 3396, reen. R. C. § 3418, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 2967; Kerr's C. ib.

Wash. C. § 1656 similar. Neustadter Bros. v. Doust (1907) 13 I. 617, 623, 92 P. 978.

Cited: Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421; (1901) 8 I. 151, 67 P. 427; Jenkins v. Coml. Nat. Bk. (1911) 19 I. 290, 113 P. 463.

Nature of action: This section contemplates an action in the district court and authorizes the issuance of an injunction, but the action may be maintained without an injunction. Murphy v. Russell & Co. supra.

Who may contest: An attaching creditor may contest the validity of the mortgage on which the foreclosure is based. Blumauer-Frank Drg. Co. v. Branstetter (1895) 4 I. 557, 43 P. 575.

In order to entitle a creditor to an injunction against the sale of personal property secured by a chattel mortgage, and enable him to resist the foreclosure thereof, he should connect himself with some interest in or claim upon the specific property either by judgment, lien or attachment. Neustadter Bros. v. Doust (1907) 13 I. 617, 92 P. 978.

A trustee in bankruptcy in possession of mortgaged property and creditors whose claims he has allowed are "persons interested" under this section. Re Hickerson (1908) 162 F. 345.

A judgment creditor and general creditors whose claims had been allowed in receivership suit may intervene in the foreclosure suit and contest validity of the mortgage so far as it covered personal property. Equitable etc. Co. v. Great Shoshone etc. Co. (1917) 245 F. 697.

In a foreclosure suit it is within the court's discretion whether a creditor who had not availed himself of the right to intervene and contest mortgage should be allowed to set up a claim. Ib.

§ 6386. [3419] **Unauthorized removal or sale of property.** If the mortgagor of any property mortgaged in pursuance of the provisions of this article, while such mortgage remains unsatisfied in whole or in part, wilfully removes from the county or counties where the mortgage is recorded, destroys, conceals, sells or in any manner disposes of, the property mortgaged, or any part thereof, without consent of the holder of said mortgage, he is guilty of larceny, and such sale or transfer is void. [R. S. § 3397.]

Hist. (See '85, p. 74, § 13) R. S. § 3397, reen. R. C. § 3419, reen. C. L. ib.

Cross ref. Similar provision: § 8479.

Comp. leg.—Cal. See Civ. C. 1872, § 2967; Kerr's C. ib.

Cited: Lewiston Nat. Bk. v. Martin (1890) 2 I. 734, 23 P. 920; (in brief of counsel) Smith v. Cons. Wagon & Mach. Co. (1917) 30 I. 148, 163 P. 609.

Oral consent: Under a territorial statute which was substantially similar to this section with the exception that it required the "written consent" of the mortgagee to a sale, it was held that oral evidence of the mortgagee's consent was admissible to sustain the sale as between vendee and vendor in the absence of any objection by the mortgagee to the sale. Mills v. Glennon (1885) 2 I. 105, 6 P. 116.

§ 6387. [3420] **Time allowed to record mortgage.** The mortgagee is allowed one day for every 20 miles or fraction thereof of the distance between his residence and the county recorder's office where such mortgage is to be recorded, to conform to the provisions of this article, before any subsequent incumbrance, sale or seizure, under any process, is effectual to hold or bind the mortgaged property. [R. S. § 3398.]

Hist. (See '85, p. 74, § 15) R. S. § 3398, reen. R. C. § 3420, reen. C. L. ib.

Comp. leg.—Cal. See Civ. C. 1872, § 2967; Kerr's C. ib.

CHAPTER 239.

PLEDGES.

§ 6388. [3421] **Pledge defined.** Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. [R. S. § 3410.]

Hist. R. S. § 3410, reen. R. C. § 3421, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2987; Kerr's C. ib.

§ 6389. [3422] **Delivery essential to validity.** The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge holder, as hereafter prescribed. [R. S. § 3411.]

Hist. R. S. § 3411, reen. R. C. § 3422, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2988; Kerr's C. ib.

§ 6390. [3423] **Increase of property pledged.** The increase of property pledged is pledged with the property. [R. S. § 3412.]

Hist. R. S. § 3412, reen. R. C. § 3423, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2989; Kerr's C. ib.

§ 6391. [3424] **Lienor may pledge property.** One who has a lien upon property may pledge it to the extent of his lien. [R. S. § 3413.]

Hist. R. S. § 3413, reen. R. C. § 3424, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2990; Kerr's C. ib.

§ 6392. [3425] **Secret owner cannot defeat pledge.** One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, can not set up his own title to defeat a pledge of the property made by the other, to a pledgee who received the property in good faith, in the ordinary course of business and for value. [R. S. § 3414.]

Hist. R. S. § 3414, reen. R. C. § 3425, reen. C. L. ib.

Cited: Bryan v. Montandon (1898) 6 I. 352, 55 P. 650.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2991; Kerr's C. ib.

§ 6393. [3426] **Pledge holder defined.** A pledgor and pledgee may agree on a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge holder. [R. S. § 3415.]

Hist. R. S. § 3415, reen. R. C. § 3426, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2993; Kerr's C. ib.

§ 6394. [3427] **Same: Must enforce rights.** A pledge holder must enforce all the rights of the pledgee, unless authorized by him to waive them. [R. S. § 3416.]

Hist. R. S. § 3416, reen. R. C. § 3427, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2996; Kerr's C. ib.

§ 6395. [3428] **Misrepresentation of value: Further pledge.** Where a debtor has obtained credit for an extension of time by a fraudulent misrepresentation of the value of property pledged by or for him, the creditor may demand a further pledge to correspond with the value represented, and in default thereof may recover his debt immediately, though it be not actually due. [R. S. § 3417.]

Hist. R. S. § 3417, reen. R. C. § 3428, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 2999; Kerr's C. ib.

§ 6396. [3429] **Sale to satisfy pledge.** When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed. [R. S. § 3418.]

Hist. R. S. § 3418, reen. R. C. § 3429, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3000; Kerr's C. ib.

§ 6397. [3430] **Same: Demand for performance.** Before property pledged may be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found. [R. S. § 3419.]

Hist. R. S. § 3419, reen. R. C. § 3430, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3001; same as amended: Kerr's C. ib.

§ 6398. [3431] **Notice of sale.** A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend. [R. S. § 3420.]

Hist. R. S. § 3420, reen. R. C. § 3431, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3002; Kerr's C. ib.

§ 6399. [3432] **Waiver of notice.** Notice of sale may be waived by a pledgor at any time; but is not waived by a mere waiver of demand of performance. [R. S. § 3421.]

Hist. R. S. § 3421, reen. R. C. § 3432, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3003; Kerr's C. ib.

§ 6400. [3433] **Waiver of demand of performance.** A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged by a positive refusal to perform after performance is due; but can not waive it in any other manner except by contract. [R. S. § 3422.]

Hist. R. S. § 3422, reen. R. C. § 3433, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3004; Kerr's C. ib.

§ 6401. [3434] **Sale must be public.** The sale by a pledgee of property pledged must be made by public auction in the manner and upon the notice required upon sale of personal property under execution, and must be for the highest obtainable price. [R. S. § 3423.]

Hist. R. S. § 3423, reen. R. C. § 3434, reen. C. L. ib.

Cross ref. Sales of personal property under execution: §§ 6922-29.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3005; Kerr's C. ib.

Cited: (Dis. op.) First Nat. Bk. of Pocatello v. Bunting & Co. (1900) 7 I. 387, 63 P. 694.

§ 6402. [3435] **Collection or sale of securities.** A pledgee can not sell any evidence of debt pledged to him except the obligations of governments, states, territories, counties or corporations; but he may collect the same when due. [R. S. § 3424.]

Hist. R. S. § 3424, reen. R. C. § 3435, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3006; Kerr's C. ib.

§ 6403. [3436] **Sale on demand of pledgor.** Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgor may require it to be sold and its proceeds to be applied to such satisfaction when due. [R. S. § 3425.]

Hist. R. S. § 3425, reen. R. C. § 3436, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3007; Kerr's C. ib.

§ 6404. [3437] **Surplus paid to pledgor.** After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand. [R. S. § 3426.]

Hist. R. S. § 3426, reen. R. C. § 3437, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3008; Kerr's C. ib.

§ 6405. [3438] **Sale before maturity.** When property pledged is sold before the claim of the pledgee is due, he may retain out of the proceeds all that can possibly become due under his claim, until it becomes due. [R. S. § 3427.]

Hist. R. S. § 3427, reen. R. C. § 3438, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3009; similar as amended: Kerr's C. ib.

§ 6406. [3439] **Pledgee can not purchase.** A pledgee or pledge holder can not purchase the property pledged except by direct dealing with the pledgor. [R. S. § 3428.]

Hist. R. S. § 3428, reen. R. C. § 3439, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3010; different as amended: Kerr's C. ib.

§ 6407. [3440] **Foreclosure by pledgee.** Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court;

and in that case may be authorized by the court to purchase at the sale. [R. S. § 3429.]

Hist. R. S. § 3429, reen. R. C. § 3440, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3011; Kerr's C. ib.

CHAPTER 240.

MISCELLANEOUS LIENS.

Cross ref. Lien for service of sires: § 1906.

§ 6408. [3441] **Vendor's lien.** One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. [R. S. § 3440.]

Hist. R. S. § 3440, reen. R. C. § 3441, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3046; Kerr's C. ib.

Cited: Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482; Re Lane Lbr. Co. (1913) 210 F. 82, 217 F. 550, 133 C. C. A. 402.

Equitable title: An equitable title will support a vendor's lien. Farnsworth v. Pepper (1915) 27 I. 154, 148 P. 48.

Attorney's fees: Attorney's fees not a cost chargeable in foreclosing a vendor's lien. (On petition for rehearing) Farnsworth v. Pepper (1915) 27 I. 159, 148 P. 48.

Deficiency judgment: A deficiency judgment may be entered in accordance with § 6949, when the property is insufficient to satisfy claim. (On petition for rehearing) Farnsworth v. Pepper (1915) 27 I. 159, 148 P. 48.

What is security: Where a person sells real estate to a married man and conveys the same by good and sufficient deed, and takes as a part of the purchase price promissory notes executed by the vendee and the vendee's wife, the signature of the wife to such notes does not constitute such security as will amount to a waiver of the vendor's lien. (Erroneously citing R. C. § 4431 for 3441.) Smith v. Schultz (1912) 23 I. 144, 129 P. 640.

§ 6409. [3442] **Waiver of lien.** Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract, but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien. [R. S. § 3441.]

Hist. R. S. § 3441, reen. R. C. § 3442, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3047; Kerr's C. ib.

§ 6410. [3443] **Extent of vendor's lien.** The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value. [R. S. § 3442.]

Hist. R. S. § 3442, reen. R. C. § 3443, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3048; Kerr's C. ib.

Who is not a purchaser or incumbrancer: Vendor's lien is enforcible against a trustee in bankruptcy, who is not a purchaser or an incumbrancer under this section. A creditor holding a lien by legal or equitable proceedings is not a purchaser or incumbrancer in good faith and for value. Re Lane Lbr. Co. (1913) 210 F. 82, aff. 217 F. 550, 133 C. C. A. 402.

§ 6411. [3445] **Lien of purchaser of real property.** One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration. [R. S. § 3444.]

Hist. R. S. § 3444, reen. R. C. § 3445, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3050; Kerr's C. ib.

§ 6412. [3446] **Liens for services on or caring for property.** Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, by labor, or skill, employed for the protection, improvement, safe keeping, or carriage there-

of, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner, for such service. Livery or boarding or feed stable proprietors, and persons pasturing live stock of any kind, have a lien, dependent on possession, for their compensation in caring for, boarding, feeding or pasturing such live stock. If the liens as herein provided are not paid within 60 days after the work is done, service rendered, or feed or pasturing supplied, the person in whose favor such special lien is created may proceed to sell the property at public auction, after giving 10 days' public notice of the sale by advertising in some newspaper published in the county where such property is situated, or if there be no newspaper published in the county then by posting notices of the sale in three of the most public places in the county, for 10 days previous to such sale. The proceeds of the sale must be applied to the discharge of the lien and costs; the remainder, if any, must be paid over to the owner. ['93, p. 67, § 1.]

Hist. R. S. § 3445; am. '93, p. 67, § 1, reen. '99, p. 181, § 1, reen. R. C. § 3446, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3051; amended: Kerr's C. ib.

Okla. Similar: Stats. 1893, c. 48, § 31. Mendilie v. Snell (1912) 22 I. 663, 127 P. 550, 43 L. R. A. (N. S.) 731.

Wash. Similar: Gen. Stat. § 1705. Mendilie v. Snell, supra.

Cited: Folen v. Saxton (1918) 31 I. 319, 171 P. 669.

Lien for service: A party placed in charge of mining property consisting of both personal and real estate, has a lien on the personal property for the value of his services so long as he remains in possession. Idaho Comstock etc. Co. v. Lundstrum (1903) 9 I. 257, 74 P. 975.

Where two or three tenants in common in possession of personal property employ another to care for and protect the property, the latter is entitled to a lien dependent on possession for his pay for his services in caring for the same, but is not entitled to a lien on real property for the care and protection of either the real estate or the personal property. Williamson v. Moore (1905) 10 I. 749, 80 P. 227.

This section applies to cases where a party takes the possession of personal property, such, for example, as live stock, and agrees to graze, feed or pasture the stock for a period of time and assumes the exclusive care of and responsibility for the property, and furnishes or procures the feed or pasture therefor, whether it be from his private inclosure or on the public domain. Mendilie v. Snell, supra.

Property in custody of law: This section has no application to property in the custody of the law. Beck v. Lavin (1908) 15 I. 363, 98 P. 1028.

Possession: The right to a lien under this section depends wholly upon the possession of the property by the claimant. Hill v. Twin Falls etc. Co. (1912) 22 I. 274, 125 P. 204.

The possession necessary to entitle the party to a lien must be such as to give the party for the time being the exclusive care, control and direction of the property, which must be more than that of a mere servant for hire from day to day or month to month who is subject to the direction and orders of the master. Mendilie v. Snell, supra.

If in connection with closing a sale, papers are put into a broker's hands incidentally, and only to have him examine the mortgage and abstract, he is not entitled to a lien upon them for any commission which might be due from the plaintiff to him in negotiating the sale of said property. Smith v. Bergstresser (1914) 26 I. 322, 143 P. 402.

§ 6413. [3447] **Same: For repair of property.** A person who makes, alters or repairs any article of personal property, at the request of the owner, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. If not paid within two months after the work is done, the person may proceed to sell the property at public auction, by giving 10 days' public notice of the sale by advertising in some newspaper published in the county in which the work was done; or, if there be no newspaper published in the county, then by posting up notices of the sale in three of the most public places in town where the work was done, for 10 days previous to the sale. The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property; the remainder, if any, must be paid over to the owner thereof. [R. S. § 3446.]

Hist. R. S. § 3446, reen. R. C. § 3447, reen. C. L. ib.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3052; Kerr's C. ib.

§ 6414. [3448] **Lien of factor.** A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal. [R. S. § 3447.]

Hist. R. S. § 3447, reen. R. C. § 3448, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3053; Kerr's C. ib.

§ 6415. [3449] **Lien of banker.** A banker has a general lien, dependent on possession, upon all property in his hands, belonging to a customer, for the balance due to him from such customer in the course of the business. [R. S. § 3448.]

Hist. R. S. § 3448, reen. R. C. § 3449, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, 3054; Kerr's C. ib.

Application: This section is limited in its application to property taken by a banker in the usual course of banking business, and does not operate to afford a lien on a stock of merchandise transferred to a bank in such a manner as to constitute a preference under the bankruptcy law. Re Gesas (1906) 146 F. 734, 77 C. C. A. 291.

§ 6416. [3450] **Lien of mechanics.** The liens of mechanics, for materials and services upon real property, are regulated by the Code of Civil Procedure. [R. S. § 3449.]

Hist. R. S. § 3449, reen. R. C. § 3450, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3059; Kerr's C. ib.

Cross ref. Mechanics' liens: §§ 7339-82.

TITLE LII.

CHAPTER 241.

TRUSTS.

§ 6417. Trustees: Power of district court to appoint. When a trust exists without any appointed trustees or where any or all of the trustees renounce, die, or are discharged, the district court of the county where the trust property or some portion thereof is situated, must appoint another trustee to direct the execution of the trust. The court may, in its discretion, appoint the original number or any less number of trustees. ['19, c. 19, § 1, p. 82.]

Comp. leg.—Cal. Similar: Kerr's C. C. P. § 2289.

§ 6418. Same: Survival of trust. On the death, renunciation, or discharge of one of the several number of trustees, the trust survives to the others. ['19, c. 19, § 2, p. 82.]

Comp. leg.—Cal. Similar: Kerr's C. C. P. § 2288.

§ 6419. Same: Compensation. When a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified and no more. ['19, c. 19, § 3, p. 82.]

Cross ref. Where compensation of trustee not fixed by will, court may make reasonable allowance: § 7722.

Comp. leg.—Cal. Similar: Kerr's C. C. P. Supp. '06-13.

TITLE LIII.

CHAPTER 242.

NUISANCES.

ARTICLE 1.

GENERAL PROVISIONS.

§ 6420. Nuisance defined. Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street or highway, is a nuisance. ['15, c. 43, § 1, p. 126.]

Hist. R. S. § 2620, reen. R. C. § 3656; am. '15, c. 43, § 1, p. 126, reen. C. L. § 3656.

Cross ref. Similar provision in criminal law: § 8339.

Comp. leg.—Cal. See Civ. C. 1872, § 3479; Kerr's C. ib.

Cited: Strickler v. Hillis (1909) 15 I. 709, 99 P. 831.

What constitutes a nuisance: The statutes mean something more than the usual, ordinary and lawful use of one's own property in order to constitute an act or acts a nuisance within the definitions they contain. Bellevue v. Daly (1908) 14 I. 545, 94 P. 1036, 15 L. R. A. (N. S.) 992, 14 Ann. Cas. 1136, 125 A. S. R. 179.

Ditch across road: When one constructs a ditch across a public street in such way as to render the street unsafe or inconvenient for travel, and maintains the same without a bridge, he is guilty of maintaining a nuisance. Lewiston v. Booth (1893) 3 I. 692, 34 P. 809.

To complete a highway across a canal a bridge must be built; and, until a bridge is built, the highway, not being complete, is not capable of being lawfully obstructed at that point; the canal, therefore, is not a nuisance because of its unlawfully obstructing the free passage or use of the highway. MacCammelly v. Pioneer Irr. Dist. ((909) 17 I. 415, 105 P. 1076.

Where a canal has been constructed and operated in accordance with law, it is not a nuisance and can only become a nuisance by reason of the manner in which it is maintained or the method of its operation and the mere fact that a municipality subsequently extends a street across a canal which has been lawfully constructed and operated does not convert the canal into a nuisance at the place where the street crosses the canal. Boise v. Boise Canal Co. (1911) 19 I. 717, 115 P. 505.

Herding sheep near homes: The herding of a large band of sheep near the homes of settlers, thereby creating an offensive smell, is a nuisance. Sweet v. Ballentyne (1902) 8 I. 431, 69 P. 995.

Gambling devices: The instruments and devices with which gambling is carried on are nuisances. Mullen & Co. v. Moseley (1907) 13 I. 457, 90 P. 986, 121 A. S. R. 277, 13 Ann. Cas. 450, 12 L. R. A. (N. S.) 394.

Railroad: A railroad and the work necessary and incident to its maintenance is not a nuisance and cannot be abated as such. Boise Valley etc. Co. v. Kroeger (1909) 17 I. 384, 105 P. 1070, 28 L. R. A. (N. S.) 968.

Preparation of meat products: The smoking of meats, rendering lard and manufacturing of sausages and other meat products is not per se a nuisance. Lorenzi v. Star Market Co. (1911) 19 I. 67, 115 P. 490, 35 L. R. A. (N. S.) 1142.

Miner's excavation: An excavation, pit or shaft made by a miner in the prosecution of his work is not of itself a nuisance. Strong v. Brown (1914) 26 I. 1, 140 P. 77, 52 L. R. A. (N. S.) 140.

§ 6421. [3657] Public nuisance. A public nuisance is one which affects at the same time an entire community or neighborhood, or a considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [R. S. § 3621.

Hist. R. S. § 3621, reen. R. C. § 3657, reen. C. L. ib.

Cross ref. Booms or weirs so constructed as to prevent passage of logs constitute a public nuisance: § 1301. Maintenance of a public nuisance a misdemeanor: § 8341.

Comp. leg.—Cal. Similar: Civ. C. 187, § 3480; same as amended: Kerr's C. ib.

Cited: Bellevue v. Daly (1908) 14 I. 545, 94 P. 1036, 15 L. R. A. (N. S.) 9[illegible] 14 Ann. Cas. 1136, 125 A. S. R. 179; Strickler v. Hillis (1909) 15 I. 709, 99 P. 831.

§ 6422. Moral nuisance. A nuisance which is injurious to public morals is a moral nuisance. ['15, c. 43, § 2, p. 126.]

Hist. R. C. § 3657a, enacted by '15, c. 43, § 2, p. 126, reen. C. L. § 3657a.

Cross ref. Abatement of moral nuisances: §§ 7042-51.

§ 6423. Same: Conducting houses of ill fame. The conducting of a place for the purpose of prostitution, lewdness, assignation, or other indecent acts, or for the resort of lewd people of both sexes, commonly called a house of ill fame, is a moral nuisance. ['15, c. 43, § 2, p. 126.]

Hist. R. C. § 3657b, enacted by '15, c. 43, § 2, p. 126, reen. C. L. § 3657b.

§ 6424. Same: House and furniture. A building or place in which a house of ill fame is conducted or kept, and the furniture and moveable contents thereof, are a moral nuisance. ['15, c. 43, § 2, p. 126.]

Hist. R. C. § 3657c, enacted by '15, c. 43, § 2, p. 126, reen. C. L. § 3657c.

§ 6425. Same: Building where gambling is carried on. Any building, place, or the ground itself, wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept, or any notice, sign or device advertising or indicating the existence or presence of such gambling or any game of chance is displayed or exposed to view, is declared a moral nuisance and shall be enjoined and abated as provided by law. ['19, c. 97, p. 361.]

Cross ref. Abatement of moral nuisances: §§ 7042-51.

§ 6426. Private nuisance. Every nuisance not defined by law as a public nuisance or a moral nuisance, is private. ['15, c. 43, § 3, p. 126.]

Hist. R. S. § 3622, reen. R. C. § 3658; am. '15, c. 43, § 3, p. 126, reen. C. L. § 3658.

Comp. leg.—Cal. Similar: Civ. C. 1872, § 3481; Kerr's C. ib.

§ 6427. [3659] **When not a nuisance.** Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [R. S. § 3623.]

Hist. R. S. § 3623, reen. R. C. § 3659, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, 3482; Kerr's C. ib.

Cited: MacCammelly v. Pioneer Irr. Dist. (1909) 17 I. 415, 105 P. 1076; Boise v. Boise C. Canal Co. (1911) 19 I. 717, 115 P. 505; Lewiston v. Isaman (1911) 19 I. 653, 115 P. 494; American Falls v. West (1914) 26 I. 301, 142 P. 42; Twin Falls v. Harlan (1915) 27 I. 769, 151 P. 1191.

§ 6428. [3660] **Liability of successive owners for continuing nuisance.** Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it. [R. S. § 3624.]

Hist. R. S. § 3624, reen. R. C. § 3660, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, 3483; Kerr's C. ib.

Construed: The purchaser of property containing a nuisance may not defend an action for damages or abatement on the ground that he did not create it, but he is not liable for damages incurred previous to his purchase. Brose v. Twin Falls L. & W. Co. (1913) 24 I. 266, 133 P. 673, 46 L. R. A. (N. S.) 1187; Partridge v. Twin Falls L. & W. Co. (1913) 24 I. 275, 133 P. 677.

§ 6429. [3661] **Abatement does not preclude action.** The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [R. S. § 3625.]

Hist. R. S. § 3625, reen. R. C. § 3661, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3484; Kerr's C. ib.

ARTICLE 2.

PUBLIC NUISANCES.

§ 6430. [3662] **Not legalized by prescription.** No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. [R. S. § 3630.]

Hist. R. S. § 3630, reen. R. C. § 3662, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3490; Kerr's C. ib.

Prescriptive right not acquired: No lapse of time can give a prescriptive right to maintain a nuisance. Lewiston v. Booth (1893) 3 I. 692, 34 P. 809.

§ 6431. [3663] **Remedies.** The remedies against a public nuisance are:

1. Indictment or information.
2. A civil action; or,
3. Abatement.

[R. C. § 3663.]

Hist. R. S. § 3631, modified by '99, p. 125, § 4 (R. C. § 7658); compiled R. C. § 3663, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3491; Kerr's C. ib.

Cited: (In brief of counsel) Strickler v. Hillis (1909) 15 I. 709, 99 P. 831.

Application: This section makes no distinction as to the remedy to abate nuisances which are a crime per se and those which are not such a crime. Redway v. Moore (1892) 3 I. 312, 29 P. 104.

§ 6432. [3664] **Indictment or information.** The remedy by indictment or information is regulated by the Penal Code. [R. S. § 3632.]

Hist. R. S. § 3632, reen. R. C. § 3664, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3492; Kerr's C. ib.

§ 6433. Action by private person. A private person may maintain an action:

1. For a moral nuisance, if he be a resident citizen of the county, whether the nuisance complained of is specially injurious to him or not.
2. For any other public nuisance, if it is specially injurious to himself. ['15, c. 43, § 4, p. 126.]

Hist. R. S. § 3633, reen. R. C. § 3665; am. '15, c. 43, § 4, p. 126, reen. C. L. § 3665.

Comp. leg.—Cal. Analogous: Civ. C. 1872, § 3493; Kerr's C. ib.

Private actions: A private person may sue to abate or restrain the continuance of a public nuisance, provided he alleges and shows that such nuisance is especially injurious to himself. Thus a person whose property is rendered undesirable as a residence and thereby depreciated in value because of the maintenance of a house of prostitution in the neighborhood, may sue to enjoin the continued maintenance of the same as a nuisance. Redway v. Moore (1892) 3 I. 312, 29 P. 104. A private person who is especially injured by the maintenance of obstructions in a navigable river may sue to abate the same. Small v. Harrington (1904) 10 I. 499, 79 P. 461. But a reasonable obstruction in a navigable stream, which merely impairs navigation but does not destroy it, cannot be enjoined at the suit of a private person. Ib.

To authorize a private person to bring an action to abate a public nuisance the plaintiff must allege and show that he will be specially injured in a different way from the public generally, or deprived of the free use of his own private property. Strickler v. Hillis (1909) 15 I. 709, 99 P. 831.

To have suffered in a different manner or extent than the public at large is to have received a special and peculiar damage for which a recovery may be had. Strickler v. Hillis (1910) 17 I. 646, 106 P. 1128.

Same: Pleading: A private person who sues to abate a public nuisance must allege by positive averment in his complaint sufficient fact to show special injury to himself. Redway v. Moore, supra.

Res adjudicata: The trial and acquitta of a party charged in criminal proceeding with the construction of a nuisance in a navigable stream, is not a bar to a civi action to enjoin the nuisance. Small v Harrington, supra.

§ 6434. [3666] **Abatement by public body or officer.** A public nuisance may be abated by any public body or officer authorized thereto by law. [R. S. § 3634.]

Hist. R. S. § 3634, reen. R. C. § 3666, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3494; Kerr's C. ib.

Cited: (Dis. and con. op.) American Falls v. West (1914) 26 I. 301, 310, 142 P. 42.

Road overseer: A road overseer is the proper party, under our statute, to bring an action to abate a nuisance when such nuisance consists of an obstruction to a public highway within his district. Meservey v. Gulliford (1908) 14 I. 133, 93 P. 78(

§ 6435. [3667] **Abatement by private person.** Any person may abate a public nuisance which is specially injurious to him, by removing, or if necessary, destroying, the thing which constitutes the same

without committing a breach of the peace, or doing unnecessary injury. [R. S. § 3635.]

Hist. R. S. § 3635, reen. R. C. § 3667, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3495; Kerr's C. ib.

ARTICLE 3.

PRIVATE NUISANCES.

§ 6436. [3668] **Remedies for private nuisances.** The remedies against a private nuisance are:

1. A civil action; or
2. Abatement. [R. S. § 3640.]

Hist. R. S. § 3640, reen. R. C. § 3668, reen. C. L. ib.

Cited: (In brief of counsel) Strickler v. Hillis (1909) 15 I. 709.

Cross ref. Actions for nuisance: § 6956.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3501; Kerr's C. ib.

§ 6437. [3669] **Abatement, when allowed.** A person injured by a private nuisance may abate it by removing, or, if necessary, destroying, the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury. [R. S. § 3641.]

Hist. R. S. § 3641, reen. R. C. § 3669, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3502; Kerr's C. ib.

§ 6438. [3670] **Same: When notice is required.** Where a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it. [R. S. § 3642.]

Hist. R. S. § 3642, reen. R. C. § 3670, reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. C. 1872, § 3503; Kerr's C. ib.

PART III. CODE OF CIVIL PROCEDURE.

CHAPTER 243.

PRELIMINARY PROVISIONS.

§ 6439. [3801] **Civil and criminal remedies not merged.** When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. [R. S. § 3801.]

Hist. R. S. § 3801, reen. R. C. ib., reen. C. L. ib.

Cross ref. Civil remedies preserved notwithstanding omission to specify in Penal Code, § 8076.

Comp. leg.—Cal. Same: C. C. P. 1872, § 32; Kerr's C. ib.

Cited: S. v. Wall (1910) 18 I. 300, 109 P. 724.

TITLE LIV. COURTS OF JUSTICE.

CHAPTER 244.

ORGANIZATION AND JURISDICTION.

ARTICLE 1.

COURTS OF JUSTICE IN GENERAL.

§ 6440. [3810] **Courts enumerated.** The following are the courts of justice of this state:

1. The supreme court.
2. The district courts.
3. The probate courts.
4. The justices' courts. [R. S. § 3810.]

Hist. (See C. C. P. '81. § 17) R. S. § 3810, reen. R. C. ib., reen. C. L. ib.

Cross ref. Investiture of judicial power: Const. V, 2. Police courts in cities and villages: §§ 3880, 3910.

Comp. leg.—Cal. (See C. C. P. 1872, § 33) as amended, ib.; Kerr's C. ib.

N. D. Analogous: C. Civ. P. § 7336.

§ 6441. [3811] **Courts of record.** The courts enumerated in the first three subdivisions of the preceeding section are courts of record. [R. S. § 3811.]

Hist. (See C. C. P. '81, § 18) R. S. § 3811, reen. R. C. ib., reen. C. L. ib.

Cross ref. Probate courts are courts of record: Const. V, 21. But in the exercise of their civil jurisdiction, they are courts of peculiar and limited jurisdiction: § 7147.

Comp. leg.—Cal. (See C. C. P. 1872, § 34) as amended: Kerr's C. ib.

N. D. Analogous: C. Civ. P. § 7336.

ARTICLE 2.

THE SUPREME COURT.

Cross ref. Clerk of the supreme court, duties, salary and deputies: §§ 189-98.

§ 6442. [3814] **Constitution of court.** The supreme court consists of three justices, a majority of whom shall be necessary to make a quorum or pronounce a decision. The justices of the supreme court shall be elected by the electors of the state at large. The terms of office of said justices shall be six years. The justice having the shortest

term to serve, not holding his office by appointment or election to fill a vacancy, shall be chief justice, and shall preside at all terms of the supreme court, and, in the case of his absence, the justice having in like manner the next shortest term to serve shall preside in his stead. [R. C. § 3814.]

Hist. R. C. § 3814, compiled from Const. V, 6, reen. C. L. 3814.

'19, c. 168, p. 539, here omitted as temporary, provided in part as follows: "There shall be nominated for and elected at the general election to be held in November, 1920, in addition to the justice of the supreme court now provided for by law, one justice for the term of four years, and one justice for the term of six years. . . . . the taking of office of said additional justices to be conditional upon the adoption and ratification of the amendment to the constitution proposed in house joint resolution No. 6. . . ."

Cross ref. Justices ineligible to other offices: Const. V, 7. Salaries of justices: § 406. Filling vacancies: §§ 457, 467.

Note: This section is probably affected by the ruling of the supreme court in Budge v. Gifford (1914) 26 I. 521, 144 P. 333.

§ 6443. [3815] Jurisdiction in general. The jurisdiction of this court is of two kinds:

1. Original; and
2. Appellate. [R. S. § 3815.]

Hist. (See C. C. P. '81, § 19) R. S. § 3815, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C P. 1872, § 42; "the supreme court" for "this court" by amendment: Kerr's C. § 50.

N. D. Analogous: C. Civ. P. § 7339.

Cited: (Dis. op.) Burkhart v. Reed (1889) 2 I. 503, 22 P. 1; Clough v. Curtis (1899) 2 I. 523, 22 P. 8; Stout v. Cunningham (1917) 29 I. 809, 162 P. 928.

§ 6444. [3816] Original jurisdiction. Its original jurisdiction extends to the issuance of writs of mandamus, certiorari, prohibition, habeas corpus, and all writs necessary or proper to the exercise of its appellate jurisdiction. [R. C. § 3816.]

Hist. (See C. C. P. '81, § 20) R. S. § 3816, modified by Const. V, 9, compiled R. C. § 3816, reen. C. L. ib.

Cross ref. Original jurisdiction as defined by Const. V, 9. To hear claims against the state: Const. V. 10; mandamus: §§ 7253-66; certiorari: §§ 7242-52; prohibition: §§ 7267-70; habeas corpus: §§ 9273-9305; original jurisdiction in judicial election contests: § 7277.

Comp. leg.—Cal. Same: C. C. P. 1872, § 43; similar as amended: Kerr's C. § 51.

N. D. Analogous: C. Civ. P. § 7339.

Cited: Burkhart v. Reed (1889) 2 I. 503, 22 P. 1; Williams v. Lewis (1898) 6 I. 184, 54 P. 619; Jain v. Priest (1917) 30 I. 273, 281, 164 P. 364.

Mandate: It is not within the scope of mandamus to confer power upon those to whom it is directed; it only enforces the exercise of power already existing when such exercise is a duty. Thus, the supreme court cannot, by writ of mandamus. require the territorial secretary to determine from evidence what are the correct minutes of the legislature and to expunge certain matter from those minutes. (Berry, J. dissents) Clough v. Curtis (1889) 2 I. 523, 22 P. 8; aff. 134 U. S. 361, 10 S. C. R. 573, 33 L. ed. 945.

Mandamus will not lie at the instance of the speaker of the house of representatives to require the secretary of the territory to deliver to him the journal of the house after the adjournment of the session for correction. (Berry, J. dissents) Burkhart v. Reed (1889) 2 I. 503, 22 P. 1; aff. 134 U. S. 361, 10 S. C. R. 573, 33 L. ed. 945.

The secretary of the territory is amenable to a writ of mandamus issued out of the supreme court. (Dis. op.) Burkhart v. Reed (1889) 2 I. 503, 22 P. 1.

A court, by means of writs of mandamus operating upon the officers of legislative bodies, cannot make up the records of the proceedings of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. Clough v. Curtis and Burkhart v. Reed (1890) 134 U. S. 361, 33 L. ed. 945, 10 S. Ct. 573.

Certiorari: When the constitution was adopted jurisdiction was therein granted to the supreme court to issue the writ of certiorari then known and in use in the territory of Idaho, and none other. Neil v. Public Utilities Com. 32 I. —, 178 P. 271. (Dis. op. by Budge, J.)

Habeas corpus: The supreme court is a court of original jurisdiction in all matters of habeas corpus, and upon an application for the writ it will not exercise the jurisdiction of an appellate court for the examination of questions reviewable on appeal. In re Knudtson (1905) 10 I. 67, 79 P. 641.

§ 6445. [3817] Appellate jurisdiction. Its appellate jurisdiction extends to a review of all cases removed to it under such regulations as are now or may be prescribed by law, from the final decisions of the district courts, or the judges thereof. [R. C. § 3817.]

Hist. (See C. C. P. '81, § 21) R. S. § 3817, modified by Const. V. 9; compiled R. C. § 3817, reen. C. L. ib.

Cross ref. Appellate jurisdiction as defined by Const. V, 9. Appeals in general: §§ 7152-72.

Comp. leg.—Cal. See C. C. P. 1872, § 44; as amended: Kerr's C. § 52.

N. D. Analogous: C. Civ. P. § 7339.

Cited: (Dis. op.) Burkhart v. Reed (1889) 2 I. 503, 22 P. 1; Weiser Irr. Dist. v. Middle Valley etc. Co. (1916) 28 I. 548, 553, 155 P. 484; Stout v. Cunningham (1917) 29 I. 809, 162 P. 928.

Limited to appeals from district courts: Its appellate jurisdiction is limited to the review of the decisions of the district courts, or the judges thereof, and it cannot entertain an appeal directly from the public utilities commission. Neil v. Public Utilities Com. 32 I. —, 178 P. 271.

§ 6446. [3818] **Disposition of appeals.** The court may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken. The decisions of the court shall be given in writing; and in giving a decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal, and necessary to the final determination of the case. [R. S. § 3818.]

Hist. (See C. C. P. '81, § 22) R. S. § 3818, reen. R. C. ib., reen. C. L. ib.

Cross ref. Court may review verdict or decision and any intermediate nonappealable order or decision: § 7170. Remedial powers on reversing or modifying judgment: § 7171. Remittitur of judgment: § 7172. Report of decisions: §§ 199-206.

Comp. leg.—Cal. Same to "taken": C. C. P. 1872. § 45; as amended: Kerr's C. § 53.

N. D. Analogous: C. Civ. P. § 7343.

Cited: County of Bingham v. Woodin (1898) 6 I. 284, 55 P. 662; Ponting v. Isaman (1901) 7 I. 581, 65 P. 434; Madsen v. Whitman (1902) 8 I. 762, 71 P. 152; (in brief of counsel) Golden v. Spokane etc. Co. Rr. Co. (1911) 20 I. 531; (on petition for rehearing) Unfried v. Libert (1911) 20 I. 730, 119 P. 885; Smith v. Peterson (1917) 31 I. 34, 169 P. 290.

Liberal construction: This section should be liberally construed and authorizes the supreme court on affirming a decision of the trial court sustaining a demurrer, to set aside the judgment of that court dismissing the action in order to afford plaintiff an opportunity to amend, or to direct that court to issue a temporary restraining order. Boise City v. Artes. H. & C. Water Co. (1895) 4 I. 392, 39 P. 566.

Under this section a cause may be remanded, with instructions to take such further proceedings therein as may appear to be in accordance with justice, including authority to hear and determine appellant's motion to amend his complaint, if made within 10 days after filing of the remittitur. Feehan v. Kendrick, 32 I. —, 179 P. 507.

Application: The provisions of this section apply to all appeals whether taken on bills of exception or statements of the case both in actions at law and suits in equity, but in no form of appeal is the court required in its decisions to pass upon and determine all the questions of law involved in the case unless a new trial is granted. Work Bros. v. Kinney (1902) 8 I. 771, 71 P. 477.

Modification of judgment: A judgment which improperly directs payment in a specified form of currency, may be corrected by the supreme court without directing a new trial. Betts v. Butler (1868) 1 I. 185. A judgment which is too large in the amount of interest allowed should be modified and not reversed. Taylor v. Peterson (1873) 1 I. 513.

If it reasonably appears that plaintiff might make a case, a new trial and not an absolute reversal will be granted. Miller v. Mullan (1909) 17 I. 28. 34, 104 P. 660, 19 Ann. Cas. 1107.

Directed judgment: Where a party is entitled to have a verdict directed in his favor at the close of the evidence and the case is reversed on appeal, a new trial will not be ordered. The case will be remanded, with instructions that judgment be entered in his favor. Exchange S. Bk. v. Taber (1915) 26 I. 723, 145 P. 1090.

Finality of judgment: The affirmance by the supreme court of a judgment of the trial court determining certain rights of parties, is final as to such issues. Idaho Trust etc. Bk. v. Ridenbaugh (1916) 29 I. 647, 161 P. 868; Idaho Trust etc. Bk. v. Nampa etc. Irr. Dist. (1916) 29 I. 658, 161 P. 872.

§ 6447. [3819] **Quorum: Adjournments.** The presence of two justices is necessary for the transaction of business, but one of the justices may adjourn the court from day to day with the same effect as if all were present. [R. S. § 3819.]

Hist. (See C. C. P. '81, § 23) R. S. § 3819, reen. R. C. § 3819, reen. C. L. ib.

Cross ref. Majority necessary to constitute a quorum or pronounce a decision: Const. V. 6.

Comp. leg.—Cal. See C. C. P. 1872, § 46; Kerr's C. § 54.

N. D. Analogous: C. C. P. § 7344.

§ 6448. [3820] **Concurrence in decisions.** The concurrence of two justices is necessary to pronounce a judgment; if two do not concur, the case must be reheard. [R. S. § 3820.]

Hist. (See C. C. P. '81, § 24) R. S. § 3820, reen. R. C. § 3820, reen. C. L. ib.

Cross ref. Majority must concur in decisions: Const. V. 6.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 47; as amended: Kerr's C. § 45.

N. D. Analogous: C. C. P. § 7347.

Second rehearing: Where a rehearing is granted and the court fails to agree upon a decision in the case, it does not lose jurisdiction, and under this section another hearing must be ordered. Cameron L. Co. v. Stack-Gibbs L. Co. (1914) 26 I. 626, 144 P. 1114.

§ 6449. Terms and places of holding supreme court. The supreme court, or any two of the justices thereof, may, by an order, fix the times for holding the terms of the supreme court, which shall not be changed oftener than once in each year, except as herein provided. At least five terms shall be held annually; two terms at the seat of the state government, one term at Lewiston, in Nez Perce county, one term at Coeur d'Alene, in Kootenai county, and one term at Pocatello, in Bannock county. [C. L. § 3821.]

Hist. '90-91, p. 11, § 1, reen. '99, p. 6, § 1; am. R. C. § 3821; am. '13, c. 52. p. 161; am. '17, c. 42, § 1, p. 93; compiled and reen. C. L. § 3821.

§ 6450. Same: In case of emergency. In case of epidemic, pestilence or destruction of courthouses, the justices may hold terms of the supreme court provided by the preceding section at other convenient places, to be fixed by a majority of the justices. [C. L. § 3821a.]

Hist. Const. V, 8; R. C. § 3821; am. '13, c. 52, p. 161; am. '17, c. 42, § 1, p. 93; compiled and reen. C. L. § 3821a.

§ 6451. Causes in supreme court: Where heard. Unless by agreement of parties, causes in which writs or appeals are taken to the supreme court:

1. From the counties of Benewah, Bonner, Boundary, Kootenai, Shoshone and counties hereafter created therefrom shall be heard at Coeur d'Alene.
2. From the counties of Clearwater, Idaho, Latah, Lewis, Nez Perce and counties hereafter created therefrom shall be heard at Lewiston.
3. From the counties of Bannock, Bear Lake, Bingham, Bonneville, Butte, Cassia, Custer, Franklin, Fremont, Jefferson, Lemhi, Madison, Minidoka, Onedia, Power, Teton, Twin Falls and counties hereafter created therefrom shall be heard at Pocatello.
4. From the counties of Ada, Adams, Boise, Blaine, Camas, Canyon, Elmore, Gem, Gooding, Lincoln, Owyhee, Payette, Valley, Washington and counties hereafter created therefrom shall be heard at Boise City.

Provided, In criminal cases, writs, including habeas corpus and certiorari, and appeals, may, on motion of defendant, be heard before the supreme court at Coeur d'Alene, Lewiston, Pocatello or Boise City. [C. L. § 3821b.]

Hist. '90-91, p. 11, § 3; am. '93, p. 63, § 1, reen. '99, p. 6, § 3, reen. R. C. § 3831; am. '13, c. 52, § 1, p. 161; am. '17, c. 42, § 1, p. 93; compiled and reen. C. L. § 3821b.

Place of hearing: The place of hearing an appeal either in an action or special proceeding is determined by this section, and parties have a right to a hearing at Boise or Lewiston in accordance with the terms of this section; it is not discretionary with the court to fix the hearing, on the application of one of the parties alone, at Boise in place of Lewiston, when the cause is such that it should properly be heard at Lewiston. Mahoney v. Elliott (1901) 8 I. 190, 67 P. 317.

§ 6452. [3822] **Appointment of crier, bailiff and messenger.** The court shall have power to appoint a crier, a bailiff and a messenger for each term of court, when such officers are necessary. The crier and

bailiff shall receive $4 per day each, and the messenger $2 per day; they shall receive such pay only when necessarily engaged in their duties as such officers; said time to be certified to the auditor by one of the justices of the supreme court, at the close of each term of court. Said salaries shall be paid quarterly out of the state treasury on warrants issued by the auditor. [R. C. § 3822.]

Hist. '90-91, p. 11, §§ 2, 4; am. '93, p. 63, reen. '99, p. 6, § 2, last part of § 6 and § 7; compiled R. C. § 3822, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pol. C. §§ 740-1.

§ 6453. [3823] **Expenses of justices: How paid.** There must be paid to each of the justices of the supreme court, out of the state treasury, for each term of the supreme court, his actual expenses, not exceeding $200. ['03, p. 47, § 1.]

Hist. '03, p. 47, § 1, adding § 6151 to R. S., reen. R. C. § 3823, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pol. C. § 720.

Cross ref. Salaries of justices: § 406.

ARTICLE 3.

THE DISTRICT COURTS.

Cross ref. Clerk of district court: §§ 3621-2. Sheriff to attend court and act as crier: §§ 3596-3609.

§ 6454. District courts established. District courts are hereby established to be held in each of the counties of the state which have been or may hereafter be organized by law, for the purpose of hearing and determining all matters and causes arising under the laws of this state. ['11, c. 4, § 1, p. 6.]

Hist. R. S. § 6146; am. R. C. § 3829; am. '11, c. 4, § 1, p. 6, reen. C. L. § 3829.

Cross ref. Judicial districts: Const. V, 11, and Pol. C. c. 5. Judges, qualifications and term of office: Const. V, 11, 12, 23. Holding court out of district: Const. V, 12. Judges pro tem: Const. V, 12. Salaries of judges: § 406. Filling vacancies in judgeship: §§ 457-61.

Cited: Hodges v. Tucker (1914) 25 I. 563, 138 P. 1139.

Misnomer of court: Where on an appeal from a justice court to a district court, the latter is improperly designated, unless it is shown to have misled or deceived the opposite party, the appeal will not be dismissed. Darling v. Fremstadt (1912) 22 I. 684, 127 P. 674.

§ 6455. Term of district judges. The district court is presided over by district judges chosen by the qualified electors of their respective districts for a term of four years, except, that upon the creation of a new district judgeship in any district, such judge shall be appointed to hold office until the next general election for district judges, unless otherwise provided in the act creating such judgeship, and until his successor is elected and qualified. [C. L. § 3829a.]

Hist. Const. V. 11; R. C. § 3829; am. '11, c. 4, § 1, p. 6; compiled and reen. C. L. § 3829a.

Cited: Hodges v. Tucker (1914) 25 I. 563, 138 P. 1139.

Cross ref. Election of judges: § 495.

§ 6456. Jurisdiction of judges where more than one. Where there is more than one judge in any district, the jurisdiction of the respective judges of said district shall be equal and coextensive with the boundaries of the district. The judges, or, in case of difference of opinion, the senior judge in point of continuous service in such district, or if there be no such senior judge, the senior in point of age, shall apportion the business of such district among such judges as equally as may be, but any judge shall have full power to hold terms of court, transact judicial business, make orders, grant or refuse writs and generally exercise all the powers of a district judge without the concurrence of the other judge or judges. [C. L. § 3829b.]

Hist. Compiled from '11, c. 4, § 1, p. 6, and language of acts creating additional judges; '11, c. 8, § 4, p. 24; '11, c. 28, § 4, p. 64; '17, c. 4, § 4, p. 7, and '17, c. 20, § 4, p. 49; compiled and reen. C. L. § 3829b.

Applied: An order for change of venue should not designate the particular judge to try the case, since the senior judge of a district must apportion the business. Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122.

§ 6457. [3830] **Jurisdiction: Original and appellate.** The district court has original jurisdiction:

1. In all cases both at law and in equity.
2. In all special proceedings.
3. In the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its powers.
4. In the trial of all indictments and informations. Its appellate jurisdiction extends to all cases arising in probate or justices' courts; and to all other matters and cases wherein an appeal is allowed by law. [R. C. § 3830.]

Hist. R. S. § 3830, modified by Const. V, 9, 20, and '99, p. 125, § 1; compiled R. C. § 3830, reen. C. L. ib.

Cross ref. Jurisdiction defined by Const. V, 20.

Comp. leg.—Cal. See C. C. P. 1872, § 57; different superior court system: Kerr's C. § 76.

N. D. Analogous: C. C. P. § 7349. See also C. C. P. §§ 7350-4.

Cited: Murphy v. Russell & Co. (1901) 8 I. 151, 67 P. 427; Clough v. Curtis and Burkhart v. Reed (1890) 134 U. S. 361, 33 L. ed. 945, 10 S. C. R. 573; McCormick v. Smith (1913) 23 I. 487, 130 P. 999; Rowe v. Stevens (1913) 25 I. 237, 247, 137 P. 159; Hodges v. Tucker (1914) 25 I. 563, 138 P. 1139.

§ 6458. Number and duration of terms. At least two terms of the district court must be held in each county each year, and each term must be held until business is disposed of. If a judge of said court deems it necessary, in order to dispose of business, to hold a term beyond the date set for the commencement of another term in the same district, he may, by order, so do and postpone the other term to a future date. When there is more than one judge in any district, or when another judge is called into the district, any or all of said judges may hold court at the same time in the same county or may hold terms concurrently in the different counties of the district. [C. L. § 3831.]

Hist. (See C. C. P. '81, § 27, and Const. V. 11) R. S. § 3831; am. R. C. § 3831; am. '09, p. 77, S. B. § 126; am. '11, c. 4, § 2, p. 7; am. '15, c. 98, §§ 1, 2, p. 237; compiled and reen. C. L. § 3831. As to last sentence see also acts creating additional judges: '11, c. 8, § 4, p. 24; '11, c. 28, § 4 p. 64; '17, c. 4, § 4, p. 7, and '17, c. 20, § 4, p. 49.

Cross ref. When judge may hold court in another district: § 6492.

Comp. leg.—Cal. See C. C. P. 1872 § 76; no similar provision in Kerr's C. § 76.

Cited: (In brief of counsel) Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122; U. S. v. Anderson (1909) 169 F. 201, 204.

§ 6459. [3832] **Adjournments.** The court may adjourn from time to time during the term, and may, when the public convenience requires, adjourn the term over the time fixed by law for the commencement of another term in the same district. [R. S. § 3832.]

Hist. (See C. C. P. '81, § 28) R. S. § 3832, reen. R. C. § 3832, reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 77; different, superior court system: Kerr's C. § 74.

Cited: U. S. v. Anderson (1909) 169 F. 201, 204.

Judicial notice: The supreme court cannot take judicial notice of terms of the district court but facts in connection with such adjournment must be presented by a bill of exceptions when any advantage is desired to be taken of the fact of an adjournment; it will be presumed, in the absence of a showing to the contrary, that the court had jurisdiction to pronounce and enter judgment in a criminal case notwithstanding an alleged ending of the term. S. v. Cotterel (1906) 12 I. 572, 86 P. 527.

§ 6460. [3833] **Judgments may be entered when.** Judgments and orders of this court may be entered either in term or vacation. ['89, p. 3, § 1.]

Hist. (See C. C. P. '81, § 29) R. S. § 3833; am. '89, p. 3, § 1, reen. R. C. § 3833, reen. C. L. ib.

Cross ref. Entry of judgment in court cases: § 6867; in jury cases: § 6895.

§ 6461. Fixing terms of court. The judge of the district court of each of the judicial districts of the state, or if there be more than one judge in any district, then the senior judge, as defined in section 6456, must, annually, fix the time for holding the district court in the several counties of his district by an order filed and entered by the clerk in each county of the district, which order must be published two consecutive weeks in a newspaper published in the district. [C. L. § 3834.]

Hist. '90-91, p. 4, § 1, reen. '99, p. 3, 1, reen. R. C. § 3834; am. '11, c. 4, § 3, . 7; compiled and reen. C. L. § 3834.

Cited: (In brief of counsel) Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122.

§ 6462. Same: Special terms. A special term of district court may be held in any county by an order of a judge of the district fixing the time of holding the same, which order must be published for two consecutive weeks in some newspaper printed in the county in which the special term is to be held, and in case no newspaper is printed in the county, then in some newspaper printed in the state nearest to the county in which said special term is to be held. The terms of court herein mentioned shall be held at the county seat of the respective counties. [C. L. § 3835.]

Hist. '90-91, p. 4, § 2, reen. '99, p. 3, 1, reen. R. C. § 3835; am. '11, c. 4, § 4, . 7; compiled and reen. C. L. § 3835.

Cited: (In brief of counsel) Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122.

§ 6463. Expenses of district judges: Within district. There shall be paid to each of the judges of the district courts, out of the state treasury, for each term of a district court held by him within his district outside the county in which he resides, his actual expenses for traveling and for holding such term, not exceeding $100. [C. L. § 3836.]

Hist. R. S. § 6147; am. '93, p. 66, § 1, reen. '99, p. 181, § 1, reen. R. C. § 3836; modified by '15, c. 98, § 2, p. 237; compiled and reen. C. L. § 3836, to which was appended the following note: "'11, c. 107, p. 57, is disregarded for three reasons: (1) The act is of doubtful constitutionality in that it is an attempt to increase the compensation of district judges under the guise of allowing for expenses, even though not actually incurred; (2) It is probably repealed by '13, c. 15, § 1, subds. 145c, 145h and 146 (C. L. 11:5, 10, 13) p. 56 et seq. (3) It has been repeatedly ignored by the legislature in its appropriation bills which have referred to § 3836: '13, c. 193, p. 641; '15, c. 157, p. 341; '17, c. 71, p. 230, and '17, c. 75, p. 238."

§ 6464. Same: Outside district. Whenever a judge of a district court in the performance of his official duty shall be required to go outside of his district, he shall receive his actual and necessary expenses incurred while absent from his residence, to be paid in the manner that other claims against the state are paid. [C. L. § 3836a.]

Hist. (See R. C. § 3836) '11, c. 107, §§ 2, , p. 358; modified by '15, c. 98, § 2, p. 237; ompiled and reen. C. L. § 3836a.

Cross ref. When judge may hold court in another district: § 6492.

ARTICLE 4.

THE PROBATE COURTS.

§ 6465. Court in each county seat. There must be a probate court held at the county seat of each of the counties. [C. L. § 3840.]

Hist. (See C. C. P. '81, § 30) R. S. § 3840, een. R. C. § 3840; reference to county eat taken from R. C. § 3844; compiled and een. § 3840.

Comp. leg.—Cal. Same: C. C. P. 1872, § 94; superior court system does away with probate court: See Kerr's C. §§ 65, 76.

N. D. Analogous: Pro. C. § 8514.

§ 6466. [3841] **Jurisdiction: Probate.** The probate court has jurisdiction:

1. To open and receive proof of last wills and testaments and to admit them to proof.

2. To grant letters testamentary of administration and of guardianship, and to revoke the same.

3. To appoint appraisers of estates of deceased persons.
4. To compel executors, administrators and guardians to rende accounts.
5. To order the sale of property of estates, or belonging to minors
6. To order the payment of debts due from estates.
7. To order and regulate all distributions of property or estates o deceased persons.
8. To compel the attendance of witnesses and the production o title deeds, papers and other property of an estate or of a minor.
9. To make such orders as may be necessary to the exercise of th powers conferred upon it.

In addition to their probate jurisdiction to hear and determine a civil causes wherein the damage or debt claimed does not exceed th sum of $500, exclusive of interest, and concurrent jurisdiction wit justices of the peace in criminal cases. [R. S. § 3841.]

Hist. (See C. C. P. '81, § 31) R. S. § 3841, reen. R. C. § 3841, reen. C. L. ib. An amendatory act, '03, p. 94, § 1, which purported to give to these courts jurisdiction of suits to foreclose mortgages and liens was held unconstitutional. Dewey v. Schreiber Implement Co. (1906) 12 I. 280, 85 P. 921.

Cross ref. Jurisdiction defined by Const. V, 21. Procedure in exercise of civil jurisdiction: § 7052.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 97; probate jurisdiction is now vested in the superior court: Kerr's C. § 76.

N. D. Analogous: Pro. C. §§ 8524-5.

Cited: Coombs v. Collins (1899) 6 536, 57 P. 310; Kimball v. Raymond (190 9 I. 176, 72 P. 957; S. v. West (1911) 20 387, 118 P. 773; S. v. Drury (1914) 25 787, 139 P. 1129.

Original probate jurisdiction: The pr bate court has original jurisdiction in pr bate and guardianship matters. Idah Trust Co. v. Miller (1909) 16 I. 308, 1 P. 360.

Lack of criminal jurisdiction: Where probate judge issues a warrant of arre without having jurisdiction of the perso or subject matter he is liable in an actio in damages for false imprisonment. Harl ness v. Hyde, 31 I. 784, 176 P. 885.

§ 6467. Construction of probate proceedings and judgments. In th exercise of its probate jurisdiction the proceedings of this court are co strued in the same manner and with like intendments as the proceed ings of courts of general jurisdiction, and to its records, orders, judg ments and decrees in probate proceedings there is accorded like force effect and legal presumptions as to the records, orders, judgments an decrees of district courts. [C. L. § 3842.]

Hist. (See C. C. P. '81, § 32) R. S. § 3842, reen. R. C. § 3842; compiled and reen. C. L. ib.

Cross ref. Probate courts are courts of record: Const. V, 21. But are courts of limited jurisdiction in civil cases: § 7147.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 98; see superior courts: Kerr's C. § 65.

Construction: The probate court is n a court of record in the trial of civil a criminal cases, but its records and jud ments in those matters are placed on t same footing with the records and jud ments of justices of the peace. Dewey Schreiber Implement Co. (1906) 12 I. 2 85 P. 921.

§ 6468. Probate court always open. The probate court shall alwa be open for the transaction of all civil, criminal or probate busines [C. L. § 3843.]

Hist. (See C. C. P. '81, § 33) R. S. § 3843; am. '07, c. 39, § 1, reen. R. C. § 3843; am. '11, c. 96, p. 340; compiled and reen. C. L. § 3843.

Comp. leg.—N. D. Analogous: Pro. C. § 8515.

Cited: Connolly v. Probate Court (191 25 I. 35, 136 P. 205; Chandler v. Proba Court (1914) 26 I. 173, 177, 141 P. 635.

§ 6469. Clerk. There shall be a clerk of said court to be appointe by the judge thereof, or the probate judge may act as clerk of his ow court. Every probate judge shall be responsible upon his official bo for every default or misconduct in office of his clerk. [C. L. § 3844.]

Hist. (See C. C. P. '81, § 34) R. S. § 3844, reen. R. C. § 3844; modified by '11, c. 97, p. 340, abolishing terms; reference to county seat transferred to C. L. § 3 (6465 herein); compiled and reen. C. § 3844.

Comp. leg.—Cal. Similar: C. C. P. 1872, 100; Kerr's C. § 65.

N. D. Analogous: Pro. C. § 8520.

Cited: Ada Co. v. Ryals (1895) 4 I. 365, 9 P. 556.

Duties ministerial: Under this section ıe probate judge may appoint a clerk of is court or act as clerk of his own court, and the clerk may properly sign and issue a summons. Such act is purely a ministerial act, and a summons signed thus, "O. J. Bandelin, probate judge, by Robt. S. McCrea, clerk," is a sufficient compliance with the statute. Zimmerman v. Bradford-Kennedy Co. (1908) 14 I. 681, 95 P. 825.

ARTICLE 5.

JUSTICES' COURTS.

Cross ref. Constable must attend justices' courts and serve as crier: § 3684.

§ 6470. Justices' courts: Where held. Every justice of the peace ıust hold a justice's court in the precinct from which he is elected or ppointed, except when the precinct lies wholly or partially within the imits of an incorporated city or village, in which case he may hold said ourt at any place within the limits of said incorporated city or village. C. L. § 3850.]

Hist. (See C. C. P. '81, § 35) R. S. § 3850, ·en. R. C. § 3850; am. '09, p. 8, H. B. 8; compiled and reen. C. L. § 3850.

Comp. leg.—Cal. Similar: C. C. P. 1872, 112; different: Kerr's C. § 85.

N. D. Analogous: Jus. C. §9003. See Jus. C. § 9005.

Cited: S. v. Noyes (1908) 15 I. 241, 96 P. 435.

§ 6471. [3851] **Civil jurisdiction.** The civil jurisdiction of these ourts within their respective precincts or cities extends:

1. To an action arising on contract, for the recovery of money only, f the sum claimed does not exceed $300.

2. To an action for damages to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property, where no issue is raised by the answer involving he plaintiff's title, or possession of the same, if the damages claimed do ot exceed $300.

3. To an action for a fine, penalty or forfeiture, not exceeding 300, given by statute or the ordinance of an incorporated city.

4. To an action upon a bond or undertaking conditioned for the ayment of money not exceeding $300, though the penalty exceed that um; the judgment to be given for the sum actually due. When the ayments are to be made by instalments, an action may be brought for ach instalment as it becomes due.

5. To an action to recover the possession of personal property when he value of such property does not exceed $300.

6. To take and enter judgment on the confession of a defendant, hen the amount confessed does not exceed $300. [R. S. § 3851.]

Hist. (See C. C. P. '81, § 36) R. S. § 3851, ·en. R. C. § 3851, reen. C. L. ib.

Cross ref. Jurisdiction defined by Const. . 22 Jurisdiction in forcible entry and nlawful detainer: § 7326. Proceedings in stices' courts: §§ 7053, 7148.

Comp. leg.—Cal. Similar: C. C. P. 1872, 114; Kerr's C. § 112.

N. D. Analogous: Jus. C. § 9006.

Cited: Hammer v. Garrett (1909) 15 I. 657, 663, 99 P. 124.

Construction: Subd. 1—Justices have no jurisdiction where the amount sued for, including principal and interest, exceeds $300. Quayle v. Glenn (1899) 6 I. 549, 57 P. 308.

§ 6472. [3852] **Restriction of jurisdiction.** The jurisdiction conerred by the last section shall not extend, however, to a civil action in hich the boundaries, title or possession of real property is put in issue. R. C. 3852.]

Hist. (See C. C. P. '81, § 37) R. S. § 3852; odified by Const. V. 22; compiled R. C. 3852, reen. C. L. ib.

Cross ref. Transfer of proceedings to district court when question of title is raised: § 7059.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 115, subd. 1; omitted in present law: Kerr's C. § 114.

N. D. Similar in part: Jus. C. § 9006.

Procedure when title to realty put in issue: To oust a justice's court of jurisdiction on the ground that title to real property is called in question or put in issue it must appear, either from the allegations of the complaint or a verified answer, that title to real property is necessarily involved in the determination of the cause of suit. When such disclosure is not made in the complaint, but appears in a verified answer it is the duty of the justice to certify the cause to the district court for trial; when a demurrer is filed to the complaint challenging the jurisdiction of such court for want of jurisdiction, the demurrer should be sustained. Hammer v. Garrett (1909) 15 I. 657, 99 P. 124.

§ 6473. [3853] **Process: Issued where.** Mesne and final process of justices' courts may be issued to any part of the county in which they are held. [R. S. § 3853.]

Hist. (See C. C. P. '81, § 38) R. S. § 3853, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 116; as amended: Kerr's C. § 106.

Cited: S. v. Noyes (1908) 15 I. 241, 96 P. 435.

§ 6474. [3854] **Criminal jurisdiction.** These courts have jurisdiction of the following public offenses, committed within the respective counties in which such courts are established:

1. Petit larceny.
2. Assault and battery, not charged to have been committed upon a public officer in the discharge of his duties.
3. Breaches of the peace, riots, affrays, committing a wilful injury to property, and all misdemeanors punished by fine not exceeding $300, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [R. S. § 3854.]

Hist. (See C. C. P. '81, § 39) R. S. § 3854, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction over prosecutions for defrauding hotel and boarding house keepers: § 8485. Criminal proceedings in justices' courts: §§ 9227-70.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 117; as amended, limit of fine is $500 and limit of imprisonment is six months: Kerr's C. § 115.

N. D. Analogous: Jus. C. § 9007.

Cited: S. v. Drury (1914) 25 I. 787, 139 P. 1129.

Constitutionality: This section was enacted under authority of Const. V, 22. S. v. Raaf (1909) 16 I. 411, 101 P. 747.

Construed with § 3880: This section likewise limits the jurisdiction of police magistrates under § 3880. S. v. Frederic (1916) 28 I. 709, 155 P. 977.

Territorial jurisdiction: The criminal jurisdiction of the justices' courts is coextensive with the jurisdiction of the county, but the justice of the peace is required to reside and exercise his jurisdiction within his precinct. S. v. Noyes (1908) 15 I. 241, 96 P. 435.

Original jurisdiction: Under the constitution and statutes of this state, it is the duty of a justice's court to take jurisdiction of and try a misdemeanor of which it has original jurisdiction whenever a case is properly commenced before such court. S. v. Raaf (1909) 16 I. 411, 101 P. 747.

The jurisdiction of the district court and justice's courts in misdemeanor cases, of which a justice's court has original jurisdiction, is a coordinate and concurrent jurisdiction. Ib.

Jurisdiction as committing magistrate: Where the penalty for an offense is in excess of the maximum penalty prescribed by this section the only jurisdiction that a justice's court or a probate court has of such offense is to hold a preliminary examination and commit the accused for trial in the district court, or discharge, as the case may be. S. v. West (1911) 21 I. 387, 118 P. 773.

ARTICLE 6.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

§ 6475. [3860] **Sittings public.** The sittings of every court of justice are public, except as provided in the next section. [R. S. § 3860.]

Hist. (See C. C. P. '81, § 40) R. S. § 3860, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 124; "shall be" for "are": Kerr's C. § 124.

N. D. Similar: C. C. P. § 7337.

§ 6476. [3861] **Exclusion of persons in certain cases.** In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined there

in to be private, and may exclude all persons except the officers of the court, the parties, their witnesses and counsel: *Provided,* That in any cause the court may, in the exercise of a sound discretion during the examination of a witness, exclude any and all witnesses in the cause. [R. S. § 3861.]

Hist. (See C. C. P. '81, § 41) R. S. § 3861, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 125; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7337.

§ 6477. [3862] **Powers of court.** Every court has power:

1. To preserve and enforce order in its immediate presence.

2. To enforce order in the proceedings before it or before a person or persons empowered to conduct a judicial investigation under its authority.

3. To provide for the orderly conduct of proceedings before it or its officers.

4. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court in an action or proceedings pending therein.

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code.

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

8. To amend and control its process and orders, so as to make them conformable to law and justice. [R. S. § 3862.]

Hist. (See C. C. P. '81, § 42) R. S. § 3862, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 128; Kerr's C. ib.

Construction, subd. 8: This section does not authorize a motion for a new trial in the supreme court in an original proceeding instituted in and disposed of by that court. People v. George (1891) 3 I. 108, 27 P. 680.

The court may quash an execution issued without authority of law after the taking of an appeal and filing of a supersedeas bond. Miller v. Pine M. Co. (1893) 3 I. 603, 32 P. 207.

Where the probate court by inadvertence confirms a sale of real estate to the wrong person, it may subsequently vacate the order of confirmance and enter a proper order. S. v. Cunningham (1898) 6 I. 113. 53 P. 451.

The court may order a summons withdrawn from the files and served after it has become a file of the court. Harpold v. Doyle (1909) 16 I. 671, 102 P. 158.

The court may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served. Ridenbaugh v. Sandlin (1908) 14 I. 472, 94 P. 827, 125 A. S. R. 175; Empire Mill Co. v. Dist. C. (1915) 27 I. 383, 149 P. 449; Empire Mill Co. v. Dist. C. (1915) 27 I. 400, 149 P. 505.

Correcting record: Courts of record always have jurisdiction over their own records to make them conform to the facts. S. v. Winter (1913) 24 I. 749, 135 P. 739.

§ 6478. [3863] **Courts may make rules.** Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules must neither impose a tax or charge upon any legal proceeding nor give an allowance to any officer for services. [R. S. § 3863.]

Hist. (See C. C. P. '81, § 43) R. S. § 3863, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 129; Kerr's C. ib.

Construction: A rule of the supreme court which provides a penalty to be taxed against an adverse party on appeal for failure of his attorney to certify within a certain time to the correctness of a transcript on appeal, is not inconsistent with the provisions of this section. (Sullivan, C. J. dissents) Lydon v. Godard (1897) 5 I. 607, 51 P. 459.

§ 6479. [3864] **When rules take effect.** The rules adopted by the supreme court take effect 60 days, and those adopted by other courts, 30 days after their publication. [R. S. § 3864.]

Hist. (See C. C. P. '81, § 44) R. S. § 3864, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 130; same except "superior courts" for "other courts," as amended: Kerr's C. ib.

§ 6480. [3865] **Courts: Days when held.** The courts of justice may be held and judicial business be transacted on any day except as provided in the next section. [R. S. § 3865.]

Hist. (See C. C. P. '81, § 45) R. S. § 3865, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 133; Kerr's C. ib.

§ 6481. [3866] **Nonjudicial days.** No court can be opened nor can any judicial business be transacted on Sunday, on the 1st day of January, on the 4th day of July, on Christmas or Thanksgiving Day, or on a day on which the general election is held, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict.
2. To receive a verdict or discharge a jury.
3. For the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature: *Provided,* That in civil causes orders of arrest may be made and executed; writs of attachment, executions, injunctions and writs of prohibition may be issued and served; proceedings to recover possession of personal property may be had; and suits for the purpose of obtaining any such writs and proceedings may be instituted on any day. [R. S. § 3866.]

Hist. (See C. C. P. '81, § 46) R. S. § 3866, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 134; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7338.

Ministerial acts permitted: The statute does not prohibit ministerial but judicial acts on a nonjudicial day; consequently the issuance of letters of administration on Christmas is not a void act where the appointment is made on another day. Glendenning v. McNutt (1875) 1 I. 592.

The filing of a complaint on Sunday and the issuance of a summons thereon is a ministerial act and is not prohibited by this section, although the action is not one in which an order of arrest or writ of attachment, injunction or prohibition is sought. Havens v. Stiles (1902) 8 I. 250, 67 P. 919.

An objection to the panel of a jury in a criminal prosecution on the ground that some of the jurors were summoned under a special venire on Sunday is properly overruled. S. v. Gilbert (1902) 8 I. 346, 69 P. 62.

§ 6482. [3867] **Adjournment to holiday: Effect.** If any of the days mentioned in the last section happen to be the day appointed for the holding of a court or to which it is adjourned, it is deemed appointed for, or adjourned to the next day. [R. S. § 3867.]

Hist. (See C. C. P. '81, § 47) R. S. § 3867, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 135; as amended: Kerr's C ib.

§ 6483. [3868] **Adjournment on absence of judge.** If no judge attend on the day appointed for holding the court, or on the day to which it may have been adjourned, before noon, the sheriff or clerk must adjourn the court until the next day at 10 o'clock a. m.; and if no judge attend on that day before noon, the sheriff or clerk must adjourn the court until the following day at the same hour, and so on from day to day for one week, unless the judge by written order directs it to be adjourned to some day certain fixed in said order, in which case it shall be so adjourned. [R. S. § 3868.]

Hist. (See C. C. P. '81, § 48) R. S. § 3868, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 139 and part of § 140; Kerr's C. ib.

N. D. Analogous: Pol. C. § 3389.

§ 6484. [3869] **Same.** If no judge attend for one week and no written order is made as provided in the last section, the sheriff or clerk shall adjourn the session until the time appointed for the holding of the next regular session. [R. S. § 3869.]

Hist. (See C. C. P. '81, § 49) R. S. § 3869, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 140; now same as amended except "be" for "is": Kerr's C. ib.

N. D. Analogous: Pol. C. § 3389.

§ 6485. Adjournment to another place. A judge authorized to hold or preside at a court appointed to be held in a county, city or village may, by an order filed with the clerk and published as he may prescribe, direct that the court be held or continued at any other place in the county, city or village than that appointed, when war, insurrection, pestilence or any other public calamity or the danger thereof, or the destruction or danger of the building appointed for holding the court may render it necessary, and may in the same manner revoke the order, and in his discretion appoint another place in the same county, city or village for holding the court. [C. L. § 3870.]

Hist. (See C. C. P. '81, § 50) R. S. § 3870, reen. R. C. ib.; compiled and reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 142; similar as amended: Kerr's C. ib.

§ 6486. [3871] **Same: Persons must appear at appointed place.** When the court is held at a place appointed as provided in the last section, every person held to appear at the court must appear at the place so appointed. [R. S. § 3871.]

Hist. (See C. C. P. '81, § 51) R. S. § 3871, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 143; Kerr's C. ib.

§ 6487. [3872] **Accommodations for district courts.** If suitable rooms for holding district courts and the chambers of the judges of such courts be not provided in any county by the commissioners thereof, together with attendants, furniture, fuel, lights and stationery sufficient for the transaction of business, the court may direct the sheriff of such county to provide such rooms, attendants, furniture, fuel, lights and stationery, and the expenses thereof are a charge against such county. [R. S. § 3872.]

Hist. (See C. C. P. '81, § 52) R. S. § 3872, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 144; similar as amended: Kerr's C. ib.

§ 6488. [3873] **Courts having seals.** Each of the following courts has a seal:

1. The supreme court.
2. The district courts.
3. The probate courts. [R. S. § 3873.]

Hist. (See C. C. P. '81, § 53) R. S. § 3873, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 147; different as amended: Kerr's C. ib.

§ 6489. [3874] **Clerk must keep seal.** The clerk of the court must keep the seal thereof. [R. S. § 3874.]

Hist. (See C. C. P. '81, § 54) R. S. § 3874, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 151; same in effect as amended: Kerr's C. § 152.

§ 6490. [3875] **Seal affixed to what.** The seal of the court need not be affixed to any proceeding therein, or document except:

1. To a writ.
2. To the certificate of the probate of a will, or of the appointment of an executor, administrator or guardian.
3. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk. [R. S. § 3875.]

Hist. (See C. C. P. '81, § 55) R. S. § 3875, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 152; same as amended: Kerr's C. § 153.

Seal not required: An order for the temporary care pending the hearing of the person whose custody is the subject of a writ of habeas corpus need not be issued and signed by the clerk under the seal of the court. Re Dowling (1896) 4 I. 715, 43 P. 871.

CHAPTER 245.

JUDICIAL OFFICERS.

ARTICLE 1.

JUDICIAL OFFICERS IN GENERAL.

§ 6491. Residence of justices of the peace. Every justice of the peace shall reside in the precinct for which he is elected or appointed. [C. L. § 3885.]

Hist. (See C. C. P. '81, § 56) R. S. § 3885, reen. R. C. ib., first part relating to residence of probate judge omitted in C. L. because duplicate of R. C. § 1984; second part amended by implication '09, p. 8, H. B. 88, amending § 3850; compiled and reen. C. L. § 3885.

Comp. leg.—Cal. See C. C. P. 1872, § 158; Kerr's C. §§ 158-9.

N. D. Analogous: Jus. C. § 9003.

Cited: S. v. Noyes (1908) 15 I. 241, 96 P. 435.

Officer de facto: While a justice of the peace is not eligible to the office in the precinct in which he was appointed, still he is an officer de facto, and as such his official acts are as valid as to the public as though he were qualified in every respect. S. v. Nolan (1917) 31 I. 71, 169 P. 295.

§ 6492. [3886] **Judge may hold court in another district.** A district judge may hold a court in any county in this state upon the request of the judge of the district in which such court is to be held; and when by reason of sickness or absence from the state, or from any other cause a court can not be held in any county in a district by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who may thereupon direct some other district judge to hold such court. [R. S. § 3886.]

Hist. (See C. C. P. '81, § 57) R. S. § 3886, reen. R. C. ib., reen. C. L. ib. A portion of the section was reenacted in '15, c. 98, § 2, p. 237.

Cross ref. Constitutional provision: V, 12. Judge of adjoining district to preside over labor arbitration on request of resident judge: § 2292. Judge called on may hold court at the same time in the same county with the regular judge or may hold concurrent term in different county: § 6458. Payment of judge's expenses outside district: § 6464. Chambers order may be made by judge of another district in certain cases: § 6496. Powers of substitute judge: Note to § 6511. Proceedings on disqualification of judge of district: § 6667.

Comp. leg.—Cal. Same: C. C. P. 1872, § 160; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7353.

Cited: Ferguson v. McGuire (1909) 17 I. 141, 104 P. 1028.

Jurisdiction: Where a district judge from one district holds court in another district and no question is raised as to his authority it will be presumed unless the record discloses to the contrary that he was lawfully exercising jurisdiction. Such jurisdiction is exercised under color of authority and is not open to collateral attack. Ex parte Allen (1918) 31 I. 295, 170 P. 921.

ARTICLE 2.

POWERS OF JUDGES AT CHAMBERS.

§ 6493. [3890] **Jurisdiction of judge at chambers.** A district judge may sit at chambers anywhere within his district, and when so acting, has jurisdiction and power as follows:

1. To grant, dissolve or modify temporary injunctions.
2. To discharge attachments.
3. To hear applications for the sale of perishable personal property held under attachment.
4. To hear applications for the appointment of a receiver, or to discharge one already appointed, or to modify the order appointing

one, and to make all orders in relation to receivers, usually made by a judge or a court in such matters.

5. To hear applications for mandamus, or habeas corpus, and enter final judgment therein.

6. To act upon a motion for a new trial.

7. To issue writs of review and prohibition, and to hear and determine the same, and enter final judgment therein.

8. To appoint appraisers under the eminent domain act.

9. To grant all orders and writs which are usually granted in the first instance upon ex parte applications.

10. To issue citation, and hear and determine, and enter final judgment in all proceedings brought under or in pursuance of section 8684 of these codes.

11. To exercise all powers expressly conferred upon a judge by any statute of this state, as contradistinguished from the court.

12. To receive a plea of guilty upon his application, from any person charged with a crime in the district court, and to pass sentence and final judgment thereon; said judgment to be filed with the clerk of the court of the proper county where said cause of action arose, and to have the same force and effect as any other final judgment entered in a criminal case.

13. To hear demurrers and motions and other issues of law, and to settle and make up issues of law.

14. To set causes for trial.

15. To hear and determine applications for a change of place of trial, after appearance, or after time for appearance has expired, and enter a final order therein.

16. To try and finally determine all causes in which the parties agree in writing to try the same before the judge at chambers.

17. To enter defaults and to hear testimony thereon; and to enter judgment in default cases, where there has been no appearance or plea filed within the time prescribed by statute, and to give such judgments the same force and effect as though entered in open court. ['07, p. 317, § 1.]

Hist. R. S. § 3890, superseding '05, p. 7, § 1; am. '07, p. 317, § 1, reen. R. C. § 3890, reen. C. L. ib.

Cross ref. Motions for new trial may be heard at chambers: § 6894. Writs of review, mandate and prohibition may be issued and heard at chambers: § 7271.

Subd. 12: Plea of guilty: § 8881.

Cited: Re Dawson (1911) 20 I. 178, 117 P. 696; Exchange Nat. Bk. v. Nor. Idaho Co. (1913) 24 I. 671, 135 P. 747; Washington etc. Co. v. Weiser Nat. Bk. (1915) 26 I. 717, 146 P. 116; Callahan v. Dunn (1917) 30 I. 225, 164 P. 356; U. S. v. Anderson (1909) 169 F. 201, 204.

No jurisdiction: The district judge has no jurisdiction to hear condemnation proceedings at chambers. Washington etc. Co. v. Coeur d'Alene Co. (1891) 3 I. 263, 28 P. 394. Nor to make an order allowing a claim for attorney's fees against an insolvent estate. Gaffney v. Piper (1897) 5 I. 490, 51 P. 99.

Jurisdiction: This section confers jurisdiction on district judges to issue writs of review at chambers. Gans v. Steele (1900) 7 I. 143, 61 P. 286. Power to order receiver's sale at chambers: See note to § 6821.

Applied (subd. 17): Where a default has been entered where unliquidated damages are claimed, the judge has power to hear testimony and to enter judgment at chambers with same force and effect as though entered in open court. Nuestel v. Spokane I. Ry. Co. (1915) 27 I. 367, 149 P. 462.

§ 6494. [3891] **Entry of chambers orders and judgments.** All orders and judgments entered by a judge at chambers shall be filed with the clerk of the court in the county in which said action is pending, and shall be entered by said clerk upon the journal and judgment docket and other records, as required by law, and have the same force

and effect as though such orders and judgments were entered as of term time. ['05, p. 7, § 2.]

Hist. '05, p. 7, § 2, reen. R. C. § 3891, reen. C. L. ib.

§ 6495. [3892] **Notice of hearing in chambers.** Before a demurrer, motion or other issue of law is heard at chambers, the party desiring said issue to be heard, shall give at least five days' notice to the opposing party, of the time and place of said hearing. ['05, p. 7, § 3.]

Hist. '05, p. 7, § 3, reen. R. C. § 3892, reen. C. L. ib.

§ 6496. [3893] **Chambers in other counties.** Unless otherwise specified by the district judge, all chamber matters shall be heard at the judge's chambers in the county where said judge resides, but said judge is hereby granted jurisdiction and power to sit at chambers in any other county in his district than that in which he lives. ['05, p. 7, § 4.]

Hist. '05, p. 7, § 4, reen. R. C. § 3893, reen. C. L. ib.

Application: This section was intended to apply to judges of the district, and when judge of another district under § 6497 assumes to act for absent judge he is subject to limitations prescribed in this section. All motions of which notice must be given and which may be contested must be made and heard in the county in which the action is pending or in any county in the same judicial district. Callahan v. Dunn (1917) 30 I. 225, 164 P. 356.

§ 6497. Vacancy in office, absence or disability of judge. In case of a vacancy in the office of any district judge, or in his absence from the judicial district or state, or his sickness or inability to act from any cause, motions may be made before, or orders granted by, any other district judge, who shall have the same jurisdiction under this chapter as though he was the judge of said district, and orders, writs and judgments entered by such judge shall be made matters of record as herein directed and have the same effect as though made by the judge of said district. ['11, c. 206, p. 676.]

Hist. '05, p. 7, § 5, reen. R. C. § 3894; am. '11, c. 206, p. 676, reen. C. L. § 3994.

Jurisdiction: Under this section jurisdiction is conferred upon judge of any other district to same extent as judge of district for whom he is acting. He is also bound by the same limitations. Callahan v. Dunn (1917) 30 I. 225, 164 P. 356.

§ 6498. [3895] **Appeal from chambers orders.** An appeal may be taken from all orders or judgments given or made by a judge at chambers, from which an appeal lies if given or made by a judge or court. ['05, p. 7, § 6.]

Hist. '05, p. 7, § 6, reen. R. C. § 3895, reen. C. L. ib.

ARTICLE 3.

DISQUALIFICATION OF JUDGES.

§ 6499. [3900] **Judge disqualified: When.** A judge can not act as such in any of the following cases:

1. In an action or proceeding to which he is a party, or in which he is interested.

2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

3. When he has been attorney or counsel for either party in the action or proceeding. But this section does not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the cause to another county. [R. S. § 3900.]

Hist. (See C. C. P. '81, § 59) R. S. § 3900, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judge who has been an adverse claimant under the townsite law is

disqualified from presiding over trials of actions by other claimants: § 3774. Change of venue for disqualification of judge: § 6666

Comp. leg.—Cal. Same: C. C. P. 1872, § 170; similar as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7644.

Cited: Re Badger (1894) 4 I. 66, 35 P. 839.

Prejudice of judge: This section was enacted before the adoption of the constitution and does not name prejudice of the judge as ground for change of venue; nevertheless such prejudice is ground for change of venue under Const. I, 18. (Stockslager, C. J. dissents) Day v. Day (1906) 12 I. 556, 86 P. 531; Bell v. Bell (1910) 18 I. 636, 639, 111 P. 1074.

Action as attorney: A judge is not disqualified from presiding over the trial of an action on a judgment because he previously acted as attorney for a party in the suit in which the judgment was rendered. Stevens v. Hall (1902) 8 I. 549, 69 P. 282.

§ 6500. [3901] **Judge can not act as attorney.** A judge can not act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to another court for trial or review, or in an action or proceeding from which an appeal may lie to his own court. [R. S. § 3901.]

Hist. (See C. C. P. '81, § 60) R. S. § 3901, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 171; Kerr's C. ib.

§ 6501. [3902] **Same: Supreme and district judges.** A justice of the supreme court or judge of the district court can not act as attorney or counsel in any court, except in an action or proceeding to which he is a party on the record. [R. S. § 3902.]

Hist. (See C. C. P. '81, § 61) R. S. § 3902, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 172; Kerr's C. § 171.

§ 6502. [3903] **Judge not to have law partner.** No judge or other judicial officer shall have a partner acting as attorney or counsel in any court of this state. [R. S. § 3903.]

Hist. (See C. C. P. '81, § 62) R. S. § 3903, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 173; Kerr's C. § 172.

ARTICLE 4.

INCIDENTAL POWERS AND DUTIES.

§ 6503. [3911] **Powers of judicial officers.** Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of an official duty.
2. To compel obedience to his lawful orders, as provided in this code.
3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code.
4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties. [R. S. § 3911.]

Hist. (See C. C. P. '81, § 64) R. S. § 3911, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 177; Kerr's C. ib.

Cross ref. Powers of district judge as arbitrator in labor disputes: § 2284.

§ 6504. [3912] **Judicial officer may punish for contempt.** For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt, in the cases provided in this code. [R. S. § 3912.]

Hist. (See C. C. P. '81, § 65) R. S. § 3912, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 178; Kerr's C. ib.

Cross ref. Contempt proceedings: §§ 7383-96.

§ 6505. [3913] **Judges may take acknowledgments, etc.** The justices of the supreme court and the judges of the district courts have

power in any part of the state, and probate judges and justices of the peace within their respective counties, to take and certify:

1. The proof and acknowledgment of a conveyance of real property or of any other written instrument.
2. The acknowledgment of a satisfaction of a judgment of any court.
3. An affidavit or deposition to be used in this state. [R. S. § 3913.]

Hist. (See C. C. P. '81, § 66) R. S. § 3913, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 179; as amended: Kerr's C. ib.

ARTICLE 5.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

§ 6506. [3920] **Successive applications for orders prohibited.** If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused, in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court; but nothing in this section applies to motions refused for any informality in the papers or proceedings necessary to obtain the order or to motions refused, with liberty to renew the same. [R. S. § 3920.]

Hist. (See C. C. P. '81, § 67) R. S. § 3920, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 182; Kerr's C. ib.

§ 6507. [3921] **Such applications a contempt.** A violation of the last section may be punished as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending. [R. S. § 3921.]

Hist. (See C. C. P. '81, § 68) R. S. § 3921, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 183; Kerr's C. ib.

§ 6508. [3922] **Proceedings not affected by vacancy.** No proceeding in any court of justice in an action or special proceeding pending therein is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof. [R. S. § 3922.]

Hist. (See C. C. P. '81, § 69) R. S. § 3922, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 184; Kerr's C. ib.

§ 6509. [3923] **Proceedings to be in English.** Every written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved and published in no other. [R. S. § 3923.]

Hist. (See C. C. P. '81, § 70) R. S. § 3923, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 185; Kerr's C. ib.

§ 6510. [3924] **Abbreviations may be used.** Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals, in the customary manner. [R. S. § 3924.]

Hist. (See C. C. P. '81, § 71) R. S. § 3924, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 186; Kerr's C. ib.

§ 6511. [3925] **Incidental means to exercise jurisdiction.** When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code. [R. S. § 3925.]

Hist. (See C. C. P. '81, § 72) R. S. § 3925, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 187; Kerr's C. ib.

Cited: Re Dowling (1896) 4 I. 715, 43 P. 871; (In brief of counsel) Pierson v. S. Bd. of Land Comrs. (1908) 14 I. 159; Pyle v. Woods (1910) 18 I. 674, 686, 111

p. 746; McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954; (In dis. op.) S. v. Dunlap (1916) 28 I. 784, 809, 156 P. 1141.

Additional undertaking: This section does not authorize the court to require an undertaking on appeal additional to the one required by statute applicable to the given case. Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267.

Ancillary orders: Where, notwithstanding a judgment of ouster in quo warranto proceedings, the person ousted takes possession of the office in open and direct violation of the judgment, the court may issue an order putting the person declared by the judgment entitled to the office in possession thereof. People v. Lindsay (1871) 1 I. 394.

A temporary order, providing for the custody of a child pending habeas corpus proceedings in relation to the same, may be issued at chambers and without the seal of the court. Re Miller (1896) 4 I. 711, 43 P. 870.

In habeas corpus proceedings for the custody of a child, the court may issue an order nisi requiring the child to be committed to the custody of the applicant until the hearing where the facts show that the health of the child is endangered in its present environments and that it is also dangerous, in view of the inclemency of the season or other conditions, to bring the child before the court for immediate hearing. Ib.

Powers of substitute judge: A judge of one district, called into another district to try a case pending in that district, has all the powers of the judge of that district for the purposes of the case, and may make an order extending the time for preparing and presenting statements and bills of exceptions, or for filing affidavits on motion for a new trial. Morris v. Lemp (1907) 13 I. 116, 88 P. 761.

Applied to appellate practice: The district court, upon the reversal of a judgment, on appeal from a probate or justice's court on question of law alone, where no issue of fact was tendered in the lower court, should remand the cause with instructions to proceed in accordance with the decision and judgment of the district court. Smith v. Clyne (1908) 15 I. 254, 97 P. 40.

Applied to sheep trespass: In pursuance of the authority of this statute and the right of action conferred by §§ 1908 and 1909, it is proper for a justice's court to proceed under the provisions of §§ 1990 and 1992 in a case where it is charged that the owner of trespassing sheep is unknown to the plaintiff, and that he is unable to ascertain the name of the owner, and the animals are taken into the possession of the plaintiff in the action and subsequently delivered to the officer who levies upon them under the execution issued by the justice. Cleveland v. Wallace (1913) 23 I. 570, 131 P. 10.

Procedure: When jurisdiction is conferred upon a court, as an incident of such grant, there is conferred the power to make same effective by suitable process or mode of procedure. Fox v. Flynn (1915) 27 I. 580, 150 P. 44.

CHAPTER 246.

JURORS.

Cross ref. Express reference to this chapter: Impanelling of jury to assess damages in drainage district cases: § 4534.

§ 6512. [3935] Jury defined. A jury is a body of men temporarily selected from the citizens of a particular district and invested with power to present or indict a person for a public offense or to try a question of fact. [R. S. § 3935.]

Hist. (See C. C. P. '81, § 73) R. S. § 3935, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 190; Kerr's C. ib.

§ 6513. [3936] Kinds of juries. Juries are of three kinds:

1. Grand juries.
2. Trial juries.
3. Juries of inquest. [R. S. § 3936.]

Hist. (See C. C. P. '81, § 74) R. S. § 3936, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 191; Kerr's C. ib.

§ 6514. [3937] Grand jury defined. A grand jury is a body of men, 16 in number, returned in pursuance of law from citizens of the county before a court of competent jurisdiction and sworn to inquire of public offenses committed or triable within the county. [R. S. § 3937.]

Hist. (See C. C. P. '81, § 75) R. S. § 3937, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 192; Kerr's C. ib.

Cross ref. Order for grand jury: § 6529.

N. D. Analogous: C. Cr. P. § 10634.

§ 6515. [3938] Trial jury defined. A trial jury is a body of men returned from the citizens of a particular district before a court or offi-

cer of competent jurisdiction and sworn to try and determine by a ver dict a question of fact. Three-fourths of the jury may render a ver dict in a civil action, and such verdict shall have the same effect as a unanimous verdict. [R. S. § 3938.]

Hist. (See C. C. P. '81, § 76) R. S. § 3938; am. '90-91, p. 165, § 1, reen. '99, p. 110, § 1, reen. R. C. § 3938, reen. C. L. ib.

Cross ref. Right to jury trial: Const I, 7. Formation of trial jury: §§ 8906-9.

§ 6516. [3939] **Constitution of trial jury.** A trial jury consists o 12 men: *Provided,* That in civil actions and cases of misdemeanor, the jury may consist of any number less than 12 upon which the parties may agree in open court. [R. C. § 3939.]

Hist R. S. § 3939, modified by Const. I, 7; compiled R. C. § 3939, reen. C. L. ib.

Cross ref. Juries in police courts consist of six men: § 3887.

Comp. leg.—Cal. See C. C. P. § 1872 § 194; Kerr's C. ib.

§ 6517. [3940] **Jury of inquest defined.** A jury of inquest is a body of men summoned from the citizens of a particular district, before the sheriff, coroner or other ministerial officer to inquire of particular facts [R. S. § 3940.]

Hist. (See C. C. P. '81, § 78) R. S. § 3940, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 187 § 195; Kerr's C. ib.

§ 6518. [3941] **Qualifications of jurors.** A person is competent t act as a juror if he be:

1. A citizen of the United States and an elector of the county.
2. In possession of his natural faculties and not decrepit.
3. Possessed of sufficient knowledge of the language in which th proceedings of the courts are held. [R. S. § 3941.]

Hist. (See C. C. P. '81, § 79) R. S. § 3941, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 198; Kerr's C. ib.

N. D. Analogous: Pol. C. § 814.

Qualifications as electors: A juror should possess the qualifications of an elector, but it does not follow that he need be registered as such, as registration does no go to his qualification but is merely a pre caution to prevent fraud in election. Te v. Evans (1890) 2 I. 651, 23 P. 232.

This section which requires jurors to b electors of the county, disqualifies as jur ors adherents to organizations counter ancing polygamy, who, by the election law are disqualified as voters. Ib.

§ 6519. [3942] **Disqualifications of jurors.** A person is not compe tent to act as a juror:

1. Who does not possess the qualifications prescribed by the pre ceding section.
2. Who has been convicted of a felony or misdemeanor involvin moral turpitude. [R. S. § 3942.]

Hist. (See C. C. P. '81, § 80) R. S. § 3942, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P 1872, § 199; Kerr's C. ib.

N. D. Analogous: Pol. C. § 814.

Cited: Ter. v. Evans (1890) 2 I. 65 23 P. 232.

§ 6520. [3943] **Exemptions from jury duty.** A person is exemp from liability to act as a juror if he be:

1. A judicial, civil or military officer of the United States or of th state of Idaho.
2. A person holding a county office.
3. An attorney and counselor at law.
4. A minister of the gospel or a priest of any denomination.
5. A teacher in a college, academy or school.
6. A practicing physician.
7. An officer, keeper or attendant of an almshouse, hospital, asylur or other charitable institution.

8. Engaged in the performance of duty as officer or attendant of a county jail or the state prison.

9. An express agent, mail carrier, telegraph operator, telephone agent or keeper of a public ferry or toll gate.

10. A dispensing druggist of a prescription drug store.

11. A superintendent, engineer, conductor, fireman or station agent of a railroad.

12. A person drawn as a juror in the district court and who has served as such within a year; but this exemption shall not apply to a person who is summoned on a special venire, or to serve as a juror in the probate court or justice's court. [R. S. § 3943.]

Hist. (See C. C. P. '81, § 81) R. S. § 3943, reen. R. C. ib., reen. C. L. ib.

Cross ref. Additional exemptions: Dentists: § 2135; pharmacists: § 2180; officers of the penitentiary: § 9384.

Comp. leg.—Cal. See C. C. P. 1872, § 200; Kerr's C. ib.

N. D. Analogous: Pol. C. § 814.

Cited: S. v. Silva (1912) 21 I. 247, 120 P. 835.

§ 6521. [3944] **Same: Fire department members.** Twenty regularly enrolled active members of any fire department for every 1000 inhabitants of the town or city where such fire department is located, are exempt from jury duty, and the chief engineer or foreman of the department must designate from the active members, and the county recorder must issue certificates of exemption for one year to the number of active members so exempt. [R. S. § 3944.]

Hist. R. S. § 3944, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See C. C. P. 1872, § 200; Kerr's C. ib.

N. D. Analogous: Pol. C. § 814.

§ 6522. [3945] **Grounds for excuse.** A juror can not be excused by the court for slight or trivial cause, or for hardship, or inconvenience to his business, but only when material injury or destruction to his property, or that of the public intrusted to him is threatened, or when his own health or the sickness or death of a member of his family, requires his absence. [R. S. § 3945.]

Hist. (See C. C. P. '81, § 82) R. S. § 3945, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 201; Kerr's C. ib.

§ 6523. [3946] **Affidavit of excuse.** If a person exempt from liability to act as a juror, as provided in section 6520, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation or employment; and such affidavit shall be delivered by the clerk to the judge of the court when the name of such person is called, and, if sufficient in substance, it shall be received as an excuse for nonattendance in person. The affidavit shall then be filed by the clerk. [R. S. § 3946.]

Hist. (See C. C. P. '81, § 83) R. S. § 3946, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 202; Kerr's C. ib.

Cited: S. v. Silva (1912) 21 I. 247, 120 P. 835.

§ 6524. [3947] **Compilation of jury list.** The board of commissioners of each county must, at their first regular meeting in each year, or at any other meeting, if neglected at the first, make a list of persons to serve as jurors in the district court of the county for the ensuing year. [R. S. § 3947.]

Hist. (See C. C. P. '81, § 84) R. S. § 3947, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 204; Kerr's C. ib.

Cited: (In brief of counsel) S. v. Steen (1916) 29 I. 337.

Quashing panel: Where the board of commissioners makes a jury list under this

section and no appeal is taken from their order in the matter, the district court is without jurisdiction to quash the panel and discharge the jury on an ex parte motion of the district attorney not made in a pending case nor pursuant to the complaint of any litigant, on the ground of illegality in the selection of the list. (Stockslager, C. J. dissents) Heitman v. Morgan (1905) 10 I. 562, 79 P. 225.

§ 6525. [3948] **Same: Selection of jurors.** In making up the jury list mentioned in section 6524 the board of county commissioners must proceed to select and list from the poll lists of the several precincts in their respective counties, last returned to the clerk of their board, the names of a sufficient number of persons legally competent to serve as jurors so that said jury list will provide at least 50 jurors for each term of the district court appointed or directed to be holden in said county for the ensuing year; and in making such selection, they must take the names of such only as are not legally disqualified or exempt from serving as jurors, who are of fair character, of approved integrity and of sound judgment. As nearly as may be, they must choose the names of residents from each precinct in the same proportion which the total of the poll lists for each precinct bears to the total of all the poll lists for the entire county, and they must not accept or reject the name of any person because of his religious or political affiliations or beliefs. ['15, c. 60, p. 147.]

Hist. (See C. C. P. '81, § 85) R. S. § 3948, reen. R. C. ib.; am. '15, c. 60, p. 147, reen. C. L. § 3948.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 205; Kerr's C. ib.

§ 6526. [3949] **Certified list given clerk.** Certified lists of the persons selected to serve as jurors must at once be placed in the possession of the clerk of the district court. [R. S. § 3949.]

Hist. (See C. C. P. '81, § 82) R. S. § 3949, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 201; Kerr's C. ib.

§ 6527. [3950] **Clerk must file list.** On receiving such lists, the clerk must file the same in his office, and write down the names contained therein on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon, and deposit them in a box to be called the "jury box." [R. S. § 3950.]

Hist. (See C. C. P. '81, § 87) R. S. § 3950, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 209; similar as amended: Kerr's C. ib.

§ 6528. [3951] **Regular jurors.** The persons whose names are so returned are known as regular jurors, and must serve for one year, and until other persons are selected and returned. [R. S. § 3951.]

Hist. (See C. C. P. '81, § 88) R. S. § 3951, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 210; similar as amended: Kerr's C. ib.

§ 6529. [3952] **Order for jury.** The district court, or the judge thereof, if a jury will be required at any term of the district court, must make and file with the clerk, an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be 20, and if a trial jury, such number as the judge may direct. ['99, § 1, p. 335.]

Hist. (See C. C. P. '81, § 89) R. S. § 3952; am. '99, p. 335, § 1, reen. R. C. § 3952, reen. C. L. ib.

Cross ref. Grand jury may be summoned on order of the district court: Const: I, 8.

Cited: S. v. Steen (1916) 29 I. 337, 158 P. 499.

Constitutionality: This section is not unconstitutional. S. v. Barber (1907) 13 I. 65, 78, 88 P. 418.

Construed with § 6538: This section as amended by Laws 1899, p. 335, does not repeal § 6538 providing for the assembling of additional jurors where a sufficient number fail to appear or have not been drawn. Re Corcoran (1899) 6 I. 657, 59 P. 18.

§ 6530. [3953] **Clerk to give notice of drawing.** At least one day before the drawing, the clerk must notify the sheriff and probate judge

of the time when such drawing will take place, which time must not be more than three days after the receipt by him of the order for such drawing. [R. S. § 3953.]

Hist. (See C. C. P. '81, § 90) R. S. § 3953, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Similar: C. C. P. 1872, § 215.
Legal panel: Jurors drawn or summoned according to the method mentioned herein or in § 6538, constitute a valid, legal panel to attend in transacting the business of the court. S. v. Steen (1916) 29 I. 337, 158 P. 499.

§ 6531. [3954] **Sheriff and probate judge to attend.** At the time so appointed, the sheriff, in person or by deputy, and the probate judge, must attend at the clerk's office to witness such drawing, and if they do so, the clerk must, in their presence, proceed to draw the jurors. [R. S. § 3954.]

Hist. (See C. C. P. '81, § 91) R. S. § 3954, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Similar: C. C. P. 1872, § 216; now the drawing is done in the presence of the superior court: Kerr's C. § 215.

§ 6532. [3955] **Adjournment of drawing.** If the officers so notified do not appear, the clerk must adjourn the drawing until the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day. [R. S. § 3955.]

Hist. (See C. C. P. '81, § 92) R. S. § 3955, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: C. C. P. 1872, § 217.

§ 6533. [3956] **Drawing on adjourned day.** If, at the adjourned day, the sheriff, probate judge, and electors, or any two of such persons, appear, the clerk must in their presence proceed to draw the jurors. [R. S. § 3956.]

Hist. (See C. C. P. '81, § 93) R. S. § 3956, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Similar: C. C. P. 1872, § 218; see Kerr's C. § 215.

§ 6534. [3957] **Conduct of drawing.** The clerk must conduct such drawing as follows:

1. He must shake the box containing the names of jurors returned to him, from which jurors are required to be drawn, so as to mix the slips of paper upon which such names were written, as much as possible.
2. He must then publicly draw out of the box as many such slips of paper as are ordered by the judge.
3. A minute of the drawing must be kept by one of the attending officers in which must be entered the names contained on every slip of paper so drawn, before any other slip is drawn.
4. If after drawing the whole number required, the name of any person has been drawn who is dead or insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact must be made in the minute of the drawing, and the slip of paper containing such name must be destroyed.
5. Another name must then be drawn, in place of that contained on the slip of paper so destroyed, which must in like manner, be entered in the minutes of the drawing.
6. The same proceeding must be had as often as may be necessary, until the whole number of jurors required are drawn.
7. The minute of the drawing must then be signed by the clerk and the attending officers or persons, and filed in the clerk's office.
8. Separate lists of the names of the persons so drawn for trial jurors, and of those drawn for grand jurors, specifying for what court they were drawn, must be made and certified by the clerk and the attending officers or persons, and delivered to the sheriff of the county.

9. If both a grand and petit jury are ordered at the same drawing, the grand jury shall be drawn first. [R. S. § 3957.]

Hist. (See C. C. P. '81, § 94) R. S. § 3957, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 219; as amended, see Kerr's C. ib.

§ 6535. [3958] **Disposition of ballots.** After the adjournment of any court at which jurors have been returned as herein provided, the clerk must inclose the ballots containing the names of those who attended and served as jurors in an envelope under seal, and the ballots of those who did not attend and serve must be returned to the jury box. The ballots sealed in envelopes must not be returned to the jury box. [R. S. § 3958.]

Hist. (See C. C. P. '81, § 95) R. S. § 3958, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 220; as amended, see Kerr's C. ib.

§ 6536. [3959] **Clerk to furnish copy of list.** The clerk of the district court must furnish any person applying therefor and paying the fees allowed by law for the same, a copy of the list of jurors drawn to attend any court. [R. S. § 3959.]

Hist. (See C. C. P. '81, § 96) R. S. § 3959, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 221.

§ 6537. [3960] **Sheriff to summon jurors.** As soon as he receives the list of jurors drawn, the sheriff must summon the persons named therein to attend by giving personal notice to each, or by leaving a written notice at his place of residence, with some person of proper age, and must return the list to the court at the time fixed in the order for their appearance, specifying the names of those who are summoned and the manner in which each person was notified:

Provided, That any person named in such list of jurors who resides elsewhere than at the place at which the court is held shall be served by the sheriff mailing a written notice to such person commanding him to attend as juror at a time and place designated therein, which notice shall be registered and deposited in the post-office addressed to such person at his usual post-office address. And the receipt of the person so addressed for such registered notice shall be regarded as personal notice to such person: *Provided, however,* That whenever jurors are not drawn or summoned to attend any court, or a sufficient number of jurors fail to appear; or when there are not competent jurors enough present to form a panel; or whenever the court for any reason requires or directs the sheriff or other proper or competent officer to summon additional jurors, then and in that event it shall be optional with the sheriff or other officer to summon said list of jurors either by personal service or by sending the written notice hereinbefore provided for by registered mail.

The grand jurors shall be summoned to appear on the first day of the term, at the hour of 11 o'clock in the forenoon, and the trial jurors on such days of the term, and at such hour, as the presiding judge of the court may by order direct. ['13, c. 30, p. 128.]

Hist. (See C. C. P. '81, § 97) R. S. § 3960, reen. R. C. ib.; am. '13, c. 30, p. 128, reen. C. L. § 3960.

Cross ref. On expiration of term of office sheriff must deliver to his successor all papers relating to summoning juries: § 3617.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 225; as amended: Kerr's C. ib.

Cited: Simmons v. Cunningham (1895) 4 I. 426, 39 P. 1109.

§ 6538. [3961] **Court may order additional jurors.** Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be drawn and summoned to attend such court; or it may, by an order entered on its minutes, direct the

sheriff of the county to summon so many good and lawful men of his county to serve as jurors as the case may require. And in either case such jurors must be summoned in the manner provided by the preceding section. [R. S. § 3961.]

Hist. (See C. C. P. '81, § 98) R. S. § 3961, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 226; similar as amended: Kerr's C. ib. See S. v. Steen (1916) 29 I. 337, 341, 158 P. 499.

Not repealed: This section is not repealed by '99, p. 335, amending § 6529, providing for ordering jurors. Re Corcoran (1899) 6 I. 657, 59 P. 18.

Open venire: If jurors are drawn and summoned and appear and are thereafter discharged by the court for good cause, the court may afterward order an open venire. Simmons v. Cunningham (1895) 4 I. 426, 39 P. 1109.

Alternative method of securing panel: The court or judge thereof may order an open venire to issue for such number of jurors as may be required to appear for service at any term of court in his district. S. v. Barber (1907) 13 I. 65, 88 P. 418.

Jurors drawn or summoned according to the method mentioned herein or in §§ 6530 to 6534, constitute a valid, legal panel to attend in transacting the business of the court. S. v. Steen (1916) 29 I. 337, 158 P. 499.

§ 6539. [3962] **Jury completed from bystanders.** When there are not competent jurors enough present to form a panel, the court may direct the sheriff or other proper officer to summon a sufficient number of persons having the qualifications of jurors, to complete the panel from the body of the county or from the bystanders, and the sheriff must summon the number so ordered, accordingly, and return the names to the court. The jurors summoned under this or the preceding section, may be required to appear forthwith or at a time to be named in the order, as the court may direct, and the officer summoning such jurors shall return the order as hereinbefore provided. [R. S. § 3962.]

Hist. (See C. C. P. '81, § 99) R. S. § 3962, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 227; somewhat different as amended: Kerr's C ib

Cited: Simmons v. Cunningham (1895) 4 I. 426, 39 P. 1109.

§ 6540. [3963] **Jurors for probate and justice courts.** When jurors are required in any probate or justice's court, they must, upon the order of the judge or justice thereof, be summoned by the sheriff, marshal or constable of the jurisdiction. [R. S. § 3963.]

Hist. (See C. C. P. '81, § 100) R. S. § 3963, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 230; Kerr's C. ib.

§ 6541. [3964] **Same: How and where summoned.** Such jurors must be summoned from the persons resident of the city or precinct competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required. [R. S. § 3964.]

Hist. (See C. C. P. '81, § 101), R. S. § 3964, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 231; Kerr's C. ib.

§ 6542. [3965] **Same: Return of venire.** The officer summoning such jurors must, at the time fixed in the order for their appearance, return the venire with a list of the persons summoned indorsed thereon. [R. S. § 3965.]

Hist. (See C. C. P. '81, § 102) R. S. § 3965, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 232; Kerr's C. ib.

§ 6543. [3966] **Juries of inquest: How summoned.** Juries of inquest must be summoned by the officer before whom the proceedings are had, or any sheriff or constable, from the persons resident of the county competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required. [R. S. § 3966.]

Hist. (See C. C. P. '81, § 103) R. S. § 3966, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 235; Kerr's C. ib.

§ 6544. [3967] **Attachment against absent jurors.** Any juror summoned who wilfully and without reasonable excuse, fails to attend, may be attached and compelled to attend, and the court may also impose a fine not exceeding $100, upon which execution may issue. If the juror was not personaly served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard. [R. S. § 3967.]

Hist. (See C. C. P. '81, § 104) R. S. § 3967, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 238; Kerr's C. ib.

§ 6545. [3968] **Grand jury empaneled: When.** Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within the state, as provided by law, unless the judge thereof shall so direct by writing under his hand and filed with the clerk of said court. ['91, p. 186, § 7.]

Hist. R. S. § 3968; superseded '91, p. 186, § 7, reen. '99, p. 125, § 7, reen. R. C. § 3968, reen. C. L. ib.

Cross ref. See Const. I, 8.

Cited: S. v. Barber (1907) 13 I. 65, 77, 88 P. 418.

§ 6546. [3969] **Same: How constituted.** Sixteen persons shall constitute a grand jury, 12 of whom shall constitute a quorum, and when of the jurors summoned, no more nor less than 16 attend they shall constitute the grand jury. If more than 16 attend the clerk shall call over the list summoned, and the 16 first answering shall constitute the grand jury. If less than 16 attend, the panel may be filled to 16 as provided in section 6538. [R. S. § 3969.]

Hist. (See C. C. P. '81, § 106) R. S. § 3969, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 242; as amended: Kerr's C. ib.

§ 6547. [3970] **Same: How impaneled.** Thereafter such proceedings shall be had in impaneling the grand jury as are prescribed by the criminal practice. [R. S. § 3970.]

Hist. (See C. C. P. '81, § 107) R. S. § 3970, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 243; Kerr's C. ib.

Cross ref. Formation of grand jury: See §§ 8771-8788.

§ 6548. [3971] **Names of trial jurors.** At the time when the order for the trial jurors was made returnable, or as soon thereafter as convenient, the clerk, under the direction of the court must call the names of those summoned, and the court may then hear the excuses of jurors summoned.

The clerk must then write the names of jurors present, and not excused, upon separate slips or ballots of paper, and fold such slips so the names are concealed, and then in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed until ordered by the court to be opened. [R. S. § 3971.]

Hist. (See C. C. P. '81, § 108) R. S. § 3971, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 246; as amended: Kerr's C. ib.

§ 6549. [3972] **Manner of impaneling jury.** When thereafter an action is called for trial by the jury, such proceedings shall be had in impaneling the trial jury as are prescribed in this code. [R. S. § 3972.]

Hist. (See C. C. P. '81, § 109) R. S. § 3972, reen. R. C. ib., reen. C. L. ib.

Cross ref. Manner of impaneling jury: §§ 6842-46.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 247; as amended: Kerr's C. ib.

Construction with § 6551: The obvious intent of the legislature under this section, construed with § 6551, is to provide several methods of impaneling juries in civil and criminal actions. People v. Kuok Wah Choi (1885) 2 I. 90, 6 P. 112.

§ 6550. [3973] **Same: In probate or justice court.** At the time appointed for a jury trial, in probate or justice's courts, the list of jurors summoned shall be called. If a sufficient number of jurors are in at-

tendance, the probate judge or justice may proceed to impanel the jury. When there are not competent jurors enough present to form a panel the judge or justice may direct the proper officer to summon a sufficient number of persons, having the qualifications of jurors to complete the panel and such officer must summon the number so ordered accordingly, and return the same into court forthwith or at such time as may be designated in the order. [R. S. § 3973.]

Hist. R. S. § 3973, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 250; as amended: Kerr's C. ib.

§ 6551. [3974] **Same: In criminal cases.** Thereafter, if the action is a criminal one, the jury must be impaneled as provided by the statutes relating thereto. If a civil one as provided by this code. [R. S. § 3974.]

Hist. (See C. C. P. '81, § 111) R. S. § 3974, reen. R. C. ib., reen. C. L. ib.

Cross ref. Impaneling juries in civil actions: See §§ 7104-7; in criminal actions: §§9237-39.

Cited: See ante § 6549.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 251; Kerr's C. ib.

§ 6552. [3975] **Same: Juries of inquest.** The mode and manner of impaneling juries of inquest are provided for in the provisions of the different statutes relating to such inquests. [R. S. § 3975.]

Hist. (See C. C. P. '81, § 112) R. S. § 3975, reen. R. C. ib., reen. C. L. ib.

Cross ref. Juries of inquest: See § 9309.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 254; Kerr's C. ib.

§ 6553. [6136] **Fees of jurors in district court.** The pay of grand and petit jurors in the district court is $3 per day for each day of actual attendance at court, and 15 cents per mile for each mile necessarily traveled in going to and returning from court, which must be paid out of the county treasury. [R. S. § 6136.]

Hist. R. S. § 6136, reen. R. C. ib., reen. C. L. § 3976.

Cited: Schmelzel v. Comrs. of Ada Co. (1909) 16 I. 32, 100 P. 100, 133 A. S. R. 89, 21. L. R. A. (N. S.) 199.

§ 6554. [6138] **Jurors' fees and mileage in inferior courts.** Jurors in civil and criminal cases in the probate and justice's courts are entitled to receive $2 per day for each day actually engaged in the trial of a case, and 25 cents per mile, one way. Such mileage and per diem in all civil cases must be entered and taxed up as costs against the losing party, and in all criminal cases, must be paid out of the county treasury of the county where such probate or justice court is held, upon the certificate of the probate judge or justice before whom such case was tried, to be audited and paid as other claims against the county. [93, p. 65, § 1.]

Hist. R. S. § 6138; am. '93, p. 65, § 1, reen. '99, p. 180, § 1, reen. R. C. § 6138, reen. C. L. § 3977.

Cited: Schmelzel v. Comrs. of Ada Co. (1909) 16 I. 32, 100 P. 106, 133 A. S. R. 89, 21 L. R. A. (N. S.) 199.

§ 6555. [6137] **Same: How paid.** At the end of each term of a district court the clerk must make out a certificate to each juror entitled hereto, certifying the number of days such juror has attended court, and the amount remaining due to him for per diem and mileage. Each juror must state on oath to the clerk the number of miles traveled for which he is entitled to pay; but no juror must receive mileage for going to, or returning from, court more than once during the same term; and no person summoned as a juror and excused at his own request, must receive any per diem or mileage. [R. S. § 6137.]

Hist. R. S. § 6137, reen. R. C. ib., reen. C. L. § 3978.

Deposit of fees: Probate courts have no power to require defendants to deposit sufficient money to pay jurors' fees as a condition precedent to the right to have a trial by jury. Randall v. Kelsey (1900) 7 I. 168, 61 P. 515.

CHAPTER 247.

COURT REPORTERS.

§ 6556. Appointment of stenographic reporter. There shall be appointed within and for each of the judicial districts of this state, by each district judge, a stenographic reporter who shall be well skilled in the art of stenography and capable of reporting the oral proceedings in court, verbatim. ['11, c. 40, § 1, p. 85.]

Hist. '90-91, p. 233, § 1; am. '95, p. 69, § 1, reen. '99, p. 163, 1, reen. R. C. § 3980; am. '11, c. 40, § 1, p. 85, reen. C. L. § 3980.

Comp. leg.—N. D. Analogous: Pol. C. § 774.

Accounting for fees: All fees earned by the reporter or his deputy under the provisions of the reporter statutes, which include this and the following seven sections must be turned into the state treasury, and the reporter can not evade that requirement by reducing the stenographic record to narrative form. Keane v. Pittsburg Lead M. Co. (1910) 18 I. 711, 112 P. 214.

§ 6557. [3981] **Oath, bond and salary.** Said reporter shall take the oath required to be taken by judicial officers; give a bond to be approved by the judge of the district court, in the sum of $5000, conditioned for the faithful performance of his duties, which bond shall be filed in the office of the secretary of state, hold his office during the pleasure of said judge, and shall receive a salary of $2500 per annum to be paid in the same manner as the salaries of other state officers are paid. There shall be paid in addition to said salary, to each of the court reporters of the district courts, out of the state treasury, for each term of a district court held by the judge thereof, for the trial and disposition of causes and the transaction of business under the laws of the state, in other counties than that in which said court reporter resides, his actual and necessary expenses for traveling and attending each term. ['07, p. 542, § 1.]

Hist. '90-91, p. 233, § 2; am. '95, p. 69, § 1, reen. '99, p. 163, § 2; am. '07, p. 542, § 1, reen. R. C. § 3981; last sentence reenacted in substance '15, c. 98, § 2, p. 237, reen. C. L. § 3981.

Cross ref. Examination of accounts: 289.

§ 6558. [3982] **Recording of testimony: Waiver.** The said reporter shall correctly report all oral proceedings had in said court and the testimony taken in all cases tried before said court, but the parties may, with the consent of the judge, waive the recording by such reporter of any part of the proceedings or testimony. ['90-91, p. 233, § 3.]

Hist. '90-91, p. 233, § 3, reen. '99, p. 163, § 3, reen. R. C. § 3982, reen. C. L. ib.

§ 6559. [3983] **Filing stenographic records and reports.** The reporter shall file the stenographic records and reports made by him with the clerk of the district court of the county in which such report was taken and was tried. ['90-91, p. 233, § 4.]

Hist. '90-91, p. 233, § 4, reen. '99, p. 163, § 4, reen. R. C. § 3983, reen. C. L. ib.

§ 6560. [3984] **Copy of record: Fees.** It shall be the duty of each reporter to furnish, on the application of the attorney general, prosecuting attorney, or any party to a suit in which a stenographic record has been made, a typewritten copy of the record, or any part thereof, for which he shall charge in addition to his salary, a fee of 7½ cents per hundred words, to be paid by the party requesting the same, and to be taxed as costs in the case against the party finally defeated in the action: *Provided,* When such copy is requested on behalf of the state or its attorney, or by a defendant in a criminal case or his attorney, and when after conviction the defendant in a criminal case shall satisfy the

court by affidavit or otherwise, that he is unable by reason of his poverty to pay for such copy, so requested by himself or his attorney, the court reporter shall furnish such copy free of charge. Such copy shall constitute prima facie the minutes of the court, and may be used on all motions for new trials, review or appeal, when the minutes of the court may be used. ['07, p. 542, § 2.]

Hist. '90-91, p. 233, § 5; am. '95, p. 69, § 1, reen. '99, p. 163, § 5; am. '07, p. 542, § 2, reen. R. C. § 3984, reen. C. L. ib.

Cross ref. Taxation of costs in general: See §§ 7207, 7218, 7219, 9013. Reporter's transcript: § 6886.

Taxation as costs: In order to entitle a party to tax fees of a stenographer as costs it must appear that the services for which the fees were charged were rendered by the court stenographer and incurred under the provisions of this statute. McDonald v. Burke (1892) 3 I. 266, 28 P. 440, 35 A. S. R. 276.

A proceeding before a judge at chambers upon motion to show cause for an injunction is a "suit" in which the prevailing party is entitled to tax the cost of stenographer's fees. Raft River etc. Co. v. Langford (1898) 6 I. 30, 51 P. 1027.

Under the rules of this court and this section the statutory fee paid by a party to an action to the reporter for a transcript of the evidence to be used on motion for a new trial and appeal may be taxed as costs against the party finally defeated on appeal. Young v. Extension Ditch Co. (1908) 14 I. 126, 93 P. 772.

"Copy" defined: The copy contemplated by this statute is a literal copy of such record, containing the questions and answers, the objections made, the exceptions taken, etc., and such record reduced to narrative form by the stenographic reporter is not such a copy as the law contemplates. Kean v. Pittsburg Lead M. Co. (1910) 18 I. 711, 112 P. 214.

By whom procured: Either party to a suit, in which a stenographic record has been made, may demand a typewritten copy of a part or the whole thereof. It is not contemplated that each party must procure a transcript of the evidence to prepare his bill, or statement, or amendments thereto; but it does contemplate that the appellant, in the first instance, shall procure such copy and that the respondent may have the benefit thereof. Ib.

§ 6561. [3985] **Same: Delivery of copy.** It shall be the duty of the reporter to deliver said copy within 30 days after being requested. ['90-91, p. 233, § 6.]

Hist. '90-91, p. 233, § 6, reen. '99, p. 163, § 6, reen. R. C. § 3985, reen. C. L. ib.

§ 6562. [3986] **Fees to be advanced to clerk.** The plaintiff in all civil actions hereafter commenced in the district courts, at the time of filing the complaint in such action, shall pay to the clerk of said court the sum of $3, which sum said clerk shall, on the first Monday of each month after the receipt thereof, pay into the state treasury, and it shall be placed by the state treasurer to the credit of the general fund. ['90-91, p. 233, § 7.]

Hist. '90-91, p. 233, § 7, reen. '99, p. 163, § 7, reen. R. C. § 3986, reen. C. L. ib.

Cross ref. Express reference to this section: Clerk must collect stenographer's fee: § 3702. Stenographer's fee not required on tax foreclosure: § 3703.

§ 6563. Appointment of deputy and assistants. When owing to the absence, sickness or other disability of the regular reporter, or when the business of the court demands it, the court may appoint a substitute or deputy court reporter to act in the place of the regular reporter during such absence, sickness or other disability of the regular reporter. Such substitute or deputy reporter shall perform the same duties prescribed by law for the regular reporter, give such bond as is required by the court, take the same oath, and shall receive such compensation as may be allowed by the court when employed owing to the absence of such regular reporter, to be paid out of the salary of the regular reporter, but when such absence is on account of sickness then such compensation shall be paid out of the state treasury as the regular reporter's salary is paid: *Provided,* That such compensation shall only be paid for the time such deputy reporter is actually engaged in such work: and, *Provided further,* That in all criminal cases where, in the opinion of

the court, the notes of the court reporter should be extended for use upon the trial of the cause, or in civil cases where in the opinion of the court, the services of a deputy reporter are required, the court may appoint an additional or substitute court reporter, to aid the regular court reporter in reporting such causes, and who shall be paid a sum to be fixed by the court, to be paid as is the salary of the regular court reporter. When in the opinion of the court, or of the judge thereof, the services of one or more persons are required to assist in the making of transcripts of testimony, the court or judge may by order authorize the reporter to employ such persons as may be necessary to facilitate the work in order that transcripts may be prepared without delay. Such assistants shall be entitled to charge and receive for their services in the preparation of transcripts the fees allowed by law therefor, the same to be paid by the reporter from the money received by him for such work. [C. L. § 3987.]

Hist. '99, p. 163; am, '07, p. 542, § 3, reen. R. C. § 3987; am. '15, c. 41, § 1, p. 122; compiled and reen. C. L. § 3987.

§ 6564. Disposal of fees: Statement. All fees earned by any court reporter or his deputy or assistants under the provisions of this title in excess of those earned by assistants in the preparation of transcripts pursuant to section 6563 shall be paid to the state treasurer to be placed to the credit of the general fund of the state. Said reporter shall make a quarterly report to the state auditor of all fees earned by himself, his deputies and assistants, and said report shall be accompanied by a remittance of such excess fees. ['15, c. 41, § 2, p. 123.]

Hist. '99, p. 163; am. '07, p. 542, reen. R. C. § 3988; am. '15, c. 41, § 2, p. 123, reen. C. L. § 3988.

Cited: Keane v. Pittsburgh M. Co. (1910) 18 I. 711, 112 P. 214.

CHAPTER 248.

ATTORNEYS AND COUNSELORS AT LAW.

ARTICLE 1.

ADMISSION TO PRACTICE.

§ 6565. [3990] **Persons entitled to admission as attorneys.** Any citizen or person, resident of this state, who has bona fide declared his intention to become a citizen in the manner required by law, of the age of 21 years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all courts of this state. ['97, p. 57, § 1.]

Hist. (See C. C. P. '81, § 113) R. S. § 3990; am. '97, p. 57, § 1, reen. '99, p. 302, § 1, reen. R. C. § 3990, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 275; Kerr's C. ib.

N. D. Analogous: Pol. C. § 789.

Cited: Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6566. Same: Qualifications and examination. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and, except as hereinafter provided, undergo a strict examination in open court as to his qualifications, by the justices of the supreme court. ['09, p. 109, S. B. 138, § 1.]

Hist. (See C. C. P. '81, § 114) R. S. § 3991, reen. R. C. ib.; am. '09, p. 109, S. B. 138, reen. C. L. § 3991.

Comp. leg.—Cal. Similar: C. C. P. 1872, §§ 275, 276; as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 790.

Effect of amendment: The admission of attorneys is placed wholly within the jurisdiction of the supreme court. The amended law does not authorize the admission of attorneys by the district courts. Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6567. [3992] **Same: Certificate of admission.** If, upon such examination in the supreme court, the applicant is found qualified, the court shall admit him as attorney and counselor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license. [R. S. § 3992.]

Hist. (See C. C. P. '81, § 115) R. S. § 3992, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 277; as amended: Kerr's C. ib.

Cited: Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6568. [3993] **Same: Oath and fee.** Every person, before receiving license to practice law, shall take the oath prescribed by law, and shall pay to the state treasurer the sum of $25 for the use of the state library fund, and the clerk of the court shall require of the person so admitted the receipt of the said treasurer before issuing such license, and in no case shall the oath be administered or the license issued until such receipt is produced and filed in the office of the clerk. [R. S. § 3993.]

Hist. (See C. C. P. '81, § 116) R. S. § 3993, reen. R. C. ib., reen. C. L. ib.

Cross ref. State library fund: § 1269; reports of names of attorneys admitted to practice: § 1270; disposition of fees of attorneys admitted from northern counties: § 1272; from southeastern counties: § 1274.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 278; Kerr's C. ib.

N. D. Analogous: Pol. C. § 791.

Cited: Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6569. Same: Attorneys from other states. The examination may be dispensed with in the case of any person who has been admitted to practice law under license or certificate from the highest court of another state or territory, and has been thereafter actually engaged in the practice of law as a principal occupation for not less than three years immediately preceding the date of application for admission to practice in this state, and who is in good standing as such. The court shall, before admitting such person, require the production of his license or certificate and an affidavit of his standing, and shall satisfy itself by questioning the applicant under oath, and such other means as it may adopt, that he has been engaged in actual practice as above stated. [C. L. § 3994.]

Hist. (See C. C. P. '81, § 117) R. S. § 3994, reen. R. C. ib.; am. '09, p. 109, S. B. 138; am. '11, c. 92, p. 338; compiled and reen. C. L. § 3994.

Cross ref. Pleadings must be signed by resident attorney: § 6702.

Comp. leg.—Cal. Similar: C. C. P. 872, § 279: Kerr's C. ib.

N. D. Analogous: Pol. C. § 792.

Cited: Re Bradley (1908) 14 I. 784, 96 P. 208.

Conditions prerequisite to practice: A nonresident attorney has no authority to appear before any court in this state or sign any pleadings unless he has been properly admitted, and has in good faith associated with him a regularly employed resident attorney. Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

Penalty for unauthorized appearance: Where a nonresident's appearance in court, as an attorney, is not authorized by the laws of the state, his name will, on motion, be stricken from all of the papers and files originally filed in such court, and he will be prohibited from further appearing as an attorney in any of the district courts of the state until such time as he has fully complied with the provisions of the statutes of this state regulating the right of an attorney to engage in the practice of law in this jurisdiction. Anderson v. Coolin, supra.

§ 6570. Roll of attorneys. The clerk of the supreme court must keep a roll of attorneys and counselors admitted to practice by the court, which roll must be signed by the person admitted before he receives a license. [C. L. § 3995.]

Hist. (See C. C. P. '81, § 118) R. S. § 3995, reen. R. C. ib.; am. by implication '09, p. 109, S. B. 138, § 1, abolishing admission by district court, compiled and reen. C. L. § 3995.

Cross. ref. Report of licentiates to state treasurer: § 1270.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 280; addition by amendment: Kerr's C. ib.

Cited: Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6571. [3996] **Practicing without license a contempt.** If any person shall practice law in any court, except a justice's court, without having received a license as attorney and counselor, he is guilty of a contempt of court. [R. S. § 3996.]

Hist. (See C. C. P. '81, § 119) R. S. § 3996, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 281: Kerr's C. ib.

Cited: Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

ARTICLE 2.

ATTORNEYS' RIGHTS AND DUTIES.

§ 6572. [3997] **Duties of attorneys.** It is the duty of an attorney and counselor:

1. To support the constitution and laws of the United States and of this state.

2. To maintain the respect due to the courts of justice and judicial officers.

3. To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judges by an artifice or false statement of fact or law.

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

7. Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest.

8. Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed. [R. S. § 3997.]

Hist. (See C. C. P. '81, § 120) R. S. § 3997, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 282: Kerr's C. ib.

N. D. Analogous: Pol. C. § 794.

Cited: Re Bradley (1908) 14 I. 784, 96 P. 208; Anderson v. Coolin (1915) 27 I 334, 149 P. 286.

Remedy for violation of trust: Where an attorney is employed by a person to secure real property belonging to the client and in the course of such employment, and before the employment terminates, such attorney secures a supposed interest in such property and repudiates his fiduciary obligation and receives in his own name the title to such property he has been employed to secure for his client, such title will be declared to be held in trust for the use and benefit of the client. Ainsworth v. Harding (1912) 22 I. 645, 12[illegible] P. 92.

§ 6573. [3998] **Authority of attorney.** An attorney and counselor has authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment. [R. S. § 3998.]

Hist. (See C. C. P. '81, § 121) R. S. 3998, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 283: Kerr's C. ib.

N. D. Analogous: Pol. C. § 796.

Termination of authority by death of client: When the client dies the agency of the attorney ceases. McCornick v. Shaughnessy (1911) 19 I. 465, 469, 114 P. 22, 34 L. R. A. (N. S.) 1188.

§ 6574. [3999] **Change of attorney.** The attorney in an action or pecial proceeding may be changed at any time before judgment or final letermination as follows:

1. Upon his own consent, filed with the clerk, or entered upon the ninutes.

2. Upon the order of the court or judge thereof, upon the applica- ion of the client, after notice to the attorney. [R. S. § 3999.]

Hist. (See C. C. P. '81, § 122) R. S. § 999, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Similar: C. C. P. 872, § 284; different as amended: Kerr's . ib.

Payment of compensation: As a gen- ral rule an order changing attorney will ot be made unless fees or compensation arned by the attorney are paid or facts re made to appear by the party moving or the change which show that this is im- ossible in the given case. Curtis v. Rich- rds (1895) 4 I. 434, 40 P. 57.

Change after judgment: After final judgment a party who appeals may employ new counsel or change his attorney without notice, and the provisions of this and the following sections do not apply in such cases. Lydon v. Piper (1897) 5 I. 541, 51 P. 101.

Appeal from order: An application for a change of attorneys to which objection is made by the attorney is a special proceeding, the final judgment made on which is reviewable on appeal to the supreme court. Curtis v. Richards, supra.

§ 6575. [4000] **Notice of change.** When an attorney is changed, as rovided in the last section, written notice of the change and of the sub- titution of a new attorney, or of the appearance of the party in person, nust be given to the adverse party; until then, he must recognize the ormer attorney. [R. S. § 4000.]

Hist. (See C. C. P. '81, § 123) R. S. § 000, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 285: Kerr's C. ib.

Cited: Lydon v. Piper (1897) 5 I. 541, 51 P. 101.

§ 6576. Attorneys' fees: Lien. The measure and mode of compen- ation of attorneys and counselors at law is left to the agreement, ex- ress or implied, of the parties, which is not restrained by law. From he commencement of an action, or the service of an answer contain- ng a counterclaim, the attorney who appears for a party has a lien upon is client's cause of action or counterclaim, which attaches to a verdict, eport, decision or judgment in his client's favor and the proceeds there- f in whosoever hands they may come; and can not be affected by any ettlement between the parties before or after judgment. ['11, c. 167, . 563.]

Hist. (See C. C. P. '81, § 692) R. S. § 990, reen. R. C. ib.; am. '11, c. 167, p. 63, reen. C. L. 4000a.

Cross ref. When attorney's fees recov- rable as costs: In damage cases against ilroads: § 4817. Foreclosure of mechan- s' liens: § 7352. Foreclosure of logging en: § 7368. In suit for wages: § 7380.

Comp. leg.—Cal. Similar: C. C. P. 1872, 1021. Merchants' Protective Assn. v. Ja- obsen (1912) 22 I. 636, 127 P. 315.

Ky. Similar: St. § 107, S. v. Nat. Surety o. (1916) 29 I. 670, 681, 161 P. 1026.

Cited: Lewis v. Sutton (1912) 21 I. 541, 22 P. 911.

Before amendment: Prior to amend- ent it was held that unless otherwise se- ured the liability of the client to attorney for fees was merely personal. Dahlstrom v. Featherstone (1910) 18 I. 179, 110 P. 243; Kerns v. Wash. Power Co. (1913) 24 I. 525, 135 P. 70.

Champerty: Attorney's fees: The com- mon law rule of champerty does not pre- vail in this state. The compensation of attorneys is left to the agreement of the parties, and when such agreement is not contrary to good morals or sound public policy it will be enforced by the courts. Merchants' Protective Assn. v. Jacobsen (1912) 22 I. 636, 127 P. 315.

No lien against state: An attorney has no lien for fees for appearance on behalf of the state. (Sullivan, J. dissents) S. v. National Surety Co. (1916) 29 I. 670, 161 P. 1026.

§ 6577. Notice to appoint another attorney. When one party's attorney dies, is removed, suspended, or ceases to act as such, the adverse party must, before any further proceedings can be had by written notice, require such party to appoint another attorney or to appear in person. ['19, c. 130, p. 425.]

Hist. (See C. C. P. '81, § 124) R. S. § 4001, reen. R. C. ib., reen. C. L. § 4001; am. '19, c. 130, p. 425.

Comp. leg.—Cal. See C. C. P. 1872, § 286: Kerr's C. ib.

ARTICLE 3.

DISBARMENT.

§ 6578. [4002] **Grounds.** An attorney and counselor may be removed or suspended by the supreme court and by the district courts for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.
2. Wilful disobedience or violation of an order of the court, requiring him to do or forbear an act connected with or in course of his profession, and any violation of the oath taken by him or his duties as such attorney and counselor.
3. Corruptly and without authority appearing as attorney for a party to an action or proceeding.
4. Lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor.
5. Failure for 10 days after written demand, and payment or tender of the fees and expenses due him from his client to pay over or deliver any money or other property belonging to his client which he shall have received in his office of attorney or counselor in the course of collection or settlement of any claim or demand.
6. Habitual intemperance to such an extent that it disqualifies such attorney from faithfully discharging the duties devolving upon him; and in all cases where an attorney is removed or suspended by a district court the judgment or order of removal or suspension may be reviewed on appeal by the supreme court. ['97, p. 55, § 1.]

Hist. (See C. C. P. '81, § 125) R. S. § 4002; am. '97, p. 55, § 1, reen. '99, p. 302, § 1, reen. R. C. § 4002, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 287; as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 800.

Cited: S. v. Goode (1896) 4 I. 730, 44 P. 640.

Object of proceeding: A disbarment proceeding is not a criminal action nor its purpose the punishment of the attorney, but intended to protect the public and those charged with the administration of justice. Re Wourms (1918) 31 I. 291, 170 P. 919.

Postponement of proceedings: Where an indictable crime is charged against an attorney the supreme court will not proceed in disbarment proceedings until criminal proceedings have been taken in the district court, or until sufficient time has elapsed to accord the proper authorities opportunity to prosecute the case in that court. Re Tipton (1895) 4 I. 513, 42 P. 504.

Suspension pending hearing: An attorney will not be suspended from his privileges as such pending the hearing on disbarment charges preferred against him. S. v. Goode (1896) 4 I. 730, 44 P. 640.

Procuring license on false affidavit: An applicant who makes a false affidavit, stating his admission to the highest court of another state, and, upon such affidavit procures his admission to practice in the courts of this state, will be disbarred. Re Bradley (1908) 14 I. 784, 96 P. 208.

Conviction: The statute does not require that the conviction be had in a court of record. On the contrary, it impliedly contemplates that some of the convictions embraced within its terms may be had in inferior courts. Re Henry (1909) 15 I. 755, 99 P. 1054, 21 L. R. A. (N. S.) 207.

Moral turpitude: Moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Conviction on the charge of petit larceny is construed as an act of moral turpitude. Re Henry (1909) 15 I. 755, 99 P. 1054, 21 L. R. A. (N. S.) 207.

The crime of aiding another to avoid registration, by advising young men, subject to registration, to not register for mili

tary service, as required by act of congress, thereby seeking to interfere with the government in its efforts to raise an army in time of war, involves moral turpitude. Re Hofstede, 31 I. 448, 173 P. 1087.

Lending name: This applies to regularly admitted resident attorneys of the state who, with knowledge, permit the use of their names by persons who have not been admitted, resulting in such unauthorized persons appearing as attorneys and counselors in the courts. Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6579. [4003] **Conviction of felony.** In case of the conviction of an attorney or counsellor of a felony, or misdemeanor involving moral turpitude, the clerk of the court in which a conviction is had, must, within 30 days thereafter, transmit to the supreme court a certified copy of the record of conviction. [R. S. § 4003.]

Hist. (See C. C. P. '81, § 126) R. S. § 4003, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 288: Kerr's C. ib.

N. D. Analogous: Pol. C. § 800.

Cited: (See preceding section) Re Henry (1909) 15 I. 755, 99 P. 1054, 21 L. R. A. (N. S.) 207.

Conviction in federal court: This section is not obligatory upon federal courts or their officers. Failure to conform to it does not interfere with the power and duty of the court to proceed upon its own motion or otherwise in disbarment cases, whenever facts justifying such action are brought to its attention. In re Hofstede, 31 I. 448, 173 P. 1087.

§ 6580. [4004] **Proceedings.** The proceedings to remove or suspend an attorney and counselor under the first subdivision of section 6578 must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second subdivision of section 6578 may be taken by the court for matters within its knowledge, or may be taken upon the information of another. [R. S. § 4004.]

Hist. (See C. C. P. '81, § 127) R. S. § 4004, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 289: Kerr's C. ib.

N. D. Analogous: Pol. C. § 801.

§ 6581. [4005] **Accusation.** If the proceedings are upon the information of another, the accusation must be in writing. [R. S. § 4005.]

Hist. (See C. C. P. '81, § 128) R. S. § 4005, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 290: Kerr's C. ib.

Cited: S. v. Goode (1896) 4 I. 730, 44 P. 640.

§ 6582. [4006] **Verification of accusation.** The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true. [R. S. § 4006.]

Hist. (See C. C. P. '81, § 129) R. S. § 4006, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872. § 291: Kerr's C. ib.

§ 6583. [4007] **Citation to answer.** After receiving the accusation the court must, if in its opinion the case requires it, make an order requiring the accused to appear and answer the accusation at a specified time in the same or subsequent term, and must cause a copy of the order and of the accusation to be served upon the accused within a prescribed time before the day appointed in the order. [R. S. § 4007.]

Hist. (See C. C. P. '81, § 130) R. S. § 4007, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 292; as amended, different: Kerr's C. ib.

§ 6584. [4008] **Appearance of accused.** The accused must appear at the time appointed in the order and answer the accusation, unless for sufficient cause the court assign another day for that purpose; if he does not appear, the court may proceed and determine the accusation in his absence. [R. S. § 4008.]

Hist. (See C. C. P. '81, § 131) R. S. § 4008, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 293; Kerr's C. ib.

§ 6585. [4009] **Answer of accused.** The accused may answer to the accusation either by objecting to its sufficiency or denying it. [R. S. § 4009.]

Hist. (See C. C. P. '81, § 132) R. S. § 4009, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 294: Kerr's C. ib.

§ 6586. [4010] **Objection to sufficiency.** If he object to the sufficiency of the accusation the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation the denial may be oral and without oath, and must be entered upon the minutes. [R. S. § 4010.]

Hist. (See C. C. P. '81, § 133) R. S. § 4010, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 295: Kerr's C. ib.

§ 6587. [4011] **Overruling objection.** If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court. [R. S. § 4011.]

Hist. (See C. C. P. '81, § 134) R. S. § 4011, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 296; now same as amended: Kerr's C. ib.

§ 6588. [4012] **Plea and trial.** If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, proceed to try the accusation. [R. S. § 4012.]

Hist. (See C. C. P. '81, § 135) R. S. § 4012, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 297; as amended: Kerr's C. ib.

§ 6589. [4013] **Reference to take depositions.** The court may, in its discretion, order a reference to a committee to take depositions in the matter. [R. S. § 4013.]

Hist. (See C. C. P. '81, § 136) R. S. § 4013, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 298: Kerr's C. ib.

§ 6590. [4014] **Judgment of conviction.** Upon conviction, in cases arising under the first subdivision of section 6578, the judgment of the court must be that the name of the party must be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state, and upon conviction in cases under the other subdivisions of that section the judgment of the court may be according to the gravity of the offense charged—deprivation of the right to practice as an attorney or counselor in the courts of this state permanently, or for a limited period. [R. S. § 4014.]

Hist. (See C. C. P. '81, § 137) R. S. § 4014, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 299; same, as amended, Kerr's C. ib.

Cited and applied: In re Hofstede, 31 I. 448, 173 P. 1087.

Constitutional rights: The disbarment of an attorney on account of his conviction of a felony or misdemeanor involving moral turpitude does not amount to a violation of any of his constitutional rights prohibiting the infliction of cruel and unusual punishment, nor is it an additional punishment to that inflicted by the judgment of conviction. Re Henry (1909) 15 I. 755, 99 P. 1054, 21 L. R. A. (N. S. 207.

TITLE LV. PROCEEDINGS IN CIVIL ACTIONS IN COURTS OF RECORD.

CHAPTER 249.

FORM OF CIVIL ACTIONS.

§ 6591. [4020] **One form of civil action.** There is in this state but one form of civil actions for the enforcement or protection of private rights and redress or prevention of private wrongs: *Provided,* That in all matters not regulated by this code, in which there is any conflict or variance between the rules of equity jurisprudence and the rules of the common law, with reference to the same matter, the rules of equity shall prevail. [R. S. § 4020.]

Hist. (See C. C. P. '81, § 138) R. S. § 4020, reen. R. C. ib., reen. C. L. ib.

Cross ref. Forms of action abolished: Const. V. 1.

Comp. leg.—Cal. Same with proviso omitted: C. C. P. 1872, § 307: Kerr's C. ib.

N. D. Analogous: C. Civ. P. § 7355.

Cited: Idaho etc. Co. v. Bradbury (1889) 132 U. S. 509, 33 L. ed. 433, 10 S. C. R. 177: Cummings v. Steele (1899) 6 I. 666, 59 P. 15; Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961; Rauh v. Oliver (1904) 10 I 3, 77 P. 20; Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561. Kendrick State Bank v. Barnum, 31 I. 562, 173 P. 1144.

Construction: While the distinction between actions at law and suits at equity is abolished and the plaintiff is entitled to any relief warranted by his complaint and established by his evidence, without regard to the form of his prayer, yet where the plaintiff draws his complaint on the theory that he is entitled to legal relief, and shows himself by his evidence only entitled to equitable relief, and does not offer to amend his complaint to conform to his proof, he cannot be granted any relief. Anderson v. War Eagle Con. Min. Co. (1902) 8 I. 789, 72 P. 671.

Action on judgment: Since the abolition of scire facias, an action on a judgment is, under this section, a new action and not an action or proceeding in the original action to revive the original judgment. Stevens v. Hall (1902) 8 I. 549, 69 P. 282.

Legal and equitable actions: Actions at law and in equity may be blended in the same complaint. Wa Ching v. Constantine (1869) 1 I. 266.

Title of action: Spongberg v. The First National Bank of Montpelier (1909) 15 I. 671, 99 P. 712.

§ 6592. [4021] **Parties designated.** In such actions the party complaining is known as the plaintiff, and the adverse party as the defendant. [R. S. § 4021.]

Hist. (See C. C. P. '81, § 139) R. S. § 4021, reen. R. C. ib., reen. C. L. ib.

Cross ref. Designation of parties in special proceedings: § 7240.

Comp. leg.—Cal. Same except "action" for "actions"; C. C. P. 1872, § 308: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7355.

Cited: Idaho etc. Co. v. Bradbury (1889) 132 U. S. 509, 33 L. ed 433, 10 S. C. R. 177.

Appeal from inferior board: In an appeal from the board of county commissioners, the action should be entitled the same as before the board: Gardner v. Blaine Co. (1909) 15 I. 698, 99 P. 826.

§ 6593. [4022] **Trial of special issues.** A question of fact not put in issue by the pleadings may be tried by a jury upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial. [R. S. § 4022.]

Hist. (See C. C. P. '81, § 140) R. S. § 4022, reen. R. C. ib., reen. C. L. ib.

Cross ref. Feigned issues prohibited: Const. V. I.

Comp. leg.—Cal. Same: C. C. P. 1872, § 309: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7357.

CHAPTER 250.

TIME OF COMMENCING CIVIL ACTIONS.

ARTICLE 1.

IN GENERAL.

§ 6594. [4030] **Limitations in general.** Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute. [R. S. § 4030.]

Hist. (See C. C. P. '81, § 141) R. S. § 4030, reen. R. C. ib., reen. C. L. ib.

Cross ref. Action to annul marriages: § 4621. Limitation does not run in favor of noncomplying foreign corporations during the time of their noncompliance: § 4778. Allowed claims against estates are not affected by limitations pending proceedings for settlement of the estate: § 7648. Pleading the statute of limitations. § 6713.

Comp. leg.—Cal. Same except "where" for "when"; C. C. P. 1872, § 312; as amended, Kerr's C. ib.

N. D. Similar: C. C. P. § 7355.

Cited: Anthes v. Anthes (1912) 21 I. 305, 308, 121 P. 553.

Statute acts on remedy: Statutes of limitations act upon the remedy only and not upon the debt. Kelly v. Leachman (1893) 3 I. 629, 33 P. 44.

Protection of right of way: The statute of limitations will not run against an action by a railroad to maintain the integrity of the right of way granted by congress for the specific use and purpose of said railroad. Oregon etc. R. R. Co. v. Quigley (1905) 10 I. 770, 80 P. 401.

Action against fiduciary: The statute does not begin to run against a cestui que trust until the trust is denied or some act is done by the trustee inconsistent with the trust. Nasholds v. McDonnell (1898) 6 I. 377, 55 P. 894.

The statute does not run against an action by the county to recover money received by a county officer as a fiduciary in trust for the county. Fremont Co. v. Brandon (1899) 6 I. 482, 56 P. 264; (Overruled: Bannock Co. v. Bell, 8 I. 1, 65 P. 710).

Presumption of death: In cases where the fact of death is established by the presumption arising from seven years' unexplained absence of a person, a cause of action on a benefit certificate payable upon the death of such person does not accrue until the end of the seven-year period of disappearance. Gaffney v. Royal Neighbors of America, 31 I. 549, 174 P. 1014.

ARTICLE 2.

FOR THE RECOVERY OF REAL PROPERTY.

Cross ref. Limitation of actions to set aside administrator's sales: § 7652. Of actions for specific performance after dismissal of proceedings by probate judge: § 7678. Limitation of actions to set aside guardian's sales: § 7898.

§ 6595. [4035] **Actions by state.** The people of this state will not sue any person for or in respect to any real property or the issues or profits thereof, by reason of the right or title of the people to the same, unless:

1. Such right or title shall have accrued within 10 years before any action or other proceeding for the same is commenced; or,
2. The people or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years. [R. S. § 4035.]

Hist. (See C. C. P. '81, § 142) R. S. § 4035, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 315: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7359.

§ 6596. [4036] **Action to recover realty.** No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims. [R. S. § 4036.]

Hist. (See C. C. P. '81, § 143) R. S. § 4036, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "and this section includes possessory rights to lands

and mining claims" omitted: C. C. P. 1872, § 318: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7360.

Cited: Fountain v. Lewiston Nat. Bk. (1905) 11 I. 451, 83 P. 505; Moss v. Ramey (1908) 14 I. 598, 95 P. 513; Hodges v. Lemp (1913) 24 I. 399, 135 P. 250; (in dis. op.) McKinnon v. McIlhargey (1913) 24 I. 720, 135 P. 826; Smith v. Yates (1913) 25 I. 137, 136 P. 622; Zehner v. Castle (1915) 27 I. 215, 148 P. 470; Trask v. Success Min. Co. (1916) 28 I. 483, 155 P. 288; Bower v. Kollmeyer, 31 I. 712, 175 P. 964.

Easement: The right to conduct excess water upon and across land of another is an easement which may be obtained by prescription, and the period of adverse possession whereby it may be acquired is that mentioned in this and §§ 6597 and 6599. Beasley v. Engstrom (1917) 31 I. 14, 168, P. 1145.

Equitable actions: The statute is as complete a bar in equity as at law. Ames v. Howes (1907) 13 I. 756, 93 P. 35.

Ownership of the equitable title and possession within the time limited is sufficient to enable plaintiff to sue. American M. Co. v. Trask (1915) 28 I. 642, 156 P. 136.

Finding: Where statute of limitations is pleaded in the answer, the court must make a finding upon such a defense unless finding thereon would not affect or control the judgment or call for a different judgment than that authorized by the findings made. Hailey v. Riley (1908) 14 I. 481, 95 P. 686, 17 L. R. A. (N. S.) 86.

Fraud only tolls the statute: If no fraud is shown, neither the ignorance of a person of his right to bring an action, nor the mere silence of the person liable to the action, prevents the running of the statute of limitations. Coe v. Sloan (1909) 16 I. 49, 100 P. 354.

Trusts: Express trusts are not within the operation of the statute of limitations, but trusts which arise from an implication of law or constructive trusts are within the operation of the statute. Ames v. Howes (1907) 13 I. 756, 93 P. 35.

An express, as well as an implied, trust is repudiated by adverse possession, and the statute of limitations begins to run from the time the beneficiary has notice of such repudiation. Olympia M. & M. Co. v. Kerns (1913) 24 I. 481, 135 P. 255, appeal dismissed 236 U. S. 211, 59 L. ed. 542, 35 S. C. R. 415.

Unpatented mining claim: Open, notorious, adverse possession of an unpatented mining claim for a period of more than five years is a bar to an action to recover possession of the same. Bradley v. Johnson (1906) 11 I. 689, 83 P. 927.

Water rights: Where plaintiff appropriated a certain number of inches of the waters of a creek in 1870, and continuously used the same, and defendant appropriated other waters of the creek in 1880 and used the same up 1893, but without, until that time, interfering with plaintiff's use of the water claimed by him, plaintiff's right to sue to enforce his claim to the water as against the defendant was not barred by the statute of limitations. Brossard v. Morgan (1900) 7 I. 215, 61 P. 1031.

§ **6597.** [4037] **Same: Seizin within five years.** No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor, of such person, was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made. R. S. § 4037.]

Hist. (See C. C. P. '81, § 144) R. S. § 4037, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 319: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7352, 7353.

Cited: Hailey v. Riley (1908) 14 I. 481, 95 P. 686, 17 L. R. A. (N. S.) 86; Moss v. Ramey (1908) 14 I. 598, 95 P. 513; Coe v. Sloan (1909) 16 I. 49, 100 P. 354; Hodges v. Lemp (1913) 24 I. 399, 135 P. 250; (in dis. op.) McKinnon v. McIlhargey (1913) 24 I. 720, 135 P. 826; Smith v. Yates (1913) 25 I. 137, 136 P. 622; Zehner v. Castle (1915) 27 I. 215, 148 P. 470; Trask v. Success Min. Co. (1916) 28 I. 483, 155 P. 288; (in dis. op. on rehearing) American Min. Co. Ltd. v. Trask (1915) 28 I. 642, 652, 156 P. 1136; Beasley v. Engstrom (1917) 31 I. 14, 168 P. 1145.

Claim of title: One who has purchased a tract of land and pays the purchase price and enters into possession believing he has title, whether he receives a good deed or an imperfect one, or none at all, nevertheless enters adversely to the vendor and all the rest of the world, and holds possession adversely. Fountain v. Lewiston Nat. Bk. (1905) 11 I. 451, 83 P. 505.

Permissive occupation: A prescriptive title can not be founded upon use and occupation, which is not adverse to the title of the owner, but which is under permission of the owner. Davis v. Davenney (1901) 7 I.742, 65 P. 500.

A claimant of property who enters into possession under an agreement whereby, upon the happening of a contingency, he may be under the duty or necessity of restoring possession to the grantor or true owner, holds possession for his grantor or the true owner and cannot claim by adverse possession against him. Fountain v. Lewiston Nat Bak., supra.

Where there is no proof showing that actual occupation was accompanied by a claim or an intention inconsistent with the title of the owner, an adverse claim based upon such occupation cannot be al-

lowed. Bower v. Kollmeyer, 31 I. 712, 175 P. 964.

Sheriff's deed: An action to set aside a judgment and sheriff's deed based thereon, is barred after the lapse of five years from the execution of the deed, in the absence of a showing that reasonable diligence has been exercised in the discovery of the acts complained of. Ryan v. Wood in (1904) 9 I. 525, 75 P. 261.

Vacation of streets: Action to have cit ordinances vacating streets declared nu and void should have been brought a least within five years from the date suc cause of action arose. Canady v. Coeu d'Alene L. Co. (1911) 21 I 77, 120 P. 830.

§ 6598. [4038] **Effect of entry.** No entry upon real estate is deeme sufficient or valid as a claim unless an action be commenced thereupo within one year after making such entry, and within five years of th time when the right to make it descended or accrued. [R. S. § 4038.]

Hist. (See C. C. P. '81, § 145) R. S. § 4038, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 320: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7364.

Cited: Canady v. Coeur d'Alene L. C (1911) 21 I. 77, 93, 120 P. 830; Wilson Linder (1912) 21 I. 576, 123 P. 487, An Cas. 1913E, 148, 42, L. R. A. (N. S.) 242.

§ 6599. [4039] **Constructive possession.** In every action for the re covery of real property, or the possession thereof, a person establishin a legal title to the property is presumed to have been possessed thereo within the time required by law, and the occupation of the property b another person is deemed to have been under and in subordination t the legal title, unless it appear that the property has been held and pos sessed adversely to such legal title, for five years before the commence ment of the action. [R. S. § 4039.]

Hist. (See C. C. P. '81, § 146) R. S. § 4039, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 321; Kerr's C. ib.

N. D. Similar: C. C. P. § 7365.

Cited: Fountain v. Lewiston Nat. Bk. (1905) 11 I. 451, 83 P. 505; Wilson v. Linder (1912) 21 I. 576, 123 P. 487, Ann. Cas. 1913E 148, 42 L. R. A. (N. S.) 242; Hodges v. Lemp (1913) 24 I. 399, 135 P. 250; Beasley v. Engstrom (1917) 31 I. 14, 168 P. 1145. Bower v. Kollmeyer, 31 I. 712, 175 P. 964.

No application to highways: This sec tion has no application whatever to publi highways; the public never acquires th legal title to land over which a highwa extends. Meservey v. Gulliford (1908) 1 I. 133, 93 P. 780.

No title can be acquired in public stree by adverse possession. Hanson v. Pro fer (1913) 23 I. 705, 132 P. 573.

Municipal property: Property held b city not for a public purpose may be a quired by adverse possession as again city. Robinson v. Lemp (1916) 29 I. 66 161 P. 1024.

§ 6600. [4040] **Possession under claim of title.** When it appea that the occupant, or those under whom he claims, entered into the po session of the property under claim of title, exclusive of other righ founding such claim upon a written instrument, as being a conveyanc of the property in question, or upon the decree or judgment of a con petent court, and that there has been a continued occupation and po session of the property included in such instrument, decree or judgmen or of some part of the property under such claim, for five years, th property so included is deemed to have been held adversely except tha when it consists of a tract divided into lots, the possession of one lot not deemed a possession of any other lot of the same tract. [R. § 4040.]

Hist. (See C. C. P. '81, § 147) R. S. § 4040, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 322: Kerr's C. ib.

N. D. Similar: C. C. P. § 7366.

Cited: Carter v. Ruddy (1897) 166 U. S. 493, 44 L. ed. 1090, 17 S. C. R. 640; Hodges v. Lemp (1913) 24 I. 399, 135 P. 250; Smith v. Yates (1913) 25 I. 137, 136 P. 622; Crandall v. Goss (1917) 30 I. 661, 167 P. 1025.

Conveyance by owner of half interest: Where one has title to only an undivided one-half interest he can not convey t other one-half interest. However his dee purporting to convey the entire proper gives color of title to the whole proper to the grantee. Coe v. Sloan (1909) 16 49, 100 P. 354.

Void deed to city street: Even though mayor has no authority to make a deed a city street, still his deed gives to t grantee color of title. Boise v. Wilkins (1909) 16 I. 150, 173, 102 P. 148.

Invalid deed: One who enters and cupies land, claiming title against t

vorld, possesses adversely, even though is possession is founded in mistake as to he validity of his deed. Bayhouse v. Urquides (1909) 17 I. 286, 296, 105 P. 1066.

Conveyance from life tenant: A remainderman who holds adversely under a deed from the life tenant purporting to convey the absolute fee simple estate claims under color of title. Wilson v. Linder (1912) 21 I. 576, 123 P. 487, Ann. Cas. 1913E 148, 42 L. R. A. (N. S.) 242.

§ 6601. [4041] **Same: What constitutes possession.** For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant.
4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. [R. S. § 4041.]

Hist. (See C. C. P. '81, § 148) R. S. § 4041, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 323: Kerr's C. ib.

N. D. Similar: C. C. P. § 7367.

Cited: Hall v. Blackman (1902) 8 I. 272, 68 P. 19; Coe v. Sloan (1909) 16 I. 49, 56, 100 P. 354; Smith v. Yates (1913) 25 I. 137, 136 P. 622; Johnson v. Sowden (1913) 25 I. 227, 136 P. 1136; Crandall v. Goss (1917) 30 I. 661, 167, P. 1025.

§ 6602. [4042] **Possession under oral claim of title.** Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely. [R. S. § 4042.]

Hist. (See C. C. P. '81, § 149) R. S. § 4042, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 324: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7368.

Cited: Coe v. Sloan (1909) 16 I. 49, 100 P. 354; Crandall v. Goss (1917) 30 I. 661, 167 P. 1025; Bower v. Kollmeyer, 31 712, 175 P. 964.

Easement: One who has acquired right of way for canal across land of another by adverse user has also acquired right of entry to clean and maintain canal. Gorrie v. Weiser Irr. Dist. (1915) 28 I. 248, 153 P. 561.

Unrecorded deed: Where a purchaser of a right of way for a ditch across a tract of land has failed to record its conveyance prior to the record of a subsequent conveyance made in good faith, and in an action to quiet title seeks to recover on the grounds of adverse possession for the statutory period, the extent of the right of way or easement must be determined by the facts proven as to the extent of the use and occupation, and can not be determined by the calls of such unrecorded deed. Swank v. Sweetwater Irr. etc. Co. (1908) 15 I. 353, 98 P. 297.

§ 6603. [4043] **Same: What constitutes possession: Payment of taxes.** For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Provided, however, That in no case shall adverse possession be considered established under the provisions of any sections of this code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon such land according to law. [R. S. § 4043.]

Hist. (See C. C. P. '81, § 150) R. S. § 4043, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same to "provided"; C. C. P. 1872, § 325; now almost identical

as amended: Kerr's C. ib. Trask v. Success M. Co. (1916) 28 I. 483, 155 P. 288.

N. D. Similar: C. C. P. § 7369.

Cited: Moss v. Ramey (1908) 14 I. 598, 95 P. 513; (In brief of counsel) Johnson v. Sowden (1913) 25 I. 227; Smith v. Yates (1913) 25 I. 137, 136 P. 622; Crandall v. Goss (1917) 30 I. 661, 167 P. 1025.

Payment of taxes: Payment of taxes must be shown in order to establish title by adverse possession. Brose v. Boise City Ry. etc. Co. (1897) 5 I. 694, 51 P. 753.

One who fails to pay the taxes on land and informs the assessor that the land belongs to another does not acquire a title by adverse possession. Green v. Christie (1895) 4 I. 438, 40 P. 54.

Where A purchases land from B which is inclosed by a fence, and within such inclosure is a small tract of land not within the description of the deeds given by B to A, which small tract is now and has been possessed, used and occupied by A for a period of 14 years, he exercising acts of control and ownership thereover, and where it appears from the record that such tract of land has not been assessed for taxation according to law, or at all, the facts so shown are sufficient to establish adverse possession. Urquides v. Flanagan (1900) 7 I. 163, 61 P. 514.

Adverse possession can not be established unless it is shown that the land has been occupied and claimed for five years continuously, and the claimant or his predecessors have paid all taxes levied upon such land or that the property was exempt from taxation or has never been assessed. Swank v. Sweetwater Irr. etc. Co. (1908) 15 I. 353, 98 P. 297. Dickerson v. Hansen, 32 I. —, 177 P. 760.

Boundaries: Where one enters into the possession of a tract of land and maintains a fence, and occupies and uses the land up to the fence for a period of 40 years, with the knowledge and acquiescence of the successive owner of the adjoining land, such occupancy will amount to adverse possession, even though the division fence was erected through mistake as to the true boundary line. Bayhouse v. Urquides, (1909) 17 I. 286, 105 P. 1066.

Where a row of trees has constituted a monument between lots of coterminous owners for more than five years, same established true boundary line. Boise Valley etc. Co. v. Kroeger (1909) 17 I. 384, 398, 105 P. 1070, 28 L. R. A. (N. S.) 968.

Acquiescence in the maintenance of a line fence for a great length of time may be presumptive evidence of an agreement as to a boundary line, but is not conclusive evidence, and will not overcome a positive agreement or understanding that after the true line is established the fence will be made to conform to it. Brown v. Brown (1910) 18 I. 345, 110 P. 269.

Effect of pendency of a homestead contest: The pendency of a homestead contest in the land department of the United States does not suspend the running of the statute of limitations. N. P. Ry. Co. v. Pyle (1910) 19 I. 3, 112 P. 678.

Any continuous five-year period: Where one claims title to property by adverse possession it is not necessary that the five years' continuous, exclusive adverse possession and payment of taxes should have been immediately preceding the commencement of the action or at any special or particular time, but it is sufficient if the party claiming such title can establish any continuous five-year period subsequent to the acquisition of the legal title by the adverse party during which he has complied with the statute in maintaining his open, notorious, continuous adverse possession and payment of taxes for such period. Cramer v. Walker (1913) 23 I. 495, 130 P. 1002.

Improved: The word "improved" in this section means to change or make better or to adapt it more to the purposes for which it is intended than had previously been done. In case of a mill site used for ordinary mining purposes, it is not necessary that it be either cultivated or inclosed. Trask v. Success M. Co. (1916) 28 I. 483, 155 P. 288.

§ 6604. [4044] Possession of tenant: Presumptions. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions can not be made after the periods herein limited. [R. S. § 4044.]

Hist. (See C. C. P. '81, § 151) R. S. § 4044, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 326: Kerr's C. ib.

N. D. Similar: C. C. P. § 7370.

§ 6605. [4045] Descent cast does not affect right. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property. [R. S. § 4045.]

Hist. (See C. C. P. '81, § 152) R. S. § 4045, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 327: Kerr's C. ib.

N. D. Similar: C. C. P. § 7371.

§ 6606. [4046] **Persons under disabilities.** If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title first descends or accrues, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offense, for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense.

The term during which such disability continues is not deemed any portion of the time in this title limited for the commencement of such action or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defense made after that period. [R. S. § 4046.]

Hist. (See C. C. P. '81, § 153) R. S. § 4046, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Disabilities in actions to set aside administrator's sales: § 7653. Guardian's sales: § 7898.

Comp. leg.—Cal. Same except "time" for "term" and "chapter" for "title" in the last paragraph: C. C. P. 1872, § 328; different as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7372.

Applied: Title by adverse possession can not be acquired against minors during minority. Harris v. McCreary (1909) 17 I. 300, 105 P. 558.

ARTICLE 3.

ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

Cross ref. Recovery of fines in police court: § 3899. Limitations in actions: Annulment of marriage: § 4621; divorce: § 4638; actions to recover corporate stock sold for delinquent assessments: § 4749; actions against railroads for killing live stock: § 4816; suits on rejected claims against estates: § 7586; on guardians' bonds: § 7897. Pleading the statute of limitations: § 6713.

§ 6607. [4050] **Limitation of actions.** The periods prescribed for the commencement of actions other than for the recovery of real property are as follows. [R. S. § 4050.]

Hist. (See C. C. P. '81, § 154) R. S. § 4050, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 335: Kerr's C. ib.

N. D. See C. C. P. § 7373.

Cited: Hillock v. Idaho etc. Co. (1912) 22 I. 440, 126 P. 612, 42 L. R. A. (N. S.) 178; (erroneously as § 450) Olympia etc. Co. v. Kerns (1913) 24 I. 481, 496, 135 P. 255. Gaffney v. Royal Neighbors of America, 31 I. 549, 174 P. 1014.

§ 6608. [4051] **Action on judgment or for mesne profits.** Within six years:

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.
2. An action for mesne profits of real property. [R. S. § 4051.]

Hist. (See C. C. P. '81, § 155) R. S. § 4051, reen. R. C. ib., reen. C. L. ib.

Cross ref. Time for execution limited to five years: § 6910. But may be extended by order or judgment: § 6914.

Comp. leg.—Cal. Different, time is five years: C. C. P. 1872, § 336: Kerr's C. ib. Bashor v. Beloit (1911) 20 I. 592, 119 P. 55.

N. D. Analogous: C. C. P. §§ 7356-74.

Cited: Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961; Sterrett v. Sweeney (1908) 15 I. 416, 98 P. 418, 128 A. S. R. 68, 20 L. R. A. (N. S.) 963; Ida. Trust etc. Bk. v. Nampa etc. Irr. Dist. (1916) 29 I. 658, 161 P. 872.

Revived judgment: Where a judgment entered in a foreign jurisdiction is revived in that jurisdiction the statute of limitations begins to run in this state from the date of the judgment of revivor. Leman v. Cunningham (1906) 12 I. 135, 85 P. 212.

Domestic judgments: There can be no question as to the application of this section to domestic judgments. Bashor v. Beloit (1911) 20 I. 592, 119 P. 55.

Right to execution immaterial: The right to maintain an action on a judgment is not dependent upon the right to issue an execution thereon, but is governed by this section. Bashor v. Beloit, supra.

§ 6609. [4052] **Action on written contract.** Within five years: An action upon any contract, obligation or liability founded upon an instrument in writing. [R. S. § 4052.]

Hist. (See C. C. P. '81, § 156) R. S. § 4052, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except time is four years: C. C. P. 1872, § 337; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7374.

Cited: Aikens v. Wilson (1900) 7 I. 12, 59 P. 932; Western Loan etc. Co. v. Smith (1906) 12 I. 94, 85 P. 1084; Sterrett v. Sweeney (1908) 15 I. 416, 98 P. 418, 128 A. S. R. 68, 20 L. R. A. (N. S.) 963; Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 143, 108 P. 901; Dern v. Olsen (1910) 18 I. 358, 110 P. 164, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016; Bates v. Cap. S. Bk. (1910) 18 I. 429, 433, 110 P. 277; Bashor v. Beloit (1911) 20 I. 592, 597, 119 P. 55; Anthes v. Anthes (1912) 21 I. 305, 308, 121 P. 553; Tritthart v. Tritthart (1913) 24 I. 186, 133 P. 121; Gaffney v. Royal Neighbors of America, 31 I. 549, 174 P. 1014 (and see § 6594 supra).

§ 6610. [4053] **Action on oral contract.** Within four years: An action upon a contract, obligation or liability not founded upon an instrument of writing. [R. S. § 4053.]

Hist. (See C. C. P. '81, § 157) R. S. § 4053, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different, time two years; C. C. P. 1872, § 339; subd. 1 as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7375.

Cited: Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226: Bates v. Cap. S. Bk. (1910) 18 I. 429, 433, 110 P. 277; Bashor v. Beloit (1911) 20 I. 592, 597, 119 P. 55; Hillock v. Idaho etc. Co. (1912) 22 I. 440, 126 P. 612, 42 L. R. A. (N. S.) 178; Tritthart v. Tritthart (1913) 24 I. 186, 133 P. 121; McLeod v. Rogers (1916) 28 I. 412, 154 P. 970; Boise Dev. Co. v. Boise (1917) 30 I. 675, 167 P. 1032; Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

Action by county: An action by a county to recover from the clerk of court, auditor and recorder, moneys illegally allowed by the county commissioners to the clerk, etc., and fees illegally collected by the clerk, etc., from the county is barred after four years. Bannock Co. v. Bell (1901) 8 I. 1, 65 P. 710.

An action by the county to recover from one who has not paid for recording instruments the full amount of fees prescribed by statute is not an action "upon a liability created by statute" but an action upon a contract, obligation or liability, not founded upon an instrument of writing." Lincoln Co. v. Twin Falls etc. Co. (1913) 23 I. 433, 130 P. 788.

Claims against state: A contract claim against the state will be deemed barred by the statute of limitations in a proceeding in the supreme court for a recommendatory decision advising the payment of such claim where the same is over 10 years past due and no excuse is shown for the delay of the claimant in presenting it. Small v. S. (1904) 10 I. 1, 76 P. 765. (See § 149.)

§ 6611. [4054] **Statutory liabilities, trespass, trover, replevin and fraud.** Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.
2. An action for trespass upon real property.
3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.
4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. [R. S. § 4054.]

Hist. (See C. C. P. '81, § 158) R. S. § 4054, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 338: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7375.

Cited: Cantwell v. McPherson (1893) 3 I. 721, 34 P. 1095, Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226; Bates v. Cap. S. Bk. (1910) 18 I. 429, 433, 110 P. 277; Canady v. Coeur d'Alene L. Co. (1911) 21 I. 77, 93, 120 P. 830; (In brief of counsel) Stoltz v. Scott (1912) 23 I. 104; (erroneously as § 454) Olympia etc. Co. v. Kerns (1913) 24 I. 481, 496, 135 P. 255; Pindel v. Holgate (1915) 221 F. 342, 137 C. C. A. 158, 349, Ann. Cas. 1916C 983; Collman v. Wanamaker (1915) 27 I. 342, 346, 149 P. 292; Weil v. Defenbach, 31 I. 258. 170 P. 103.

Statutory liabilities: An action against the sureties of an officer to recover an amount allowed to said officer for services after the expiration of his term of office is within the provisions of this section. Ada Co. v. Ellis (1897) 5 I. 333, 48 P. 1071.

When one county is carved out of a portion of another and adjustment and settlement of all accounts is made, the liability of one county to the other is created by statute and an action to enforce such liability must be brought within three years. Canyon Co. v. Ada Co. (1897) 5 I. 686, 51 P. 748.

Limitation does not begin to run in favor of a county against the claim of a municipality to the 25 per cent of the road tax collected by the county within the limits of the municipality, as provided for in R. S. § 870, until demand is made by the municipality for such payment. Mountainhome v. Elmore Co. (1904) 9 I. 410, 75 P. 65.

A "statutory liability" within the meaning of subd. 1 is one that depends for its existence on the enactment of a statute, and not on the contract of the parties. Dietrich v. Copeland L. Co. (1916) 28 I. 312, 154 P. 626.

An action against the president and secretary of a corporation based on their statutory liability under R. C. § 2792 (§§ 4772-9), to answer for its contractual obligations is barred within three years under subd. 1. Dietrich v. Copeland L. Co. supra.

Subd. 1 has no application to an action by a county to recover balance of fees due for recording of instruments. Lincoln Co. v. Twin Falls etc. Co. (1913) 23 I. 433, 130 P. 788.

Trespass: An action for damages for recurrent flowage of agricultural lands by waters polluted with poisonous waste from ore reduction works is not for trespass but on the case, and not limited by subd. 2 of this section. Hill v. Empire State etc. Co. (1908) 158 F. 881.

Limitation for action for trespass upon real property has no application to action on the case for consequential damages. Boise Dev. Co. v. Boise (1917) 30 I. 675, 167 P. 1032.

Recurring trespasses: Where a dam causes periodical damage to a sand beach by flooding the statute does not run from the first as to all recurring floodings. Defenbaugh v. Wash. W. Power Co. (1913) 24 I. 514, 135 P. 247.

Tort: Under subd. 3 a right of action accrues in favor of the owner of goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them. Havird v. Lung (1911) 19 I. 790, 115 P. 930.

Where the possession of property is acquired by a tort no demand is necessary prior to the institution of suit for its recovery; consequently the statute of limitations is set in motion without such demand. Ib.

Fraud or mistake: The provisions of subd. 4 have no application to the action for taking, detaining or injuring goods or chattels, the period for commencing which is prescribed by subd. 3. Havird v. Lung, supra.

One who sustains damage by reason of the mistake and false and fraudulent representation contained in an abstract may commence his action to recover damages against the abstracter within three years after discovering the fraud or mistake. Hillock v. Idaho etc. Co. (1912) 22 I. 440, 126 P. 612, 42 L. R. A. (N. S.) 178.

The test, under subd. 4, is not whether the fraud or mistake occurred in a contract or independently of contract, but the test is whether the action seeks relief from or on account of a fraud or mistake. Ib.

Under subd. 4 knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to knowledge of fraud, and will start commencement of statute. Williams v. Shrope (1917) 30 I. 746, 168 P. 162.

Complainant's eight-year delay in seeking relief against an administrator who fraudulently represented that he was the next of kin, held not to warrant denial of relief. Diamond v. Connolly, 251 F. 234.

§ 6612. [4055] Actions against officers, for penalties, on bonds and for personal injuries. Within two years:

1. An action against a sheriff, coroner or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.

2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

3. An action upon a statute or upon an undertaking in a criminal action for a forfeiture or penalty to a county or to the people of the state.

4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another.

5. An action for libel, slander, assault, battery, false imprisonment or seduction.

6. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. ['03, p. 56, § 1.]

Hist. (See C. C. P. '81, § 159) R. S. § 4055; am. '03, p. 56, § 1, reen. R. C. § 4055, reen. C. L. ib.

Cross ref. Claims against state two years: 149.

Comp. leg.—Cal. See C. C. P. 1872, § 339; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7376-8.

Cited: Collman v. Wanamaker (1915) 27 I. 342, 346, 149 P. 292; Pindel v. Holgate (1915) 221 F. 342, 137 C. C. A. 158, 348, Ann. Cas. 1916C 983.

§ 6613. [4056] **Actions to recover goods or money from officers.** Within one year: An action against an officer or officer de facto:

1. To recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of or injury to, any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

2. For money paid to any such officer under protest or seized by such officer in his official capacity as a collector of taxes, and which, it is claimed, ought to be refunded. [R. S. § 4056.]

Hist. (See C. C. P. '81, § 160) R. S. § 4056, reen. R. C. ib., reen. C. L. ib.

Cross ref. Recovery of fines in police courts one year: § 3899.

Comp. leg.—Cal. Almost identical except time is six months: C. C. P. 1872, § 341; as amended, same through subd. 1: Kerrs' C. ib.

§ 6614. [4057] **Actions on claims against county.** Actions on claims against a county which have been rejected by the board of commissioners must be commenced within six months after the first rejection thereof by such board. [R. S. § 4057.]

Hist. (See C. C. P. '81, § 161) R. S. § 4057, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 342; Kerr's C. ib.

Cited: Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

§ 6615. [4058] **Actions on open accounts.** In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. [R. S. § 4058.]

Hist. (See C. C. P. '81, § 162) R. S. § 4058, reen. R. C. ib., reen. C. L. ib. § 344; Kerr's C. ib.

Comp. leg.—Cal. Same: C. C. P. 1872,

N. D. Similar: C. C. P. § 7379.

Application: This section has no application to fees charged by the county for recording of instruments. Lincoln Co. v. Twin Falls etc. Co. (1913) 23 I. 433, 130 P. 788.

§ 6616. [4059] **Actions to recover deposits.** To actions brought to recover money or property deposited with any bank, banker, trust company or saving and loan society, no limitation begins to run until after an authorized demand. [R. S. § 4059.]

Hist. (See C. C. P. '81, § 163) R. S. § 4059, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; different: Kerr's C. § 348.

Cited: Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961; Bates v. Cap. S. Bk. (1910) 18 I. 429, 110 P. 277.

§ 6617. [4060] **Actions for other relief.** An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued. [R. S. § 4060.]

Hist. (See C. C. P. '81, § 164) R. S. § 4060, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 343; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7381.

Cited: Re Counties v. Alturas Co. (1894) 4 I. 145, 37 P. 349; Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226; Nelson v. Steele (1906) 12 I. 762, 88 P. 95; Hill v. Empire State etc. Co. (1908) 158 F. 881, 885; Hailey v. Riley (1908) 14 I. 481, 95 P. 686, 17 L. R. A. (N. S.) 86; Bashor v. Beloit (1911) 20 I. 592, 119 P. 55; Canady v. Coeur d'Alene L. Co. (1911) 21 I. 77, 120 P. 830; (erroneously as § 454) Olympia etc. Co. v. Kerns (1913) 24 I. 481, 496, 135 P. 255.

Action against officer: An action by a county to recover from the clerk of court, auditor and recorder moneys illegally allowed by the county commissioners to the clerk, etc., and fees illegally collected by the clerk, etc., from the county, is barred after four years. Bannock Co. v. Bell (1901) 8 I. 1, 65 P. 710.

Appointment of administrator: A proceeding for the appointment of an administrator is an action within the meaning of this section and it is barred if not commenced within four years from the death of the decedent. Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961.

Actions for damages: Actions for damages against real property come under this section. Boise Dev. Co. v. Boise (1917) 30 I. 675, 167 P. 1032.

§ 6618. [4061] **Limitations apply to state.** The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. [R. S. § 4061.]

Hist. (See C. C. P. '81, § 165) R. S. § 4061, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 345; Kerr's C. ib.

N. D. Similar: C. C. P. § 7382.

Application to state: The statute of limitations applies to the state as well as to private individuals. Small v. S. (1904) 10 I. 1, 76 P. 765.

Limitation of section: This section is specifically restricted to the limitations "prescribed by this title," that is, of actions of a private nature and against private individuals. It does not apply to an action to enforce a public duty, such as an action on behalf of a county to compel the commissioners of another county to appoint an accountant for the apportionment of the indebtedness of the counties as prescribed by a county division act. Re Counties v. Alturas Co. (1894) 4 I. 145, 37 P. 349.

Action by county: The statute runs against the county in a civil action brought by it against the clerk, auditor and recorder for illegal fees and compensation collected by him from the county during his term of office. (Overruling Fremont Co. v. Brandon, 6 I. 482, 56 P. 264; Quarles, C. J. dissenting) Bannock Co. v. Bell (1901) 8 I. 1, 65 P. 710.

§ 6619. [4062] **Action to redeem mortgage.** An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. [R. S. § 4062.]

Hist. (See C. C. P. '81, § 166) R. S. § 4062, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 346; Kerr's C. ib.

Cited: Fountain v. Lewiston Nat. Bk. (1905) 11 I. 451, 83 P. 505.

§ 6620. [4063] **Same: Partial redemption.** If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action under the provisions of this title, any one of them who is entitled to maintain such an action may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises. [R. S. § 4063.]

Hist. (See C. C. P. '81, § 167) R. S. 6 4063, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 347; Kerr's C. ib.

ARTICLE 4.

GENERAL PROVISIONS.

Cross ref. Pleading statute of limitations: § 6713.

§ 6621. [4068] **Action: When commenced.** An action is commenced within the meaning of the title when the complaint is filed. [R. S. § 4068.]

Hist. (See C. C. P. '81, § 168) R. S. § 4068, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 350; Kerr's C. ib.

N. D. See C. C. P. § 7383.

Cited: Gold Hunter etc. Co. v. Holleman (1891) 3 I. 99, 27 P. 413; (Dis. op.) Elmore Co. etc. Assn. v. Stockslager (1912) 22 I. 420, 126 P. 616.

Effect on new parties: Statute ceases to run upon filing an original complaint even as to parties later brought into suit after the time limited in the statute. Idaho Trust etc. Bk. v. Nampa etc. Irr. Dist. (1916) 29 I. 658, 161 P. 872.

§ 6622. [4069] **Absence of defendant from state.** If, when the cause of action accrues against a person, he is out of the state, the ac-

tion may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. [R. S. § 4069.]

Hist. (See C. C. P. '81, § 169) R. S. § 4069, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 351; Kerr's C. ib. West v. Theis (1908) 15 I. 167, 174, 96 P. 932, 128 A. S. R. 58, 17 L. R. A. (N. S.) 472.

Mont. Similar: R. S. § 50. West v. Theis (1908) 15 I. 167, 172, 96 P. 932, 128 A. S. R. 58, 17 L. R. A. (N. S.) 472.

N. D. Analogous: C. C. P. § 7384.

Utah: Similar: R. S. § 2888. West v. Theis (1908) 15 I. 167, 175, 96 P. 832, 128 A. S. R. 58, 17 L. R. A. (N. S.) 472.

When action accrues: A cause of action accrues within the meaning of this section when it can be properly commenced. Pridgeon v. Greathouse (1871) 1 I. 359.

Debtor entering state: The words "return to the state" apply to a nonresident debtor who enters into a contract in a foreign state and thereafter comes into this state, as well as to a citizen who enters into a contract within this state and thereafter departs from the state. West v. Theis, supra.

Not amended: The act of March 13, 1907 ('07, pp. 319, 321) amending R. C. § 4144 and providing a method of substituted service of process upon a resident of this state temporarily absent from his residence or from the state, did not amend this section. Anthes v. Anthes (1912) 21 I. 305, 121 P. 553.

Absence: It is immaterial what may be the cause of absence or whether it be of a mere temporary nature or a change of residence and domicile. Anthes v. Anthes, supra.

§ **6623.** [4070] **Persons under disabilities.** If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action;

The time of such disability is not a part of the time limited for the commencement of the action. [R. S. § 4070.]

Hist. (See C. C. P. '81, § 170) R. S. § 4070, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "mentioned in chapter 3 of this title," for "other than for the recovery of real property": C. C. P. 1872, § 352; Kerr's C. ib.

N. D. Similar: C. C. P. § 7385.

§ **6624.** [4071] **Death of party.** If a person entitled to bring an action die before the expiration of the term limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. [R. S. § 4071.]

Hist. (See C. C. P. '81, § 171) R. S. § 4071, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except first time mentioned is six months: C. C. P. 1872, § 353; Kerr's C. ib. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

N. D. Similar: C. C. P. § 7386.

Cited: Moulton v. Williams (1899) 6 I. 424, 55 P. 1019.

Construed: The provisions of this section were not intended to shorten the time within which an action may be brought under the general provisions of the statute, but were intended to extend such time in certain cases, that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statute. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

This section does not mean that claims against an estate must be either allowed or rejected and suit brought thereon within one year from the date of the issuing of letters of administration. Ib.

§ **6625.** [4072] **Aliens: Time of war.** When a person is an alien subject, or citizen of a country at war with the United States, the time

of the continuance of the war is not part of the period limited for the commencement of the action. [R. S. § 4072.]

Hist. (See C. C. P. '81, § 172) R. S. § 4072, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 354; Kerr's C. ib.

N. D. Similar: C. C. P. § 7387.

§ 6626. [4073] **Reversal of judgment: New action.** If an action is commenced within the time prescribed therefor and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal. [R. S. § 4073.]

Hist. (See C. C. P. '81, § 173) R. S. § 4073, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 355; Kerr's C. ib.

N. D. Similar: C. C. P. § 7388.

§ 6627. [4074] **Action stayed by injunction or statute.** When the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. [R. S. § 4074.]

Hist. (See C. C. P. '81, § 174) R. S. § 4074, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 356; Kerr's C. ib.

N. D. Similar: C. C. P. § 7389.

§ 6628. [4075] **When disability must exist.** No person can avail himself of a disability unless it existed when his right of action accrued. [R. S. § 4075.]

Hist. (See C. C. P. '81, § 175) R. S. § 4075, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 357; Kerr's C. ib.

N. D. Identical: C. C. P. § 7390.

§ 6629. [4076] **Coexisting disabilities.** When two or more disabilities coexist at the time the right of action accrues the limitation does not attach until they are removed. [R. S. § 4076.]

Hist. (See C. C. P. '81, § 176) R. S. § 4076, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 358; Kerr's C. ib.

N. D. Identical: C. C. P. § 7391.

§ 6630. [4077] **Actions against directors and stockholders.** This chapter does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. [R. S. § 4077.]

Hist. (See C. C. P. '81, § 177) R. S. § 4077, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 359; Kerr's C. ib.

N. D. Similar: C. C. P. § 7393.

Cited: (In brief of counsel) Stoltz v. Scott (1912) 23 I. 104; Weil v. Defenbach (1918) 31 I. 258, 170 P. 103.

Liability created by law: The liability of a stockholder for corporate indebtedness to the amount unpaid upon the par value of his stock is not a "liability created by law" within the meaning of this section. Feehan v. Kendrick, 32 I. —, 179 P. 507.

§ 6631. [4078] **Acknowledgment of new contract.** No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby. [R. S. § 4078.]

Hist. (See C. C. P. '81, § 178) R. S. § 4078, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 360; Kerr's C. ib. Dern. v. Olsen (1910) 18 I. 358, 110 P. 164, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016.

N. D. Similar: C. C. P. § 7394.

Application: The acknowledgment and promise to pay a debt which would otherwise be barred by limitations must be in writing signed by the party sought to be charged as well where the original debt is not barred when the acknowledgment and promise is made, as in cases where the statute has already run. Reed v. Smith (1874) 1 I. 533.

Clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by the statute of limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt and fixes a new date from which the statute begins to run. Dern v. Olsen (1910) 18 I. 358, 110 P. 164, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016.

Renewal notes: The giving of new notes, including the interest due on the original debt, is sufficient acknowledgment of the whole indebtedness to prevent the running of the statute of limitations. Kelly v. Leachman (1893) 3 I. 629, 33 P. 44.

Indorsement on note: An indorsement written on a note and mortgage by which the debtor purports to acknowledge and renew the same is evidence of waiver by the debtor of the bar of the statute. Moulton v. Williams (1899) 6 I. 424, 55 P. 1019.

Payment as acknowledgment: Payment on a promissory note to remove the bar of the statute of limitations must be evidenced by a writing, and must be a voluntary payment by the payee, and made for the purpose of applying the payment on the note. Gray v. Pierson (1901) 7 I. 540, 64 P. 233.

Administrator can not waive statute: An administrator can not "acknowledge or promise" to pay "a new or continuing contract" so as to remove the same from the operation of the statute of limitations. Dern v. Olsen, supra.

§ 6632. [4079] **Actions barred in another state.** When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon can not there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued. [R. S. § 4079.]

Hist. (See C. C. P. '81. § 179) R. S. § 4079, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 361; Kerr's C. ib. West v. Theis (1908) 15 I. 167, 174, 96 P. 932, 128 A. S. R. 58, 17 L. R. A. (N. S.) 472.

Mont. Similar: § 55. West v. Theis, supra.

Utah: Similar: R. S. § 3889. West v. Theis, supra.

Cited: Alspaugh v. Reid (1898) 6 I. 223, 55 P. 300.

Construed: The phrase "has arisen in another state" refers to and means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state or foreign country through which the debtor may subsequently travel or in which he may reside for a sufficient length of time to constitute the bar of the statute of limitations of such state, prior to coming to this state, where an action is eventually commenced. West v. Theis, supra.

"A cause of action arises" at the time and the place in the state or foreign country when and where the debt is to be paid or the contract performed, and continues and follows the debtor until it is either barred by the statute of limitations of the state wherein it arose or until the debtor has lived within this state a sufficient length of time to bar it by the statute of limitations of this state. Ib.

Where a resident of this state goes into the state of Washington and makes a partial payment upon a Washington contract after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to this state the contract follows him as made, and is enforceable under the laws of this state, and the statute of limitations of this state begins to run upon his reentry into this state, after such payment. Sterrett v. Sweeney (1908) 15 I. 416, 98 P. 418, 128 A. S. R. 68, 20 L. R. A. (N. S.) 963.

§ 6633. [4080] **"Action" includes special proceeding.** The word "action" as used in this chapter is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature. [R. S. § 4080.]

Hist. (See C. C. P. '81, § 181) R. S. § 4080, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 363; Kerr's C. ib.

Cited: Nelson v. Steele (1906) 12 I. 762, 88 P. 95.

Construction: The word "action" includes proceedings for the appointment of an administrator. Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961.

CHAPTER 251.

PARTIES TO CIVIL ACTIONS.

§ 6634. [4090] **Party in interest must prosecute.** Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code. [R. S. § 4090.]

Hist. (See C. C. P. '81, § 182) R. S. § 4090, reen. R. C. ib., reen. C. L. ib.

Cross ref. Parties plaintiff in action to annul marriage: § 4621. Designation of parties: § 6592.

Comp. leg.—Cal: Same: C. C. P. 1872, § 367; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7395.

Cited: U. S. v. Shoup (1889) 2 I. 493, 21 P. 656; (Dis. op.) Anderson v. Or. Mtg. Co. (1902) 8 I. 418, 69 P. 130; (In brief of counsel) Ind. Sch. Dist. v. Collins (1908) 15 I. 535; Bower v. Moorman (1915) 27 I. 162, 147 P. 496, Ann. Cas. 1917C 99.

Applied: Where a party purchased a stallion and at the same time received from the vendor a contract of warranty, and thereafter and before using him sold the animal without assigning the contract of warranty to the purchaser, he may sue on the contract of warranty as the real party in interest. Olson Bros. v. Hurd (1911) 20 I. 47, 116 P. 358.

Where an action is brought by a married woman to recover a judgment on promissory notes, and decree foreclosing mortgage given to secure notes, and the answer of defendant avers that real estate covered by mortgage is community property, and sets up an offset or counterclaim against husband and asks to have him made a party plaintiff, it is error for court to deny such motion. Campbell v. Kerns (1907) 13 I. 287, 70 P. 108.

Any resident taxpayer may sue to determine the legality of acts of a city official. Moore v. Hupp (1909) 17 I. 232, 245-6, 105 P. 209.

The holder of certificates of indebtedness incurred by the state engineer in a water suit and representing a judgment for costs is the legal owner of judgment and may sue thereon in his own name. Idaho Trust etc. Bk. v. Ridenbaugh (1916) 29 I. 647, 161 P. 868; Idaho Trust etc. Bk. v. Nampa etc. Irr. Dist. (1916) 29 I. 658, 161 P. 872.

Assignees: Where as between assignor and assignee the transfer of a chose in action is complete the assignee is the real party in interest and is entitled to maintain action in his own name whether the assignment is with or without consideration and notwithstanding any equities to which the same may be subject. Brumback v. Oldham (1878) 1 I. 709.

Where A delivers property to an express company with direction to deliver the same to B he thereby vests the rights of possession in B, and the latter will be entitled to demand, sue for and receive the same. Pratt v. N. P. Express Co. (1907) 13 I. 373, 90 P. 341, 121 A. S. R. 268, 10 L. R. A. (N. S.) 499.

Action on official bond: Under the statute providing that action shall be brought in the name of the real party in interest, the people of the territory are the proper party plaintiff in an action on an official bond of a county treasurer running to "the people of the United States in the territory of Idaho," and it is proper to further allege that the action is brought for the use of the county. People v. Slocum (1866) 1 I. 62.

Action on injunction bond: An action on an injunction bond given in a suit against the mayor and common council of a city in their official capacity is properly brought in the name of the city as the real party in interest. Boise City v. Randall (1901) 8 I. 119, 66 P. 938.

Action by agent: A real estate broker who takes an option for the purchase of property in his own name, but in reality for the benefit of a customer, to whom he demands its conveyance, having himself no interest in the contract beyond a contingent commission in case the sale is made, can not maintain a suit for the specific enforcement of the contract, as he is not the real party in interest and does not bring himself within the exceptions enumerated in this section. Lawyer v. Post (1901) 109 F. 512.

Where an attorney has collected moneys for his clients and deposited the same in a bank and sues to collect the money so deposited from the bank, his clients, for whom the money was deposited, are proper parties plaintiff. Cunningham v. Bk. of Nampa (1907) 13 I. 167, 88 P. 975, 121 A. S. R. 257, 10 L. R. A. (N. S.) 706.

Mode of raising objection: The fact that the plaintiff is not the real party in interest can not be taken advantage of by demurrer when it does not appear from the face of the complaint, but is a proper matter of defense. Holton v. Sandpoint L. Co. (1901) 7 I. 573, 64 P. 889.

Negotiable instruments: In relation to negotiable instruments § 5918 of the uniform negotiable instruments law supersedes this section. The holder of such an instrument even though he may hold it for collection only may sue thereon in his own name. Craig v. Palo Alto Stock Farm (1909) 16 I. 701, 102 P. 393; Anderson v. Coolin (1916) 28 I. 494, 155 P. 677.

§ 6635. [4091] **Assignment of thing in action.** In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable instrument, transferred in good faith and upon good consideration, before maturity. [R. S. § 4091.]

Hist. (See C. C. P. '81, § 183) R. S. § 4091, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Almost identical: C. C. P .1872, § 368; Kerr's C. ib.

N. D. Similar: C. C. P. § 7396.

Negotiable instruments: In relation to negotiable instruments § 5918 of the uniform negotiable instruments law supersedes this section. Craig v. Palo Alto Stock Farm (1909) 16 I. 701, 102 P. 393; Anderson v. Coolin (1916) 28 I. 494, 155 P. 677.

Assignment of cost bill: The assignee of a cost bill takes the same subject to any right of offset against the bill existing at the time of the assignment. Northwestern etc. Bk. v. Rauch (1901) 8 I. 50, 66 P. 807.

§ 6636. [4092] **Actions by executors and trustees.** An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section. [R. S. § 4092.]

Hist. (See C. C. P. '81, § 184) R. S. § 4092, reen. R. C. ib., reen. C. L. ib.

Cross ref. Actions by and against executors, etc.: §§ 7657-9. Administrator may sue on the bond of a former executor or administrator: § 7661. Persons to whom letters were issued but who failed to qualify need not be joined in action by or against administrator, etc.: § 7662.

Comp. leg.—Cal: Same: C. C. P. 1872, § 369; Kerr's C. ib .

N. D. Similar: C. C. P. § 7397.

Cited: Cunningham v. Bk. of Nampa (1907) 13 I. 167, 88 P. 975, 121 A. S. R. 257, 10 L. R. A. (N. S.) 706; (In brief of counsel) Craig v. Palo Alto Stock Farm (1909) 16 I. 701; (In brief of counsel) Olson Bros. v. Hurd (1911) 20 I. 47; (In brief of counsel) Hodges v. Lemp (1913) 24 I. 399, 135 P. 250; (In brief of counsel) Robinson v. Lemp (1916) 29 I. 661, 662.

Applied: In a suit against a foreign corporation on an official bond for the use and benefit of all persons who may become aggrieved by the wrongful act or default of the principal, and the state sues on the bond, it sues as trustee of an express trust and the particular persons aggrieved do not need to be joined as parties. S. v. Title Guaranty & Surety Co. (1915) 27 I. 752, 152 P. 189; aff. 240 U. S. 136, 60 L. ed. 566, 36 S. C. R. 345.

§ 6637. [4093] **Married women as parties.** A woman may while married sue and be sued in the same manner as if she were single: *Provided,* That except in actions between husband and wife the husband shall not be chargeable in any manner with the wife's costs or other expenses of suit. ['03, p. 345, § 3.]

Hist. '03, p. 345, § 3, reen. R. C. § 4093, reen. C. L. ib.

Cross ref. The remainder of the act from which this section is taken, and which deals with the property rights of married women is found in the Civil Code: §§ 4656-8. Married woman as defendant in summary proceedings for obtaining possession of real property: § 7327. Married woman as executrix: § 7479.

Comp. leg.—Cal: Same: C. C. P. 1872, § 371; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7393.

Cited: Re Meier & Frank (1917) 30 I. 732, 740, 168 P. 5.

Repeal: This section repeals by implication R. S. § 4093 which provides that "when a married woman is a party her husband must be joined with her" except in certain cases. Decisions under the repealed section are as follows:

Bassett v. Beam (1894) 4 I. 106, 36 P. 501; (In brief of counsel) Campbell v. Kerns (1907) 13 I. 287.

Action by wife: The husband must join with the wife in an action by her for personal injuries but need not join with the action a separate and distinct cause of action for injuries to himself sustained at the same time and by the same wrongful act. Lindsay v. O. S. L. Ry. Co. (1907) 13 I. 477, 90 P. 984, 12 L. R. A. (N. S.) 184.

Action against wife: In an action against the wife to foreclose a mortgage, the husband is a necessary party although the mortgaged property is the separate property of the wife, unless they are living separate and apart by reason of the desertion of the husband, or by an agreement in writing entered into between them. Vermont Loan & Trust Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

§ 6638. [4094] **Same: Wife may defend.** If a husband and wife be sued together the wife may defend her own right, and if the husband neglect to defend she may defend for his right also. [R. S. § 4094.]

Hist. (See C. C. P. '81, § 186) R. S. § 4094, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 372; Kerr's C. ib

N. D. Analogous: C. C. P. §§ 7399, 7401.

Disclaimer by husband: In an action against husband and wife relating to a water right appurtenant to real estate occupied by them as a residence, a disclaimer filed therein by the husband does not af-

fect the rights of the wife, and she may defend the action in her own name. The only effect of such disclaimer is that he refuses to defend the action. Stowall v. Tucker (1900) 7 I. 312, 62 P. 1033.

Wife may testify: The wife may also testify in such action in regard to the contract sued on. Larson v. Carter (1908) 14 I. 511, 94 P. 825.

§ 6639. [4095] Infants and insane persons: Guardians ad litem. When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient, to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. [R. S. § 4095.]

Hist. (See C. C. P. '81, § 187) R. S. § 4095, reen. R. C. ib., reen. C. L. ib.

Cross ref. Appointment of guardians ad litem in justice's court: § 7064.

Nonresident guardian: It is not error to appoint a nonresident as guardian ad litem, although there is a general guardian, where the court is satisfied that the interest of the minor requires it. Pine v. Callahan (1902) 8 I. 684, 71 P. 473.

Time of appointment: The appointment of a guardian ad litem after the trial of a case and on the hearing of a motion for new trial, by an order of the trial court nunc pro tunc, is not a jurisdictional defect, but at most an irregularity which does not of itself vitiate the proceedings. Trask v. Boise King Placers Co. (1914) 26 I. 290, 142 P. 1073.

§ 6640. [4096] Same: Appointment of guardian. When a guardian ad litem is appointed by the court or judge he must be appointed as follows:

1. When the infant is plaintiff; upon the application of the infant if he be of the age of 14 years; or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant; upon the application of the infant if he be of the age of 14 years and apply within 10 days after the service of the summons; if he be under the age of 14, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

3. When an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding. [R. S. § 4096.]

Hist. (See C. C. P. '81, § 188) R. S. § 4096, reen. R. C. ib., reen. C. L. ib.

Cross ref. Appointment of guardian ad litem in justice's court: § 7064.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 373; now subd. 3 has been added as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7400.

Cited: Pine v. Callahan (1902) 8 I. 684, 71 P. 473.

§ 6641. [4097] Action for seduction. An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor. [R. S. § 4097.]

Hist. (See C. C. P. '81, § 189) R. S. § 4097, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 374; Kerr's C. ib.

N. D. See C. C. P. § 7164.

§ 6642. Same: Parent or guardian may prosecute. The parents may prosecute as plaintiffs for the seduction of a daughter under the age of majority at the time of the seduction, and the guardian for the seduction of a ward under the age of majority at the time of seduction, though the guardian or ward be not living with or in the service of the plaintiff or plaintiffs at the time of the seduction, or after-

ward, and there be no loss of service, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. ['15, c. 120, § 2, p. 266.]

Hist. (See C. C. P. '81, § 190) R. S. § 4098, reen. R. C. ib.; am. '15, c. 120, § 2, p. 266, reen. C. L. § 4098.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 375; Kerr's C. ib.

§ 6643. Action for injury to child. The parents may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person. ['15, c. 120, § 3, p. 266.]

Hist. (See C. C. P. '81, § 191) R. S. § 4099, reen. R. C. ib.; am. '15, c. 120, § 3, p. 266, reen. C. L. § 4099.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 376; amended: Kerr's C. ib.

Cited: Trask v. Boise King Placers Co. (1914) 26 I. 290, 298, 142 P. 1073.

§ 6644. [4100] **Action for wrongful death.** When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just. [R. S. § 4100.]

Hist. (See C. C. P. '81, § 192) R. S. § 4100, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 377; same as amended: Kerr's C. ib. Anderson v. G. N. Ry. Co. (1908) 15 I. 513, 98 P. 91; Whitley v. Spokane etc. Ry. Co. (1913) 23 I. 642, 132 P. 121.

N. D. Analogous: C. C. P. §§ 8321, 8322.

Not repealed: This section was not repealed by '09, p. 34, H. B. 26, the employers' liability law. Chiara v. Stewart M. Co. (1913) 24 I. 472, 135 P. 245; St. Germain v. Potlatch Lbr. Co. (Wash. 1913) 135 P. 804.

Construed: The word "heirs" as used in this section means such heirs as are entitled to inherit from a deceased person under the statute of this state. Where there are no heirs the action can not be maintained. Any judgment obtained in such an action inures to the benefit of the "heirs" of the decedent, and in no case becomes a part of the assets of the estate of the deceased. Whitley v. Spokane etc. Ry. Co. (1913) 23 I. 642, 132 P. 121.

The construction of this statute by the supreme court of Idaho, with respect to the nature of the right of action created, is in accord with the accepted view of statutes similar to Lord Campbell's act. The recovery is not for the benefit of the "estate" of the decedent; the heirs are the only beneficiaries and are not represented by the administratrix in a suit brought without their consent. Spokane etc. R. Co. v. Whitley (1915) 237 U. S. 487, 59 L. ed. 1060, 35 S. C. R. 655, aff. 23 I. 642, 132 P. 121.

Nature of action: The right of action given by this section to the heirs or personal representatives of a person whose death is caused by the wrongful act or neglect of another, is an entirely new cause of action for damages for the loss sustained by such beneficiaries, and is not dependent on the right of the deceased to maintain an action for the act which caused his death, had he survived. N. P. Ry. Co. v. Adams (1902) 116 F. 324, 54 C. C. A. 196.

The death of a free passenger on a railway train, not due to omission on the part of the railroad of any duty owing to the deceased, is not "wrongful" or "negligent" within the meaning of this section and does not authorize an action by the heirs against the railroad. N. P. Ry. Co. v. Adams (1904) 192 U. S. 440, 24 S. C. R. 408, 48 L. ed. 513.

Right of action: Under this section neither the widow nor the next of kin can maintain an action in their own names. Vaughn v. Bunker Hill & Sullivan M. etc. Co. (1903) 126 F. 895.

A mother who is the sole heir of an unmarried adult son, may maintain an action in her own name for the wrongful death of such son. Peterman v. N. P. Ry. Co. (1900) 105 F. 335.

Pleading: A complaint under this section is not obnoxious to a general demurrer because it fails to show whether the deceased is a minor or a major. Palmer v. Utah & N. R. Co. (1887) 2 I. 315, 13 P. 425.

Damages: The expression "as under the circumstances of the case, may be just,"

used in this section, means such circumstances as are properly shown to the jury by the evidence under the pleadings, and the jury should be so instructed. The jury should not be permitted to assess damages on their own ideas and notions of what the "circumstances of the case" are, regardless of the pleadings and proof. Holt v. Spokane & Palouse Ry. Co. (1893) 3 I. 703, 35 P. 39.

It is not error for the court to instruct the jury that in considering the amount of pecuniary damages sustained by the plaintiff, they may take into consideration "the degree of intimacy existing between the father and the child and the loss of companionship if such be shown." The jury is not limited to a precise and specific pecuniary amount measured by the direct evidence given in the case, but are at liberty to take into consideration, guided by the evidence given in the case, the intrinsic probabilities 'that damages have been sustained by and on account of the loss of bodily care or intellectual culture or moral training which the parent of the deceased had previously supplied or bestowed. Anderson v. G. N. Ry. Co. (1908) 15 I. 513, 99 P. 91.

In an action by the father for the wrongful death of a son seven years of age, caused by collision on the railway, where it is admitted that the death occurred through the negligence and carelessness of the servants of the defendant, the value of the child's services to the father during the period of his minority should be ascertained by the jury from the evidence introduced and by using their own judgment, common sense and discretion, as an estimate of such services must of necessity to a considerable extent be a matter of opinion. Golden v. Spokane etc. R. Co. (1911) 20 I. 526, 118 P. 1076.

If it be shown heirs have suffered injury in loss of companionship of deceased, such loss may be considered by jury, even though heirs are not relatives in direct line. Kelly v. Lemhi Irr. etc. Co. (1917) 30 I. 778, 168 P. 1076.

§ 6645. [4101] Joinder of parties plaintiff. All persons having an interest in the subject of the action, and in obtaining relief demanded, may be joined as plaintiffs, except when otherwise provided in this code. [R. S. § 4101.]

Hist. (See C. C. P. '81, § 193) R. S. § 4101, reen. R. C. ib., reen. C. L. ib.

Cross ref. Joinder of claimants in mechanics' lien cases: §§ 7352, 7369.

Comp. leg.—Cal: Same: C. C. P. 1872, § 378; Kerr's C. ib.

N. D. Similar: C. C. P. § 7403.

Cited: First Nat. Bk. of Hailey v. Bews (1892) 3 I. 486, 31 P. 816; Boise v. Wilkinson (1909) 16 I. 150, 102 P. 148; Idaho Irr. Co. v. Dill (1914) 25 I. 711, 139 P. 714.

Water suits: Settlers along a stream who have acquired the right to appropriate and use the waters of such stream as the common source of supply have such a common interest in having the rights of the respective appropriators determined and quieted as to entitle them to join as plaintiffs in a suit for that purpose, although each owns his separate land and water right in his own individual capacity. Frost v. Alturas Water Co. (1905) 11 I. 294, 81 P. 996.

Where several land owners agree among themselves to unite in interest and construct their own ditch or lateral and make a joint application to a ditch company for sufficient water for all their land, they may join as plaintiffs in an action to compel the company to deliver the quantity of water applied for at their headgate. Helphrey v. Perrault (1906) 12 I. 451, 86 P. 417.

Separate parties who own and hold their lands separately and each of whom has a separate written contract with a water company whereby the company separately agrees to furnish each with water for the irrigation of his land, can not join in a common action to compel the company to deliver them a sufficient amount of water to properly irrigate their lands. Creer v. Bancroft Land & Irr. Co. (1907) 13 I. 407, 90 P. 228.

§ 6646. Joinder of parties defendant. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant. ['09, p. 20, H. B. 76.]

Hist. (See C. C. P. '81, § 194) R. S. § 4102, reen. R. C. ib.; am. '09, p. 20, H. B. 76, reen. C. L. § 4102.

Comp. leg.—Cal. Similar: C. C. P. 1872, 379; Kerr's C. ib.

N. D. Similar: C. C. P. § 7404.

Cited: Boise v. Wilkinson (1909) 16 I. 50, 102 P. 148; Idaho Irr. Co. v. Dill 1914) 25 I. 711, 139 P. 714.

Custodian of fund: A bank is a proper party defendant to an action brought by a depositor to recover money deposited therein, although it may be shown on the trial as a defense that the bank is no longer liable because of having parted with the deposit in good faith. Cunningham v. Bk. of Nampa (1907) 13 I. 167, 88 P. 975, 121 A. S. R. 257, 10 L. R. A. (N. S.) 706.

Parties affected by judgment: A sheriff who has sold property under execution sale and who refuses to make a deed therefor to the purchaser, the execution defendants whose property was sold, and a third party who claims adversely to the plaintiff, may be joined as defendants in an action by

the purchaser to obtain a sheriff's deed to the property. Brady v. Linehan (1898) 5 I. 732, 51 P. 761.

Community of interest: Where settlers along a stream claim the waters from the stream to irrigate their lands they all have such a common interest in the adjudication of the water rights of the stream that they may all be joined as defendants in a suit by other appropriators of waters from the same stream, brought for the purpose of determining such rights. Frost v. Alturas Water Co. (1905) 11 I. 294, 81 P. 996.

Additional parties: Where the rights of the parties to an action can not be properly determined without bringing in other parties, the court should permit the defendant to file a cross complaint and require such other parties to be brought in. First Nat. Bk. of Hailey v. Bews (1892) 3 I. 486, 31 P. 816.

§ 6647. [4103] **Same: Actions to determine adverse claims.** In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and if the judgment be for the plaintiff he may have a writ for the possession of the premises, as against the defendants in the action against whom the judgment has passed. [R. S. § 4103.]

Hist. (See C. C. P. '81, § 195) R. S. § 4103, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 380; same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8148.

§ 6648. [4104] **Plaintiffs claiming under common title.** Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same. [R. S. § 4104.]

Hist. (See C. C. P. '81, § 196) R. S. § 4104, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 381; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8146.

§ 6649. [4105] **Unity of interest: Nonconsenting parties.** Of the parties to the action, those who are united in interest must be joined as plaintiffs, or defendants; but if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. [R. S. § 4105.]

Hist. (See C. C. P. '81, § 197) R. S. § 4105, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 382; Kerr's C. ib.

N. D. Similar: C. C. P. § 7406.

Cited: Whitley v. Spokane etc. Ry. Co. (1913) 23 I. 642, 132 P. 121, aff. 237 U. S. 487, 59 L. ed. 1060, 35 S. C. R. 655; Bower v. Moorman (1915) 27 I. 162, 147 P. 496, Ann. Cas. 1917C 99.

Construed: It is not all persons who have an interest in the subject matter of the suit but in general those only who have an interest in the object of the suit who are ordinarily required to be made parties. The term "parties to an action" is used to designate the person or persons seeking to establish a right, and the person or persons upon whom it is sought to impose a corresponding duty or liability. Idaho Irr. Co. v. Dill (1914) 25 I. 711, 139 P. 714.

§ 6650. [4106] **Defendants severally liable.** Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff. [R. S. § 4106.]

Hist. (See C. C. P. '81, § 198) R. S. § 4106, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 383; same in part as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7407.

Cited: First Nat. Bk. v. Williams (1890) 2 I. 670, 23 P. 552; (In brief of counsel) Armstrong v. Slick (1908) 14 I. 208.

§ 6651. [4107] **Cotenants may join or sever.** All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. [R. S. § 4107.]

Hist. (See C. C. P. '81, § 199) R. S. § 4107, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: C. C. P. 1872, § 384; Kerr's C. ib.

§ 6652. [4108] **Actions not to abate on death or transfer of interest.** An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. [R. S. § 4108.]

Hist. (See C. C. P. '81, § 200) R. S. § 4108, reen. R. C. ib., reen. C. L. ib.

Cross ref. Action to recover land does not abate by transfer of defendant's interest: § 6969. In case of death of defendant pending suit the claim must be presented to the executor or administrator: § 7590. Judgment after death: § 6900.

Comp. leg.—Cal. Differs slightly: C. C. P. 1872, § 385; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7408.

Cited: Good Road Dist. No. 2 v. Wash. Co. (1915) 27 I. 732, 152 P. 183.

§ 6653. [4109] **Substitution of defendant.** A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order. [R. S. § 4109.]

Hist. (See C. C. P. '81, § 201) R. S. § 109, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 286; same in part as amended: Kerr's . ib.

N. D. Similar: C. C. P. § 7414.

Cited: Dennison v. Willcut (1894) 3 I. 93, 35 P. 698.

Identity of claims: To authorize the substitution of a third person for the defendant the claims under which the substitution is made must be identical and must arise upon the same contract; where two suitors are seeking to recover from a general debtor, the one upon express contract and the other upon garnishment, there is no such identity of claims as to authorize substitution to be made. McCauley v. Sears (1893) 3 I. 676, 34 P. 814.

§ 6654. [4110] **Conflicting claims: Interpleader.** Whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another. [R. S. 4110.]

Hist. R. S. § 4110, reen. R. C. ib., reen. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; same provision is found in Kerr's C. § 386.

N. D. Similar: C. C. P. § 7412.

Cited: Blumaur-Frank Drug Co. v. Branstetter (1895) 4 I. 557, 43 P. 575.

Escrow agreement: Where a mining company enters into a contract with other parties for the sale of mining stock and an escrow agreement is entered into whereby the stock and agreements are deposited with a bank and a controversy arises between the parties to the contract and escrow agreement as to what shall be done with the stock and the cash paid for the stock, the depositary may bring an action to require the adverse parties to interplead, and upon proper allegations the court may permit the escrow to turn such stock and money into the hands of the court and thus relieve the escrow holder from further responsibility. First Nat. Bk v. Callahan M. Co. (1916) 28 I. 627, 155 P. 673.

§ 6655. [4111] Intervention. Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding any thing adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. [R. S. § 4111.]

Hist. (See C. C. P. '81, § 202) R. S. § 4111, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 387; Kerr's C. ib. Potlatch L. Co. v. Runkel (1909) 16 I. 192, 101 P. 396, 18 Ann. Cas. 591, 23 L. R. A. (N. S.) 536.

N. D. Similar: C. C. P. § 7413.

Cited: Berlin Mach. Works v. Bradford-Kennedy Co. (1912) 21 I. 669, 123 P. 637; Union Trust etc. Bk. v. Idaho S. & R. Co. (1913) 24 I. 735, 135 P. 822.

Construction: The word "action" as used in this section means a civil action purely, and no intervention is authorized in proceedings of a quasi criminal nature such as proceedings in quo warranto. People v. Green (1869) 1 I. 235.

Interest authorizing intervention: The interest which entitles a person to intervene in a suit against other parties must be in the matter in litigaton, and of such a direct and immediate character that the intervenor will either gain or lose in the direct legal operation and effect of the judgment. People v. Green (1869) 1 I. 235; Pittock v. Buck (1908) 15 I. 47, 96 P. 212.

The fact that an intervenor has some other and adequate remedy for the protection of his property and right is no bar to his right to intervene. Potlatch L. Co. v. Runkel (1909) 16 I. 192, 101 P. 396, 18 Ann. Cas. 591, 23 L. R. A. (N. S.) 536.

Separate action instituted by a party does not prevent such party intervening in another action between other parties involving the same subject matter and similar conflicting interests. Kaesemeyer v. Smith (1912) 22 I. 1, 16, 17, 123 P. 943, 43 L. R. A. (N. S.) 100.

Claimant of fund: Where a fund is deposited in court pursuant to stipulation, to abide the result of the action, a third person claiming an interest in said fund is entitled to intervene in the action. Pence v. Sweeney (1891) 3 I. 181, 28 P. 413.

Claim or ownership of attached property: The owner or claimant of property attached in an action for debt has such an interest against both parties to the main action as entitles him to intervene for the purpose of asserting his right and title to the attached property. Potlatch L. Co. v. Runkel, supra.

Judgment creditors: A judgment creditor and general creditors whose claims had been allowed in receivership suit may intervene in the foreclosure suit and contest validity of the mortgage so far as it covered personal property. Equitable etc. Co. v. Great Shoshone Co. (1917) 245 F. 697.

Effect of intervention: One who is allowed to intervene in a suit between third persons becomes a party to such suit, and his rights are as comprehensive as those of the original parties so far as any action of the court intereferes with said rights, and he is consequently entitled to a writ of review equally with the original parties to the suit. Gold Hunter M. etc. Co. v. Holleman (1891) 3 I. 99, 27 P. 413.

Pleadings: When an officer whom it is sought to oust by quo warranto proceedings holds office under the statute until his successor is elected and qualified, a complaint in intervention in such proceeding which alleges that the officer wrongfully withholds the office but directly avers that the intervenor has failed to qualify, fails to state a cause of action. People v. Green (1869) 1 I. 235.

Time for intervention: A complaint in intervention filed after the joinder of issue on demurrer and the submission of the case thereby, is too late. Ib.

In a foreclosure suit it is within court discretion whether a creditor who had not availed himself of the right to intervene and contest mortgage should be allowed to set up a claim. Equitable etc. Co. v. Great Shoshone etc. Co., 245 F. 697.

§ 6656. [4112] **Actions against partners.** When two or more persons associated in any business transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability. [R. S. § 4112.]

Hist. (Sec C. P. '81, § 203) R. S. § 4112, reen. R. C. Ib., reen. C. Lb.

Comp. leg.—Cal. Same: C. C. P. 1872, § 388; Kerr's C. ib.

§ 6657. [4113] **Additional parties.** The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties the court must then order them to be brought in, and thereupon the party, directed by the court, must cause to be served a copy of the summons in the action, and the order aforesaid, in like manner as provided for the service of the summons, upon each of the parties ordered to brought in, who shall have 10 days or such time as he court may order, after service in which to appear and plead; and n case such party fail to appear and plead within the time aforesaid, he court may cause his default to be entered and proceed as in other ases of default, or make such other order as the condition of the action nd justice shall require, and when, in an action for the recovery of eal or personal property, a person not a party to the action, but having n interest in the subject thereof, makes application to the court to be nade a party, it may order him to be brought in by the proper amendment. [R. S. § 4113.]

Hist. (See C. P. '81, § 204) R. S. § 4113, een. R. C. ib., reen. C. L. ib.

Cross ref. Bringing in additional parties in partition; § 6985.

Comp. leg—Cal. Same in part: C. C. P. 872, § 389; Kerr's C. ib.

Cited: Willman v. Friedman (1894) 4 I. 09, 38 P, 937; Stevens v. Home etc. Assn. 1898) 5 I. 741, 51 P. 779, 986.

Possible claimants: Where in an action gainst a carrier for the loss of property ntrusted to it there is any question or oubt as to the party to whom the carrier liable, all necessary parties may be rought in and required to set up their terests and determine their respective ghts and thus protect the carrier from the sertion of any further claim by other rties; thus, if action is brought by the nsignor, the carrier may bring the congnee in as a party to have his right adicated and protect the carrier from fur- er liability to him. Pratt v. N. P. Exess Co. (1907) 13 I. 373, 90 P. 341, 121 S. R. 268, 10 L. R. A. (N. S.) 499.

Time of order: Other parties may be brought in at any stage of the action before decision of the court or verdict of the jury, when it is ascertained that they are necessary parties. First Nat. Bk of Hailey v. Bews (1892) 3 I. 486, 31 P. 816; Smith v. Rader, 31 I. 423, 173 P. 970.

Duty of court: Where a complete determination of the rights of all water users on a stream can not be had without their presence it is the imperative duty of the trial court, under this section, to make the necessary order to bring them in, that their rights may be adjudicated. It is left largely to the trial court to determine in the first instance whether such an order should be made. Weiser Irr. Dist. v. Middle Valley etc. Co. (1916) 28 I. 548, 155 P. 484.

A failure to make a person a party to a suit where he is a proper but not an indispensable party does not affect the judgment against those properly made parties. Frost v. Idaho Irr. Co. (1911) 19 I. 372, 114 P. 38.

§ 6658. [4114] **Unknown owners or heirs as parties.** In all actions proceedings to obtain title or possession, or to remove adverse claim title, or to quiet title, or for partition, or for sale, or for foreclosure any incumbrance, or enforcement of any trust, or specific performance any contract, or for any other disposition of any property, real, ersonal, or mixed, situate within the state of Idaho, including choses action either situate within or due or claimed to be due from persons, rms or corporations resident within the state of Idaho, persons may

be made parties defendant either on the filing of the complaint, cros complaint or complaint in intervention, as the case may be, or at an time thereafter by amendment thereof, by the name and descriptio of unknown owners, or unknown heirs, or unknown devisees of an deceased person, or by all of such designations. When persons ar made parties defendant by the designation of unknown owners ther shall be added to such designation a brief description of the property real, personal, or mixed, including choses in action as aforesaid, o which such persons are claimed or supposed to be unknown owner or claimants or parties in interest. When any persons are made de fendant by the style and description of unknown heirs, there shall b added to such designation of them the name of the deceased perso of whom they shall be claimed or supposed to be the heirs. Whe persons are made defendant by the style and description of unknow devisees, there shall be added to such designation the name of th deceased person of whom they shall be claimed or supposed to be th devisees. ['03, p. 370, § 1.]

Hist. '03, p. 370, § 1, reen. R. C. § 4114, reen. C. L. ib.

Comp. leg—N. D. Analogous: C. C. P. § 8149.

Cross ref. Express reference to thi section: Dissolution and modification o irrigation districts: § 4434.

§ 6659. [4115] Same: Summons, affidavit and publication. Whe persons are made defendant by any or all of the designations abov mentioned such persons shall be named as defendants by such desig nations respectively in all summons which shall thereafter issue in th action. After the issue of any such summons in the action or proceed ings, on the filing of an affidavit made by or on behalf of the plain tiffs in the action, or some one or more of them, stating that there ar persons interested in the controversy whose names are unknown to th plaintiffs, or any of them, and, in case of unknown heirs and devisee that there are persons interested in the controversy whose names ar unknown to the plaintiffs in the action, or any of them, and who deriv their interest as heirs of some person deceased, naming such perso or as devisees of such deceased person, naming such person, or bot as such heirs and devisees, or either as heirs or devisees, and that nor of the plaintiffs know whether as heirs or devisees, and that the nam of such heirs and devisees are unknown to the plaintiffs, the court judge thereof, or the probate judge of the county in which the actio is pending, must direct that publication be made of such summo in a newspaper to be designated as most likely to give notice to th person or persons to be served, and for such length of time as ma be deemed reasonable at least once a week for not less than one mont Proof of such publication of summons shall be made in the manner no provided by law for proof of publication of summons. The servi of such summons upon persons made parties as aforesaid shall deemed complete at the expiration of the time prescribed by the ord for publication. ['03, p. 370, § 2.]

Hist. '03, p. 370, § 2 reen. R. C. § 4115, reen. C. L. ib.

Cross ref. Express reference to this section: Dissolution and modification of irrigation districts: § 4434. Publicati of summons: § 6677-8.

Comp. leg.—N. D. Analogous: C. C. § 8150.

§ 6660. [4116] Same: Effect of judgments and decrees. Judgme and decrees rendered in actions or proceedings when persons have be made parties and served by publication as aforesaid, shall have t same effect in all respects as if such persons had been made parties their own proper names, and had been served by publication and ma

ng of summons according to the statutes in such case made and pro-ided. If in such action or proceeding persons are made parties by the lesignation of unknown heirs as aforesaid, the judgment or decree hall be conclusive as to all heirs of such deceased party. When in any ction or proceeding persons are made defendants by the designation f unknown devisees as aforesaid, the judgment or decree in such pro-eeding shall be conclusive as against all devisees of such deceased erson. When in any action or proceeding persons are made defend-nts by the designation of unknown owners as aforesaid, the judg-nent or decree rendered in such action or proceeding shall be conclu-ive as against the world, including all contingent interests in the con-roversy and persons not in being who may have an interest or contin-ent interest therein. ['03, p. 370, § 3.]

Hist. '03, p. 270, § 3, reen. R. C. § 4116, een. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 8154.

Cross ref. Express reference to this sec-ion: Dissolution and modification of irri-ation districts: § 4434.

CHAPTER 252.

PLACE OF TRIAL OF CIVIL ACTIONS.

§ **6661.** [4120] **Actions relating to real property.** Actions for the ollowing causes must be tried in the county in which the subject of the ction or some part thereof is situated, subject to the power of the ourt to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or interest herein, or for the determination in any form of such right or interest nd for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property. Where the eal property is situated partly in one county and partly in another, he plaintiff may select either of the counties, and the county so selected s the proper county for the trial of such action. [R. S. § 4120.]

Hist. (See C. C. P. '81, § 205) R. S. § 120, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7415.

Comp. leg.—Cal. Same: C. C. P. 1872, 392; Kerr's C. ib.

§ **6662.** [4121] **Actions for penalties and against officers.** Actions or the following causes must be tried in the county where the cause, r some part thereof, arose, subject to the like power of the court to hange the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute, xcept, that when it is imposed for an offense committed on a lake, iver or other stream of water, situated in two or more counties, the ac-on may be brought in any county bordering on such lake, river or ream, and opposite to the place where the offense was committed.

2. Against a public officer, or person specially appointed to execute is duties, for any act done by him in virtue of his office; or against a erson who, by his command or in his aid, does anything touching the uties of such officer. [R. S. § 4121.]

Hist. (See C. C. P. '81, § 206) R. S. § 121, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7416.

Comp. leg.—Cal. Same: C. C. P. 1872, 393; Kerr's C. ib.

§ **6663.** [4122] **Actions against counties.** An action against a county ay be commenced and tried in such county unless such action is

brought by a county, in which case it may be commenced and tried in any county, not a party thereto. [R. S. § 4122.]

Hits. (See C. C. P. '81, § 207) R. S. § 4122, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Somewhat similar: C. C. P. 1872, § 394; now similar by amendment: Kerr's C. ib.

§ 6664. [4123] **Other actions: Venue determined by residence.** In all other cases the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action; or, if none of the defendants reside in the state, or, if residing in this state, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside, or service is had, subject, however, to the power of the court to change the place of trial, as provided in this code: *Provided,* That in all actions against life or fire insurance companies, suit or action may be commenced and tried in the county where the death occurred or the loss was sustained. ['97, p. 9, § 1.]

Hist. (See C. C. P. '81, § 208) R. S. § 4123; am. '97, p. 9, § 1, reen. '99, p. 292, § 1, reen. R. C. § 4123, reen. C. L. ib.

Cross ref. Actions against insurance companies may be brought where the loss occurs or where the policy holder resides: § 4967.

Comp. leg—Cal. Same to proviso, rest omitted: C. C. P. 1872, § 395; Kerr's C. ib.

N. D. Similar: C. C. P. § 7417.

Cited: Guynn v. McDaniel (1895) 4 I. 605, 43 P. 74; Smith v. Intermountain Auto Co. (1913) 25 I. 212, 136 P. 1125.

Actions against corporations: Either a domestic corporation or a foreign corporation which has complied with the requirements of the statute prescribing the conditions on which it may do business in the state is entitled to be sued in the county in which its principal place of business is located. (Overruled: Boyer v. N. P. Ry. Co. post.) Easely v. New Zealand Ins. Co. (1894) 4 I. 205, 38 P. 405.

Same: Foreign corporations may be sued in any county of the state although the designated agent for the service of process resides in some other county than that of suit. (Overruling Easely v. Ins. Co. ante.) Boyer v. N. P. Ry Co. (1901) 8 I. 74, 66 P. 826.

§ 6665. [4124] **Improper venue: Proceedings.** If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county. [R. S. § 4124.]

Hist. (See C. C. P. '81, § 209) R. S. § 4124, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 396; Kerr's C. ib.

N. D. Similar: C. C. P. § 7418.

Cited: Easely v. New Zealand Ins. Co. (1894) 4 I. 205, 38 P. 405.

Rights of cross-complainant: Where an action is commenced to contest the foreclosure of a chattel mortgage and a cross-complaint is filed seeking to foreclose a real estate mortgage covering property in another county and given to secure the same debt for which the chattel mortgage was given, the court in which the action is commenced has jurisdiction to foreclose the real estate mortgage, and the cross complainant is not entitled to a change of venue to the county in which the real property is situated. Murphy v. Russell (1901) 8 I. 151, 67 P. 427.

§ 6666. Change of venue: When granted. The court or judge must, on motion, when it appears by affidavit or other satisfactory proof change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial can not be had therein.

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

4. When from any cause the judge is disqualified from acting. ['13 c. 96, p. 385.]

Hist. (See C. C. P. '81, § 210) R. S. § 4125, reen. R. C. ib.; am. '13, c. 96, p. 385, reen. C. L. § 4125.

Cross ref. Application for change of venue may be heard and determined at chambers: § 6493. Grounds of disqualification of judge: § 6499.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 397; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7418.

Cited: Easely v. New Zealand Ins Co. (1894) 4 I. 205, 38 P. 405.

Discretion of trial court: An application for a change of venue is addressed to the sound legal discretion of the trial court, and the decision reached by the trial court on such matter will not be reversed on appeal unless the showing made is such as to convince the appellate court that the trial court has abused such discretion. Gibbert v. Wash. W. P. Co. (1911) 19 I. 637, 115 P. 924. But see Gordon v. Conor (1897) 5 I. 673, 51 P. 747; Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122.

Popular prejudice: Where a motion for change of venue is based on the ground of popular prejudice, supported by the affidavit of the applicant and denied by the counter affidavit of the adverse party, supported by the affidavits of 100 citizens showing that each of them is competent to sit as a juror in the case, it is error to grant the motion, although the applicant alleges without contradiction that two juries had failed to agree in the case. Sommercamp v. Catlow (1878) 1 I. 717.

Counter affidavit may be filed in opposition to a motion for change of venue on the ground of popular prejudice. Hyde v. Harkness (1875) 1 I. 601.

An application for change of venue on the grounds of popular prejudice ought to be supported by the affidavits of persons who have either been over the county generally or through large communities thereof, and have heard the citizens generally express themselves in regard to the matter at issue, or by residents of different portions of the county who know of the sentiment prevailing in their respective communities. Gibbert v. Wash. W. P. Co., supra.

Convenience of witness: A motion for change of venue on the ground of convenience of witnesses is addressed to the sound discretion of the trial court and its action will not be reversed in the absence of an abuse of discretion. Shirley v. Nodine (1878) 1 I. 696.

Where an application for change of venue on the ground of convenience of a witness shows that the witness resides in another state, the application should at least allege that the witness had promised to attend the trial if the change should be ordered; it is insufficient to allege that he thinks that he will do so. Ib.

Where a motion for change of the place of trial is made under the provisions of this section upon the ground that "the convenience of witnesses and the ends of justice would be promoted by the change," but no affidavits accompany the motion in support thereof, and it does not appear from the complaint or answer that the convenience of witnesses or the ends of justice would be promoted by such change, it is no abuse of discretion to deny the motion. Young v. Extension Ditch Co. (1916) 28 I. 775, 156 P. 917.

Prejudice of judge: Prejudice of the judge is ground for a change of venue under this section in view of Const. V, 18. which requires the courts to administer justice without prejudice. (Stockslager, C. J. dissents) Day v. Day (1906) 12 I. 556; 86 P. 531.

When a district judge is disqualified from acting as a judge in a case pending in his court, and a motion is made for a change of venue on the ground of such disqualification, it is the duty of such judge to grant a change of venue, and such duty is mandatory and not discretionary. Gordon v. Conor (1897) 5 I. 673, 51 P. 747. Especially is this true since the '13 amendment. Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122.

Where a motion is made and sustained for change of venue on the ground of disqualification of the judge, such judge has no power to pass upon questions preliminary to the trial, such as the question of convenience of witnesses as determining the place of trial. Gordon v. Conor, Ib.

Where a party moves for a change of place of trial, on the grounds of the prejudice of the judge, it is not sufficient for him to state that "he has good reason to believe, and does believe, that he can not have a fair and impartial trial," but he must state the facts upon which he predicates his charge of prejudice. Bell v. Bell (1910) 18 I. 636, 111 P. 1074.

§ 6667. [4126] Same: Disqualification of judge. Whenever in any action pending before any court, the judge or justice thereof shall be disqualified from acting therein, or, if from any cause the court orders the place of trial to be changed, it must be transferred for trial to such other court of competent jurisdiction as may be agreed upon by the parties by stipulation in writing in open court, and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1. If in the district court, to another district court.
2. If in the probate court, to the district court in the same county.
3. If in a justice's court, to another justice's court in the same county.
4. Whenever the judge of any district court shall be disqualified from hearing any cause pending therein, and any of the attorneys of record in such cause shall petition the governor to request that the

judge of some other district court hold court in the county wherein such cause is pending, the governor may request the judge of the district court of some other district, who is not disqualified, to hold court in the county in which such cause is pending; and, upon receiving such request from the governor, it shall be the duty of the judge so requested to hold such court and to try and determine such cause, and it shall be the duty of the disqualified judge to hold court for an equal length of time for the judge who takes his place, if so requested by such judge. The request of the attorneys hereinbefore provided for shall be in writing, filed in the cause, and a copy thereof, together with a list of all the attorneys of record in such cause, shall be certified by the clerk of the court to the governor as speedily as possible. ['07, p. 578, § 1.]

Hist. R. S. § 4126; am. '07, p. 578, § 1, reen. R. C. § 4126, reen. C. L. ib.

Cross ref. District judge may hold court in other districts: § 6492; Const. V, 12. Judge pro tem may try cause: Const. V, 12. Grounds of disqualification: § 6499.

Comp. leg.—Cal. Similar through subd. 3: C. C. P. 1872, § 398; as amended: Kerr's C. ib.

Cited: Gordon v. Conor (1897) 5 I. 673, 51 P. 747; Bell v. Bell (1910) 18 I. 636, 111 P. 1074.

Contents of order: The order should transfer the cause to the nearest court, without designating the particular judge who shall try the case. Callahan v. Callahan (1917) 30 I. 431, 165 P. 1122.

§ 6668. [4127] **Same: Transmission of papers.** When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein. [R. S. § 4127.]

Hist. (See C. C. P. '81, § 212) R. S. § 4127, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 399; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7419.

§ 6669. [4128] **Same: Proceedings after judgment.** When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket and record the judgment in the records of the court, briefly designating it as a judgment transferred from ..... court (naming the proper court.) [R. S. § 4128.]

Hist. (See C. C. P. '81, § 213) R. S. § 4128, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 400; Kerr's C. ib.

CHAPTER 253.

MANNER OF COMMENCING CIVIL ACTIONS.

§ 6670. [4138] **Actions commenced by filing complaint.** Civil actions in the courts of this state are commenced by filing a complaint. [R. S. § 4138.]

Hist. (See C. C. P. '81, § 214) R. S. § 4138, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 405; Kerr's C. ib.

N. D. See C. C. P. § 7420.

Cited: Gold Hunter M. etc. Co. v. Holleman (1891) 3 I. 99, 27 P. 413; West Theis (1908) 15 I. 167, 96 P. 932, 128 A.

2. 58, 17 L. R. A. (N. S.) 472; Shaw v. Martin (1911) 20 I. 168, 117 P. 583; (Dis. p.) Elmore Co. etc. Assn. v. Stockslager 1912) 22 I. 420, 126 P. 616.

Claim and delivery: An action to recover the possession of personal property is commenced by filing a complaint, and the filing of the affidavit and undertaking in "claim and delivery" is not required in order to commence or maintain the action. Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

§ 6671. [4139] Indorsements on complaint: Issuance of summons: Appearance. The clerk must indorse on the complaint the year, month, day, hour and minute that it is filed, and at any time within one year hereafter the plaintiff may have a summons issued; and if the action be brought against two or more defendants who reside in different counties, may have a summons issued for each of said counties. But at any time within the year after the complaint is filed the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons, or if the action be brought upon a joint contract by two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial. ['95, p. 139, § 1.]

Hist. (See C. C. P. '81, § 215) R. S. § 139; am. '95, p. 139, § 1, reen. '99, p. 271, 1, reen. R. C. § 4139, reen. C. L. ib.

Comp. leg.—Cal. See C. C. P. 1872, § 06; similar as amended: Kerr's C. ib.

Cited: Gold Hunter M. etc. Co. v. Holman (1891) 3 I. 99, 27 P. 413; Ridenbaugh v. Sandlin (1908) 14 I. 472, 94 P. 827, 125 A. S. R. 175; West v. Theis (1908) 15 I. 167, 96 P. 932, 128 A. S. R. 58, 17 L. R. A. (N. S.) 472; Shaw v. Martin (1911) 20 I. 168, 117 P. 853; (Dis. op.) Elmore Co. etc. Assn. v. Stocklager (1912) 22 I. 420, 126 P. 616; U. S. v. Scheurman (1914) 218 F. 915, 920.

§ 6672. Form of summons. The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain the name of the parties to the action, the court in which it is brought and the county in which the complaint is filed, and may be in substantially the following form: *Provided, however,* That where the summons is to be served by publication, it shall contain in general terms a statement of the nature of the cause of action.

In the district court of the.....judicial district of the state of Idaho, in and for.....county.

.....
Plaintiff.
vs. } *Summons*
.....
Defendant.

The state of Idaho sends greetings to (name or names of defendants), the above-named defendant.

You are hereby notified that a complaint has been filed against you in the district court of the (the number of the district) judicial district of the state of Idaho in and for the county of (name of county) by the above-named plaintiff, and you are hereby directed to appear and answer the said complaint within 20 days of the service of this summons, if served within said judicial district, and within 40 days if served elsewhere; and you are further notified that unless you so appear and answer said complaint within the time herein specified, the plaintiff will take judgment against you as prayed, in said complaint.

Witness my hand and the seal of said district court, this.....day of....., 19.....

.....
Clerk.

.....
Deputy.

The name of the plaintiff's attorney, with his post-office address or residence, must be indorsed on the summons. ['13, c. 87, p. 361.]

Hist. (See C. C. P. '81, § 216) R. S. § 4140; am. '07, p. 537, § 1, reen. R. C. § 4140; am. '13, c. 87, p. 361, reen. C. L. § 4140.

Cross ref: Sheriff must indorse time of reception on process: § 3596. Summons must be indorsed by resident attorney: § 6702. Summons in proceedings for assessment of damages against drainage district: § 4534; in action to condemn lands for mining purposes: § 5540; in partition: § 6980; after judgment in proceedings against joint debtors: § 7186-7; in election contests: § 7283; in condemnation proceedings: § 7411.

Comp. leg.—N. D. Analogous: C. C. P. § 7422. See also C. C. P. §§ 7421, 7423.

Cited: Dunbar v. Griffiths (1908) 14 I. 120, 93 P. 654; Ridenbaugh v. Sandlin (1908) 14 I. 472, 94 P. 827, 125 A. S. R. 175; U. S. v. Anderson (1909) 169 F. 201, 204.

Sufficiency of summons: A substantial compliance with the statute is all that is required. Hill v. Morgan (1904) 9 I. 718, 76 P. 323; McKnight v. Grant (1907) 13 I. 629, 92 P. 989, 121 A. S. R. 287; Harpold v. Doyle (1909) 16 I. 671, 102 P. 158; Snake River Valley Irr. Dist. v. Stevens (1910) 18 I. 541, 110 P. 1033.

Attempt to remove does not excuse appearance: This section fixes the time within which to appear and answer, and the defendant is not excused from answering within such time because of his vain effort to get the case into a federal court. Morbeck v. Bradford-Kennedy Co. (1910) 19 I. 83, 95, 113 P. 89; S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

Name of attorney: The provision requiring that "the name of plaintiff's attorney, with his postoffice address or residence, must be indorsed on the summons," is directory and not mandatory. Foore v. Simon Piano Co. (1910) 18 I. 167, 108 P. 1038.

§ 6673. Alias summons. If the summons is returned, without being served on any or all of the defendants, or if it has been lost, the clerk, upon demand of the plaintiff, may issue an alias summons in the same form as the original. ['11, c. 110, p. 366.]

Hist. (See C. C. P. '81, § 217) R. S. § 4141, reen. R. C. ib.; am. '11, c. 110 p. 366, reen. C. L. § 4141.

Comp. leg.—Cal. See C. C. P. 1872, § 408; same as amended: Kerr's C. ib.

Form of alias: An alias summons must be in the same form as the original but need not be in identically the same langauge, and is not vitiated by the insertion of a few additional words which language, and is not vitiated by the in the action, and do not attempt to change the nature of the action or the demand for relief. Hill v. Morgan (1904) 9 I. 718, 76 P. 323.

The omission of the seal of the court on an alias summons is not fatal, but is a mere irregularity and does not render the process void. Harpold v. Doyle (1909) 16 I. 671, 102 P. 158.

Presumption of demand: In considering the sufficiency of an alias summons it will be presumed that the demand or the clerk was duly made therefor, in the absence of any showing to the contrary. Hill v. Morgan, supra.

§ 6674. [4142] **Lis pendens.** In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. [R. S. § 4142.]

Hist. (See C. C. P. '81, § 218) R. S. § 4142, reen, R. C. ib., reen. C. L. ib.

Cross ref. Lis pendens in actions on official bonds: § 450; in suits for partition: § 6979.

Comp leg.—Cal. Similar: C. C. P. 1872, § 409; same as am.; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7425.

Actual notice: The filing of a lis pendens is necessary only for the purpose of giving record notice to subsequent purchasers or incumbrancers of the property who do not have actual knowledge of the action or of the claim upon which it is based; one who has actual knowledge is not entitled to insist that the filing of a lis pendens was necessary. Smith v. Faris-Kesl Const. Co. (1915) 27 I. 407, 151 P. 25.

§ 6675. [4143] **Service of summons: Return.** The summons may be served by the sheriff of the county where the defendant is found, or b

any other person over the age of 18, not a party to the action. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. When the summons is served by the sheriff, it must be returned with his certificate of its service, and of the service of a copy of the complaint when such copy is served, to the office of the clerk from which it issued. When it is served by any other person it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint, when such copy is served. [R. S. § 4143.]

Hist. (See C. C. P. '81, § 219) R. S. § 4143, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Almost identical: C. C. P. 1872, § 410; now same by amendment: Kerr's C. ib.

N. D. Similar: C. C. P. § 7427.

Cited: (Con. op.) O'Neill v. Potvin (1907) 13 I. 721, 733, 93 P. 20.

Exemption from service: A nonresident who commences a suit in the circuit court of the United States against a resident of this state, and attends in this state for the purpose of conducting said suit, is not by reason of such attendance exempt from service of summons in a suit against him brought by the defendant in the suit brought by him. Guynn v. McDaneld (1895) 4 I. 605, 43 P. 74.

Motion to quash: Where the sheriff returns that he served a certified copy of the complaint with the summons a motion to quash, based on an affidavit stating that no copy of the complaint has been served with the summons, is properly overruled, where the defendant refuses to produce the copy of the complaint served on him after being ordered to do so. Forsman v. Bright (1902) 8 I. 467, 69 P. 473.

Time of service: There is no statutory limitation as to the time within which the summons must be served after being issued; but the action may be dismissed where reasonable diligence to serve it is not shown; and reasonable diligence is a question of fact. Shaw v. Martin (1911) 20 I. 168, 117 P. 853.

Necessity of record: Where clerk's record does not show issuance of summons, and return of service is on unauthenticated copy, default based thereon is void. Leonard v. Brady (1915) 27 I. 78, 147 P. 284.

§ 6676. Same: Manner of service. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a corporation formed under the laws of this state, to the president or other head of the corporation, secretary, cashier or managing agent thereof: *Provided,* That if such president, secretary, cashier or managing agent shall all have moved from or ceased to be a resident of, or be absent from the state, or their names can not be ascertained by the sheriff or other person seeking to procure service, then service may be made by delivering a copy of the summons and copy of the complaint to the auditor of the county in which the principal place of business of such corporation is located according to its articles of incorporation, in the manner and with the same effect as though such service had been made upon any of the above officers or agents of such company. It shall be the duty of such auditor to forward a copy of any such summons so served on him, by registered mail, to such corporation at its principal place of business in such county, in care of any officer of such corporation if any are known to him, but no failure on the part of such auditor to mail such summons shall affect the validity of such service thereof: *Provided further,* That nothing herein contained shall be construed to prevent or invalidate the service of such summons on an agent of such corporation in any other county in which he may be found.

2. If the suit is against a foreign corporation or a nonresident joint stock company, or association doing business and having a managing or business agent, cashier or secretary within this state, to such agent, cashier or secretary, or to any station, ticket or other agent of said corporation, transacting business thereof, in the county where the action is commenced, and if there is no such agent in said county then service may be made upon any such agent in any other county.

3. Whenever any foreign corporation, nonresident joint stock com-

pany or association shall not have any designated person actually residing in the county in which said corporation or joint stock company shall be doing business in this state upon whom process can be served as provided in section 4773 of these codes, or when the agent of such company as provided in said section shall have removed from, or ceased to be a resident, or can not after due diligence be found within the county where the action arose, or conceals himself in order to avoid the service of process, then service of such summons shall be made upon the county auditor of said county with like effect as though said service were made upon an agent or person appointed and designated as provided in said section 4773, and it shall be the duty of such auditor to forward a copy of such summons so served on him, by registered mail, to the principal business office of such corporation, in this state, if the address of such office be known to him, but no failure on the part of such auditor to mail such copy of summons shall affect the validity of the service thereof.

4. If against a minor under the age of 14 years residing within this state, to such minor personally and also to his father, mother or guardian, or if there be none in this state, then to any person having the control or care of such minor or with whom the minor resides, or in whose service he is employed.

5. If against a person residing in this state who has been judicially declared to be of unsound mind, incapable of conducting his own affairs, or for whom a guardian has been appointed, to such person, also to his guardian.

6. If against a county, city or village, to the chairman of the board of county commissioners, mayor, chairman or president of the council, or trustees, of such county, city or village.

7. In all other cases to the defendant personally. [C. L. § 4144.]

Hist. R. S. § 4144; am. '97, p. 13, § 1, reen. '99, p. 293, § 1; am. '07, p. 319, §1, reen. R. C. § 4144; am. '09, p. 185, S. B. 79, § 1; compiled and reen. C. L. § 4144.

Cross ref. Express reference to this section: Notice of hearing on drainage commissioners' report: § 4510.

Service of process: In actions against the state to quiet title against transfer tax liens: § 3395; on cities and villages: § 4059; on foreign corporations: § 4773; on insurance companies: § 4949; on inter-insurance associations: § 5126; on foreign secret fraternal insurance companies: § 5163. Transmission of summons by telegraph for service: § 7205. Service of papers on sheriff for prisoners in county jail: § 9427.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 411, as am.; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7426.

Cited: Brooks v. Orchard L. Co. (1912) 21 I. 212, 121 P. 101; Anthes v. Anthes (1912) 21 I. 305, 308, 121 P. 553; (In brief of counsel) Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 385; companion case of same title, 27 I. 400.

Foreign corporations: Foreign corporations may be sued in any county of the state although the designated agent for the service of process resides in some other county than that of suit. Boyer v. N. P. Ry. Co. (1901) 8 I. 74, 66 P. 826.

Proof of service: Proof of service of summons on the president of a foreign corporation without anything to show that the president was the managing or business agent or cashier of the corporation, is fatally defective. Applington v. G. V. B. Mining Co. (1898) 6 I. 216, 55 P. 241.

Sufficiency of service: Service of summons on a corporation is sufficient when made upon a person who had theretofore been served with process, and the corporation accepted such service by its appearance, where the corporation, through its attorney or some one authorized to act for it did not inform the party in interest how a better service could be made. Hill v. Morgan (1904) 9 I. 718, 76 P. 323.

Service of summons on "manager" of corporation is prima facie service upon the corporation. Densel v. Atlanta Merc. Co. (1909) 17 I. 432, 106 P. 2.

§ 6677. Service by publication: Affidavit. When the person on whom the service is to be made resides outside of the state, or has departed from the state, or can not after due diligence be found within the state, or conceals himself therein to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier or secretary within this state, and the fact appears by affidavit to the satis-

faction of the court in which the suit is pending, or to the judge or to the clerk thereof in vacation, and it also appears by the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, and that he is a necessary or proper party to the action, such court or judge or the clerk in vacation of the court, may make an order for the publication of the summons, or, if the address of the defendant outside of the state is known, may make an order that personal service of the summons may be made outside of the state in lieu of such publication, and an affidavit setting forth in ordinary and concise language any of the grounds as above set forth, upon which the publication of the summons is asked for, shall be sufficient without setting forth or showing what efforts have been made or what diligence has been exerted, in attempting to find the defendant. ['11, c. 29, § 1, p. 65.]

Hist. (See C. C. P. '81, § 221) R. S. § 4145; am. '07, p. 319, § 2, reen. R. C. § 4145; am. '09, p. 185, S. B. 79, § 2; am. '11, c. 29, § 1, p. 65, reen. C. L. § 4145.

Cross ref. Publication of summons: In suits to quiet title against unknown owners or heirs: § 6659; in partition: § 6981; out of justices' courts: § 7070.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 412; as am.; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7428. See also C. C. P. § 7431.

Cited: Whitley v. Spokane etc. Ry. Co. (1913) 23 I. 642, 651, 132 P. 121, aff. 237 U. S. 487, 59 L. ed. 1060, 35 S. C. R. 655.

Constitutionality: This section as it appeared in the R. S. was not in conflict with the constitution by reason of its authorizing a probate judge to make the order for publication in a case not pending in his court. McKnight v. Grant (1907) 13 I. 629, 92 P. 989, 121 A. S. R. 287.

Affidavit for publication: An affidavit for publication which describes as the basis of the action a cause of action different from the one alleged in the complaint, can not be made the basis for an order for publication, and an order for publication and publication of summons under such order are void and do not give an absent defendant constructive notice of the pendency of the action. Vermont L. &. T. Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

An affidavit for publication which states that due and diligent search has been made for defendants and that they can not be found within the state, but fails to allege the facts which constitute such due and diligent search, is insufficient to authorize an order for publication. Mills v. Smiley (1904) 9 I. 325, 76 P. 786.

An affidavit for publication should show whether the defendant is a resident or nonresident of the state and his last place of residence, if known, and if such place is unknown, that fact should also appear. Ib.

Due diligence: This section does not dispense with the use of due diligence to ascertain the residence or postoffice address of the defendant, and the mere assertion of diligence in the affidavit is not a compliance with the statute. Lohr v. Curley (1915) 27 I. 739, 152 P. 185.

§ 6678. Same: Order and service. The order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, at least once a week for the full period of one month; at least 30 days shall intervene between the first and last publication of summons against a defendant residing outside of the state or absent therefrom. In case publication is ordered where the residence of a nonresident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served at his place of residence. When publication is ordered and made the service of summons is complete at the expiration of the period of publication. When personal service of summons is ordered and made outside of the state the service is complete at the time of service. ['09, p. 185, S. B. '9, § 3.]

Hist. (See C. C. P. '81, § 222) R. S. § 146, reen. R. C. ib.; am. '09, p. 185, S. B. 9, § 3, reen. C. L. § 4146.

Comp. leg.—Cal. Similar: C. C. P. 1872, 413; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7429, 7430.

Cited: Mills v. Smiley (1904) 9 I. 325, 6 P. 786; McKnight v. Grant (1907) 13 I. 629, 92 P. 989, 121 A. S. R. 287; Whitley v. Spokane etc. Ry. Co. (1913) 23 I. 642, 132 P. 121, aff. 237 U. S. 487, 59 L. ed. 1060, 35 S. C. R. 655.

Substantial compliance: The proceedings of courts of general jurisdiction, where the summons is served by publication, are supported by the same presump-

tions as where the service is personally made, and can not be avoided for mere errors or irregularities. Harpold v. Doyle (1908) 16 I. 671, 102 P. 158.

Duration of publication (prior to amendment): The month contemplated by this section is a calendar month and not a lunar month, but a publication for five consecutive weeks at intervals of a week is sufficient. Forsman v. Bright (1902) 8 I. 467, 69 P. 473.

Where the order for publication of summons directed that publication be made "at least once a week for one full month" and the summons is published in a weekly newspaper for five consecutive weeks, the first publication being made on September 16 and the last publication October 14 following, the requirement of this section was complied with. (Ailshie, J. dissents) Harpold v. Doyle (1908) 16 I. 671, 102 P. 158.

Extra territorial service: Where after order for publication the summons is personally served on the defendant out of the state, the service does not become complete until the expiration of the time prescribed in the order for publication, and the defendant has 40 days after the expiration of such time in which to answer; a default judgment entered within such 40 days is void. Bowen v. Harper (1899) 6 I. 654, 59 P. 179.

§ 6679. [4147] Service on one of joint defendants. When the action is against two or more defendants jointly or severally liable on a contract and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. [R. S. § 4147.]

Hist. (See C. C. P. '81, § 223) R. S. § 4147, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judgment by default against one or more of several defendants: § 6832.

Comp. leg.—Cal. Same: C. C. P. 1872, § 414; Kerr's C. ib.

Cited. Shumake v. Shumake (1910) 17 I. 649, 107 P. 42; Bonham Nat. Bk. v. Grimes Pass P. M. Co. (1910) 18 I. 629, 111 P. 1087.

§ 6680. Proof of service. Proof of service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof.
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post office if the same has been deposited; or,
4. In case of personal service outside of the state, an affidavit thereof by the person making such service.
5. The written admission of the defendant. In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service. ['09, p. 185, S. B. 79, § 4.]

Hist. (See C. C. P. '81, § 224) R. S. § 4148, reen. R. C. ib.; am. '09, p. 185, S. B. 79, § 4, reen. C. L. § 4148.

Cross ref. Sheriff may return process after expiration of term: § 3619. Return is prima facie evidence of facts: § 3598. Penalty for failure to make return: § 3599.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 415; Kerr's C. ib.

N. D. Similar: C. C. P. § 7436.

Construed: Subd. 3 prescribes what shall constitute the proof of service of summons when the service was made by publication; proof of service in such cases does not include the affidavit and order for the publication of summons, in addition to the affidavits provided for in this section. O'Neill v. Potvin (On rehearing 1908) 13 I. 721, 93 P. 20, 257.

§ 6681. [4149] Jurisdiction acquired by service. From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication, when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him. [R. S. § 4149.]

Hist. (See C. C. P. '81, § 225) R. S. § 4149, reen. R. C. ib., reen. C. L. ib.

Cross ref. What constitutes an appearance: § 7202.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 416; now same as amended Kerr's C. ib.

N. D. Similar: C. C. P. § 7438.

Cited: (In brief of counsel) Washington etc. Co. v. Weiser Nat. Bk. (1915) 26 . 717.

Effect of special appearance: Illegality n the service of process by which jurisiction is to be obtained is not waived by he special appearance of defendant to move that the service be set aside nor after such motion is denied, by his answering to the merits. Objection to the illegal service is considered as abandoned only when the party pleads to the merits in the first instance. Harkness v. Hyde (1879) 98 U. S. (8 Otto) 476, 25 L. ed. 237.

§ 6682. Summons against nonresident owner of public utility: Lien f judgment. Where any suit has been commenced in any court of this tate upon any cause of action arising therein against any nonresident, irm or person engaged in the ownership and control of any electric ight or water system or other public utility in this state, and where the ause of action arises out of some matter connected with the carrying on nd conducting of said public utility the summons therein may be erved by delivering a copy thereof attached to a copy of the comlaint on file to the person in charge or control of said public utility in his state, or to some agent, cashier or clerk in charge of any office of aid firm or person in this state used in the carrying on and conducting f such business.

Any judgment rendered in such action shall become a lien upon and ind all the property of such firm or person used in the carrying on and onducting of such electric light or water system or other public utility. '13, c. 63, §§ 1, 2, p. 298.]

Hist. '13, c. 63, §§ 1, 2, p. 298, reen. . L. § 4150.

CHAPTER 254.

PLEADINGS IN CIVIL ACTIONS.

ARTICLE 1.

IN GENERAL

§ 6683. [4160] Definition of pleadings. The pleadings are the forhal allegations by the parties of their respective claims and defenses, or the judgment of the court. [R. S. § 4160.]

Hist. (See C. C. P. '81, § 226) R. S. § 160, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 420; Kerr's C. ib.

§ 6684. [4161] Form and rules prescribed by code. The forms of leadings in civil actions, and the rules by which the sufficiency of the leadings is to be determined, are those prescribed in this code. [R. S. 4161.]

Hist. (See C. C. P. '81, § 227) R. S. § 61, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 421; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7439.

Cited: Nobach v. Scott (1911) 20 I. 558, 119 P. 295.

§ 6685. [4162] Pleadings enumerated. The only pleadings allowed n the part of the plaintiff are:

1. The complaint.
2. The demurrer to the answer.

nd on the part of the defendant:

1. The demurrer to the complaint.
2. The answer. [R. S. § 4162.]

Hist. (See C. C. P. '81, § 228) R. S. § 62, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 422; Kerr's C. ib.

Demurrer to cross-complaint: A demurrer may be interposed to a cross-complaint, which is classed as a complaint. Nobach v. Scott (1911) 20 I. 558, 119 P. 295.

ARTICLE 2.

THE COMPLAINT.

§ 6686. [4167] **First pleading is complaint.** The first pleading on the part of the plaintiff is the complaint. [R. S. § 4167.]

Hist. (See C. C. P. '81, § 229) R. S. § 4167, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 425; Kerr's C. ib.

N. D. Similar: C. C. P. 7440.

§ 6687. [4168] **Contents of complaint.** The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action.

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief which the plaintiff claims; if the recovery of money or damages be demanded, the amount thereof must be stated. [R. S. § 4168.]

Hist. (See C. C. P. '81, § 230) R. S. § 4168, reen. R. C. ib., reen. C. L. ib.

Cross ref. Forms of action abolished: Const. V, 1.

Comp. leg.—Cal. Same: C. C. P. 1872, § 426; Kerr's C. ib.

N. D. Similar: C. C. P. § 7440.

Cited: Idaho & Oregon etc. Co. v. Bradbury (1889) 10 S. C. R. 177, 132 U. S. 509, 33 L. ed. 433; P. v. Bancroft (1892) 3 I. 356, 29 P. 112; Elliott v. Collins (1898) 6 I. 266, 55 P. 301; Murphy v. Russell (1901) 8 I. 133, 67 P. 421; Porter v. Allen (1902) 8 I. 358, 69 P. 105, 236; Coleman v. Jaggers (1906) 12 I. 125, 85 P. 894.

Forms abolished: No particular form of complaint is required; it must contain a statement of the facts constituting the cause of action in ordinary and concise language, and when that is done the plaintiff is entiteld to whatever relief his allegations and proof show him entitled to, either at law or in equity. Anderson v. War Eagle Con. M. Co. (1902) 8 I. 789, 72 P. 671.

The technicalities of pleading have been dispensed with by the code and the plaintiff need only state his cause of action in ordinary concise terms, whether it be in assumpsit, trespass or ejectment, without regard to the ancient forms of pleadings and the plaintiff can be sent out of court only when, upon the facts pleaded, he is entitled to no relief either at law or equity. Rauh v. Oliver (1904) 10 I. 3, 77 P. 20; Bates v. Cap. S. Bk. (1912) 21 I. 141, 121 P. 561; Poncia v. Eagle (1915) 28 I. 60, 152 P. 208; Carroll v. Hartford Fire Ins. Co. (1916) 28 I. 466, 154 P. 985.

Name of pleading: The sufficiency of the pleading must be determined upon the facts pleaded rather than upon any name given to the pleading or the cause of action. Bates. v. Cap. S. Bk. (1910) 18 I. 429, 110 P. 277.

Allegations should be positive: A complaint alleging generally an indebtedness for a balance due for goods, wares and merchandise sold and delivered, while it does not comply with this section, is sufficient. Shaw v. Manville (1895) 4 I. 369, 39 P. 559.

A pleading should contain a positive statement of the essential facts and is insufficient where it merely states that such facts are alleged to exist; in an action on an account a complaint which fails to allege, except by way of recital, that there is a certain amount due the plaintiff, is demurrable. Holton v. Sandpoint L. Co. (1901) 7 I. 573, 64 P. 889.

Brevity in the complaint is to be commended but the ultimate facts, as distinguished from mere conclusions, should be detailed with sufficient particularity to apprise the defendant of the basis of the plaintiff's claim. That the defendant is indebted to plaintiff, without setting forth when, where or how the indebtedness arose, is not a statement of facts constituting a cause of action. Phoenix L. Co. v. Regents of U. of Idaho (1908) 197 F. 425.

A common-law count for money had and received, without alleging the facts creating the indebtedness, is insufficient to state a cause of action for fraud, under this section. Moser v. Pugh-Jenkins Furniture Co., 31 I. 438, 173 P. 639.

Actions for negligence: In an action against a carrier for personal injuries to a passenger, it is sufficient to allege in general terms that the injury complained of was occasioned by the negligence of the servant of the carrier, without further alleging that the servant was acting within the scope of his employment. Lindsay v. O. S. L. Ry. Co. (1907) 13 I. 477, 90 P. 984, 12 L. R. A. (N. S.) 184.

In an action for the negligent killing of an animal, the complaint must contain a statement of the facts constituting the negligent killing, in ordinary, concise language. A general allegation of negligence is insufficient to withstand a special demurrer for uncertainty. King v. O. S. Ry. Co. (1898) 6 I. 306, 55 P. 665.

But where no demurrer is interposed against a complaint in which negligence is pleaded generally, such general plea is sufficient. Younie v. Blackfoot L. & Co. (1908) 15 I. 56, 96 P. 193.

Pleading corporate existence: An allegation that the defendant is a corporation organized and existing by virtue of the law and doing business in a certain county is a sufficient allegation of corporate existence. Jones v. Pacific Dredging Co. (1903) 9 I. 186, 72 P. 956.

Exhibits: Pleading an instrument by attaching a copy to the complaint as an exhibit thereto does not tender an issue or involve an assertion of the truth of the statements and recitals contained in the exhibit. In order to tender an issue as to the truth or correctness of statements and recitals contained in such exhibit, it is necessary to plead them in appropriate terms. Sweeney v. Johnson (1913) 23 I. 530, 130 P. 997.

§ 6688. Joinder of causes. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied.
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.
3. Claims to recover specific personal property, with or without damages for the withholding thereof.
4. Claims against a trustee by virtue of a contract, or by operation of law.
5. Injuries to character.
6. Injuries to person.
7. Injuries to property: *Provided,* That where injuries to person and to personal property arise out of the occurrence or transaction, causes of action may be united in the same complaint, and separate actions for such injuries are hereby prohibited.

With the exception of the causes of action specified in subdivision 7 last preceding, the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to the character or to the person. ['13, c. 23, p. 92, § 1.]

Hist. (See C. C. P. '81, § 231) R. S. § 169, reen. R. C. ib.; am. '13, c. 23, § 1, p. 92, reen. C. L. § 4169.

Comp. leg.—Cal. Same: C. C. P. 1872, 427; Kerr's C. ib.

N. D. Similar: C. C. P. § 7466.

Commingling causes in one count: Procedure: Where two or more causes of action are improperly united and commingled in one count in the complaint, the proper procedure to reach the defect is by motion to require the plaintiff to separately state his several causes of action in different counts. Darknell v. Coeur d'Alene etc. Co. (1910) 18 I. 61, 108 P. 836.

When joinder is permissible: The plaintiff may unite several causes of action in the same complaint where all of such causes belong to either one of the several classes therein mentioned, but is prohibited from uniting in the same complaint causes of action arising under different classes or not coming within any one of the said classes. Kruger v. St. Joe L. Co. (1905) 9 I. 504, 83 P. 695.

Single cause of action: In an action on an injunction bond, sums of money paid to two attorneys for fees in the injunction suit constitute but one cause of action. Angel v. Levy (1878) 1 I. 722.

A complaint alleging in one paragraph an indebtedness on a balance of account for money loaned, services performed, goods furnished and money paid, states but one cause of action and is not bad for failing to separately state the different amounts due on each item separately. Mills v. Glennon (1885) 2 I. 105, 6 P. 116.

Allegations showing separate items of damages growing out of the same facts may be alleged as a part of the same cause of action. Unfried v. Libert (1911) 20 I. 708, 119 P. 885.

Repetition of allegations: Where several causes of action are united in one complaint, it is not necessary to rewrite in each count, after the first, all the allegations. but it is sufficient if apt and express reference is made in each subsequent count to each preliminary allegation stated in the first, thus making them a part thereof. Aulbach v. Dahler (1896) 4 I. 654, 43 P. 322.

Restatement of same count: Under the code, a party may state as many causes of action as he may have if they are of a character to be properly embraced in the same complaint, but he may not write out the same causes of action under different forms. People v. Slocum (1866) 1 I. 62.

Contract actions: A count of a complaint seeking relief on the theory of rescission of a contract is inconsistent with another count claiming damages from breach of the contract, and it is proper to compel

an election between said counts. Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421.

A cause of action arising on an express contract for the payment of a fixed and specified salary may be united in the same action with a cause of action for the same services on an implied contract to pay the reasonable value of such services. Darknell v. Coeur d'Alene etc. Co., supra.

An action by the state to the use of various parties claiming under an indemnity bond given the state for their protection is not a misjoinder of causes of action, nor a misjoinder of parties plaintiff. S. v. Title Guaranty & Surety Co. (1915) 27 I. 752, 152 P. 189; aff. 240 U. S. 136, 60 L. ed. 566, 36 S. C. R. 345.

Real property actions: A complaint in a suit brought to obtain a deed to property, sold under execution, from the sheriff, and to determine plaintiff's right to such a deed as against the sheriff and an adverse claimant, states but one cause of action. Brady v. Linehan (1898) 5 I. 732, 51 P. 761.

A plaintiff may unite several causes of action to recover specific real property with or without damages for withholding the same or for waste committed thereon and the rents and profits thereof where the same judgment is asked against all of the defendants. White v. Whitcomb (1907) 13 I. 490, 90 P. 1080.

Where a number of parties have at divers times and acting severally, gone upon a certain tract of land and each taken severally a part thereof and erected improvements thereon, and one or mor of the parties have individually and o their own account removed certain im provements placed on the land, a caus of action for the removal of the improve ments against the party guilty thereof, ca not be joined with an action against a of the defendants for a restitution of th premises. White v. Whitcomb, supra; af 214 U. S. 15, 53 L. ed. 889, 29 S. C. R. 59

An action for waste on real propert can not be united with an action fo damages for an assault, and an actio for injuries to property can not be unite with an action for damages for injurie to the person. Kruger v. St. Joe L. Co (1905) 11 I. 504, 83 P. 695.

Injuries to property: A plaintiff ma join in the same action all injuries t property arising out of the same contract Frepons v. Grostein (1906) 12 I. 671, 8 P. 1004.

Identity of parties: Where a certain per son is a necessary party to one caus of action but is neither a proper or neces sary party to three other causes of actio stated in the complaint, a demurrer fo misjoinder of causes of action should b sustained. Beane v. Givens (1898) 5 I 774, 51 P. 987.

Writ of mandate: Application for wri of mandate is a special proceeding an may not be united in the same complain with an action to quiet title or with on for injunctive relief. Lewis v. Mountai Home Coop. Irr. Co. (1916) 28 I. 68 156 P. 419.

ARTICLE 3.

DEMURRER TO THE COMPLAINT.

§ 6689. [4174] **Grounds of demurrer.** The defendant may demu to the complaint within the time required in the summons to answe when it appears on the face thereof, either:

1. That the court has no jurisdiction of the person of the defen ant or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same partie for the same cause; or,
4. That there is a defect or misjoinder of parties, plaintiff or d fendant; or,
5. That several causes of action have been improperly united; or
6. That the complaint does not state facts sufficient to constitute cause of action; or,
7. That the complaint is ambiguous, unintelligible or uncertai [R. S. § 4174.]

Hist. (See C. C. P. '81, § 232) R. S. § 4174. reen. R. C. ib., reen. C. L. ib.

Cross ref. Demurrers may be heard at chambers: § 6493.

Comp. leg.—Cal. Same: C. C. P. 1872, § 430; Kerr's C. ib.

N. D. Similar: C. C. P. § 7442.

Cited: Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421; Vane v. Jones (1907) 13 I. 21, 88 P. 1058; Dunbar v. Griffiths (1908) 14 I. 120, 93 P. 654; (In brief of counsel) Trask v. Boise King Placers Co. (1914) 26 I. 290.

Demurrer does not cure default: T filing of a demurrer on behalf of defen ants who are already in default can n affect such default. Harr v. Kight (191 18 I. 53, 108 P. 539.

Several demurrers: A party may n interpose different demurrers to the sa pleading except by permission of the cou Murphy v. Russell & Co. (1901) 8 I. 1 67 P. 421.

Lack of jurisdiction: If the compla upon its face discloses that the court, which the action is brought, has no jur diction of the subject matter, then a

murrer to the complaint upon that ground should be sustained. The court is not required to wait until a verified answer is filed in order to determine the question of jurisdiction. Hammer v. Garrett (1909) 15 I. 657, 99 P. 124.

Want of capacity: A demurrer on the ground of want of legal capacity to sue must relate to some legal disability on the part of the plaintiff to maintain the action, such as infancy, coverture and the like, and not to the absence of facts sufficient to constitute a cause of action, as that the plaintiff is not the proper party to sue for the injury complained of; in that case a general demurrer for want of facts reaches the defect. Pratt v. Northern Pac. Exp. Co. (1907) 13 I. 373, 90 P. 341, 121 A. S. R. 268, 10 L. R. A. (N. S.) 499.

The objection that a foreign executor can not maintain his action in this state without being first appointed by the courts of this state goes to the capacity of the plaintiff to sue or maintain his action, and is a ground of demurrer under this section, and if not raised by demurrer or answer, is thereby waived under the provisions of § 6693. Anthes v. Anthes (1912) 21 I. 305, 121 P. 553.

Another action pending: Pendency of another action in which the plaintiff, who is defendant in such other action is bound to assert the right which he seeks to enforce in the action brought by him, is ground for demurrer. Stevens v. Home Savings etc. Assn. (1898) 5 I. 741, 51 P. 979, 986.

Defect of parties: The question of nonjoinder of parties plaintiff is not properly an issue on an application for an injunction against the actions of a stranger to the property threatened with injury. Gilin v. Sierra Nev. Con. M. Co. (1890) 2 I. 696, 23 P. 547, 1014.

In an action concerning water rights, where it does not appear from the complaint that the subject in litigation is within any water district, or that there is any water master in charge of the water in question, a demurrer based on nonjoinder of the water master is not well taken. Boulware v. Park (1896) 4 I. 692, 43 P. 680.

When one brings suit on four causes of action, three being for personal services, and the fourth for the purpose of having a chattel mortgage executed by himself and wife on the separate property of the wife, declared fraudulent and void, and fails to make his wife a party, a demurrer on the ground of nonjoinder of parties will be sustained. Beane v. Givens (1898) 5 I. 774, 51 P. 987.

A defect in naming parties defendant can not be raised by general demurrer going to the sufficiency of the complaint, but must be raised by special demurrer. Bonham Nat. Bk. v. Grimes Pass P. M. Co. (1910) 18 I. 629, 111 P. 1087.

Nonjoinder of a proper as distinguished from a necessary party is not ground of demurrer. Taylor v. Lytle (1914) 26 I. 141 P. 92.

Misjoinder of causes: The remedy for improperly joining several causes of action in one count of the complaint is not by demurrer for misjoinder of causes of action, but by motion to require an election between the causes of action and to strike out all matter relating to the cause not elected. Fox v. Rogers (1890) 6 I. 710, 59 P. 538; Jones v. Caldwell (1911) 20 I. 5, 116 P. 110.

Where the complaint mingled two causes of action, not inconsistent, in one count, the proper procedure was a motion to require plaintiff to separately state his causes, and not by demurrer or motion to strike out or compel the pleader to elect. Fox v. Rogers and Jones v. City of Caldwell, supra, overruled so far as they hold the contrary. Labonte v. Davidson, 31 I. 644, 175 P. 588.

Want of facts: A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action will only lie when the defects of the case are such as would render the count bad on general demurrer at law or for want of equity in chancery; the defects must be so fatal that, admitting all the facts, they do not show a cause of action. Brown v. Bledsoe (1879) 1 I. 746.

Where a single cause of action is sufficiently stated in the complaint, a general demurrer will not lie although there are objectionable causes of action joined therewith. Carter v. Wann (1899) 6 I. 556, 57 P. 314.

When the complaint states a cause of action, a general demurrer will not be sustained. First Nat. Bk. of Lewiston v. Sampson (1901) 7 I. 564, 64 P. 890; Steinour v. Oakley S. Bk., 32 I. —, 177 P. 843.

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action is not sufficient to raise the question of the legal capacity of a foreign corporation to maintain an action in this state. Valley L. & Mfg. Co. v. Driessel (1907) 13 I. 662, 93 P. 765, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63; Valley L. Co. v. Nickerson (1907) 13 I. 682, 93 P. 24.

Where a complaint contains several causes of action separately stated, and a general demurrer is directed against the complaint as a whole and not against any separate cause of action, it should be overruled if any one of the causes of action is well pleaded. Bonham Nat. Bk. v. Grimes Pass P. M. Co. (1910) 18 I. 629, 111 P. 1087.

A joint demurrer of two defendants should be overruled if complaint states a cause of action against either. Jones v. Moss (1915) 28 I. 245, 153 P. 249; Harkness v. Hyde, 31 I. 784, 176 P. 885.

Ambiguity and uncertainty: The failure of a complaint for death by wrongful act, to state whether the deceased was a minor so that the action should be brought by his father or mother, or a major so that it should be brought by his heirs or representatives, is ground of demurrer for uncertainty and not of general demurrer for want of facts. Palmer v. Utah & N. R. Co. (1887) 2 I. 315, 13 P. 425.

In ejectment to recover certain property on the theory that it was community property, an objection to the complaint on the ground that it does not state that the property was obtained by "gift, bequest,

devise, or descent," is not ground of general demurrer but of special demurrer for ambiguity and uncertainty. Jacobson v. Bunker Hill etc. M. Co. (1891) 3 I. 126, 26 P. 396.

Where no objection on the ground of uncertainty is taken to a complaint, the complaint, although uncertain, is sufficient to admit proof of the facts uncertainly pleaded. Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226.

Appeal: If a demurrer, sustained by the trial court on an erroneous ground is good on any ground, the ruling will not be reversed. Feehan v. Kendrick, 32 I. — 179 P. 507.

§ 6690. [4175] **Form of demurrer.** The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time. [R. S. § 4175.]

Hist. (See C. C. P. '81, § 233) R. S. § 4175, reen. R. C. ib., reen. C. L. ib.

Cross ref. Demurrer not waived by filing answer at same time: § 6725.

Comp. leg.—Cal. Same: C. C. P. 1872, § 431; Kerr's C. ib.

N. D. Similar: C. C. P. §§ 7443, 7444.

Cited: Valley L. & Mfg. Co. v. Driesse (1907) 13 I. 662, 93 P. 765, 15 L. R. A (N. S.) 299, 13 Ann. Cas. 63.

Demurrer and answer: Where there is both a demurrer and answer to same complaint, the issue of law raised by the demurrer should be first disposed of. Guthrie v. Phelan (1885) 2 I. 95, 6 P. 107.

§ 6691. [4176] **Amendment of complaint.** If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed; and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant must answer the amendment or the complaint as amended within 10 days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases. [R. S. § 4176.]

Hist. (See C. C. P. '81, § 234) R. S. § 4176, reen. R. C. ib., reen. C. L. ib.

Cross ref. Amendments of course: § 6725. Judgment on issues of law, procedure: § 6869.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 432; now same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7445.

Service of amended complaint: Where an amendment affects but one of several defendants, it is not necessary to serve the amended complaint on the defendant not affected. Vermont L. & T. Co. v. McGregor (1897) 5 I. 320, 51 P. 102.

Cited: Dunbar v. Griffiths (1908) 1 I. 120, 125, 93 P. 654.

Default: Where defendant fails to plead to amended complaint within statutory time, judgment by default may be entered the same as in other cases. Nuestel v. Spokane I. Ry. Co. (1915) 27 I. 367, 14 P. 462.

§ 6692. [4177] **Objections by answer.** When any of the matters enumerated in section 6689 do not appear upon the face of the complaint, the objection may be taken by answer. [R. S. § 4177.]

Hist. (See C. C. P. '81, § 235) R. S. § 4177, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except number of section referred to: C. C. P. 1872, § 433; Kerr's C. ib.

N. D. Similar: C. C. P. § 7446.

Cited: Valley L. Co. v. Driessel (1907) 13 I. 662, 93 P. 765, 15 L. R. A. (N. S. 299, 13 Ann. Cas. 63.

§ 6693. [4178] **When objections deemed waived.** If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. [R. S. § 4178.]

Hist. (See C. C. P. '81, § 236) R. S. § 4178, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 434; Kerr's C. ib.

N. D. Similar: C. C. P. § 7447.

Cited: Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421; Pratt v. N. P. Express Co. (1907) 13 I. 373, 90 P. 341, 121 A. S. R. 268, 10 L. R. A. (N. S.) 499; Valley L. & Mfg. Co. v. Driessel (1907) 13 I. 662, 93 P. 765, 15 L. R. A. (N. S.) 29 13 Ann. Cas. 63; Richardson v. Rudd (1908) 15 I. 488, 98 P. 842; Bonham Na Bk. v. Grimes Pass P. M. Co. (1910) I. 629, 111 P. 1087; Anthes v. Anth (1912) 21 I. 305, 121 P. 553.

Criticized: Crowley v. Croesus Gold et M. Co. (1906) 12 I. 530, 86 P. 536.

Waiver of objections: Any objection a complaint on the ground that the san

s ambiguous, unintelligible or uncertain s waived if not raised by demurrer. Aul- ›ach v. Dahler (1896) 4 I. 654, 43 P. 322; West v. Johnson (1909) 15 I. 681, 99 P. 709.

Where a complaint in a justice's court s subject to any of the objections which ›y this section are waived, if not raised ›y demurrer, he must demur to the com- ›laint on proper grounds, either in the ustice's court or on appeal to the district ›ourt. Carter v. Wann (1899) 6 I. 556, 7 P. 314.

Failure on the part of defendant to easonably raise by demurrer questions in- ›olving lack of capacity on the part of he plaintiff to sue, or defect or misjoinder ›f parties, must be deemed to be a waiver f the right to thereafter raise such ques- ions. Trask v. Boise King Placers Co. 1914) 26 I. 290, 142 P. 1073.

Where a defendant does not plead the tatute of limitations as a bar to a cause f action by either demurrer or answer, he defense that the cause of action is so ›arred must be deemed to have been ›aived, under the provisions of this sec- ion. Rogers v. O. W. R. R. & N. Co. 1916) 28 I. 609, 156 P. 98.

Objection to jurisdiction not waived: An bjection to the jurisdiction of the court s never waived and may be raised for the rst time in the supreme court. Aram v. Edwards (1903) 9 I. 333, 74 P. 961.

Objection to evidence not waived: Fail- re to demur to paragraphs of a complaint alleging improper items of damage or to move to strike such items does not pre- clude the defendant from objecting to the introduction of evidence thereunder. Risse v. Collins (1906) 12 I. 689, 87 P. 1006.

Appellate review: A judgment based on a complaint which fails to state facts sufficient to constitute a cause of action will be reversed. Greathouse v. Heed (1873) 1 I. 482.

Where no objection to a complaint is made in the trial court, either by demurrer or motion, and it is objected to for the first time on appeal as stating facts in- sufficient to constitute a cause of action, the supreme court will only consider whether there is a sufficient statement of facts to support the judgment. Crowley v. Croesus Gold M. Co. (1906) 12 I. 530. 86 P. 536.

An objection that the complaint does not state facts sufficient to constitute a cause of action can be reviewed on appeal from the judgment but not from an order denying a new trial. Taylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573.

If the complaint does not state facts sufficient to constitute a cause of action, it will not support a judgment; and, if a judgment is rendered on such a complaint, it will be reversed on appeal. Trueman v. S. Maries (1912) 21 I. 632, 123 P. 508; Newport Water Co. v. Kellogg, 31 I. 574, 174 P. 602.

ARTICLE 4.

THE ANSWER.

§ **6694.** [4183] **Contents of answer.** The answer of the defendant hall contain:

1. A general or specific denial of the material allegations of the omplaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counter- laim. If the complaint be verified, the denial of each allegation con- roverted must be specific, and be made positively, or according to the nformation and belief of the defendant. If the defendant has no in- ›rmation or belief upon the subject sufficient to enable him to answer n allegation of the complaint, he may so state in his answer, and place is denial on that ground. If the complaint be not verified a general enial is sufficient, but only puts in issue the material allegations of the ›mplaint. [R. S. § 4183.]

Hist. (See C. C. P. '81, § 237) R. S. § 183, reen. R. C. ib., reen. C. L. ib.

Cross ref. Essentials of answer in par- tion: § 6982.

Comp. leg.—Cal. Different: C. C. P. 172, § 437; now same, as amended: Kerr's ib. Golden v. Spokane etc. R. R. Co. 1911) 20 I. 531, 118 P. 1077.

N. D. Similar: C. C. P. § 7448.

Cited: U. S. v. Shoup (1889) 2 I. 493, P. 656; Stevens v. Home Savings & L. ssn. (1898) 5 I. 741, 51 P. 779, 986; Burke nd etc. Co. v. Wells Fargo Co. (1900) I. 42, 60 P. 87; Givens v. Keeney (1900) I. 335, 63 P. 110; Murphy v. Russell & ›. (1901) 8 I. 151, 67 P. 427; Anderson Or. Mtg. Co. (dis. op.) (1902) 8 I. 418, 69 P. 130; Hunter v. Porter (1904) 10 I. 72, 77 P. 434.

General denial: A general denial is suf- ficient where the complaint is not verified, although the action is brought by the people of the territory so that the defend- ant is required by statute to verify his answer whether the complaint is verified or not. U. S. v. Shoup (1889) 2 I. 493, 21 P. 656.

A general conjunctive denial of the alle- gations of a complaint, such as a denial of all the statements and allegations in a certain paragraph, is insufficient. Stick- ney v. Hanrahan (1900) 7 I. 424, 63 P. 189.

But a denial of each and every of the allegations contained in certain specified

paragraphs is a sufficient denial under this section. Joyce v. Rubin (1913) 23 I. 296, 305, 130 P. 793.

Denial of conclusion: A denial of indebtedness without a denial of the facts pleaded to show the existence of the indebtedness, is a denial of a conclusion of law and raises no issue of fact. Swanholm v. Reeser (1892) 3 I. 476, 31 P. 804.

A denial of the correctness of an account is not a sufficient denial of a complaint on a balance of account due. Ib.

Denials on information: Matters of public record must be denied positively; denials on information and belief are insufficient. Simpson v. Pennington (1899) 6 I. 681, 59 P. 360; Work Bros. v. Kinney (1900) 7 I. 460, 63 P. 596; (on petition for rehearing) Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 I. 5, 38, 93 P. 789; Vadney v. Med. Examiners (1911) 19 I. 203, 210, 112 P. 1046; First Nat. Bk. v. Walker (1915) 27 I. 199, 148 P. 46.

If the pleader avers that he has no knowledge or information sufficient to form a belief of the truthfulness of an allegation, it is sufficient averment that he has no belief, and is a good basis for his denial. Golden v. Spokane etc. R. R. Co. (1911) 20 I. 531, 118 P. 1077.

A denial on information and belief when the truth of the allegations attempted to be denied may be easily or readily obtained by the defendants, is not sufficient. First Nat. Bk. v. Callahan M. Co. (1916) 28 I. 627, 155 P. 673.

Evasive denials: Where a verified complaint alleges the possession by plaintiff of land traversed by a watercourse; that defendants built a dam across the watercourse a little below plaintiff's land, thereby causing the water to flow back over plaintiff's land, thereby causing him damage, an answer, not denying the existence of the watercourse but merely denying building a dam across the same, is evasive and bad. Norris v. Glenn (1875) 1 I. 590.

Conclusion of denial: A denial of the allegations of a complaint which is otherwise sufficient is not rendered objectionable because it concludes with the words, "other than as hereinafter set forth," although the pleader does not thereafter refer to the same. Anderson v. War Eagle Con. M. Co. (1902) 8 I. 789, 72 P. 671.

New matter: The true test of whether matter relied on in defense is new, in such sense that it must be affirmatively pleaded is whether it merely controverts the original cause of action, tendering no new issue, in which case it is simply a traverse or whether it raises a new issue or involves the introduction of a new ingredient as the basis of such an issue, by way of confession and avoidance, when it is new matter. Lindsay v. Wyatt (1878) 1 I. 738.

Where a complaint alleges the sale and delivery of property, an answer denying the purchase of or receiving the property does not authorize the defendant to show illegality of the contract or failure of title but such matters must be affirmatively pleaded. Miller v. Donovan (1905) 11 I. 545, 83 P. 608.

In an action of claim and delivery a defence based on possession by virtue of a lien is not new matter, which must be affirmatively pleaded, but may be shown in evidence under denials in the answer. Lindsay v. Wyatt, supra.

Cross complaint as answer: An equitable right of action which might be brought as an independent right of action may be interposed as a defense in a cross complaint in an action involving the same subject matter. Penninger Lat. Co. v. Clark (1912) 22 I. 397, 126 P. 524.

§ 6695. [4184] Essentials of counterclaim. The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action. [R. S. § 4184.]

Hist. (See C. C. P. '81, § 238) R. S. § 4184, reen. R. C. ib., reen. C. L. ib.

Cross ref. Improvements may be set off against damages in actions to recover land: § 6964. Judgment on counter claim: § 6897.

Comp. leg.—Cal. Same: C. C. P. 1872, § 438; Kerr's C. ib.

N. D. Similar: C. C. P. § 7449.

Cited: U. S. v. Shoup (1889) 2 I. 493, 21 P. 656; Burke Land etc. Co. v. Wells Fargo Co. (1900) 7 I. 42, 60 P. 87; (Dis. op.) Anderson v. Or. Mtg. Co. (1902) 8 I. 418, 69 P. 130; Shields v. Johnson (1906) 12 I. 329, 85 P. 972; Portland Wood Pipe Co. v. Slick Bros. Const. Co. (1915) 222 F. 528.

Matters arising from transaction: In an action on a note, an answer alleging that as a part of the transaction in which the note was given, the plaintiff was to take possession of a certain building, mortgaged to secure payment of the note, and rent the same, applying the rental money in the satisfaction of the note; that plaintiff when in possession of the building, collected the rent and applied the same to his own use; that the building was destroyed by fire, and that plaintiff recovered in insurance money, rents, etc., a sum largely in excess of the sum due on the note, is a proper counterclaim. First Nat. Bk. of Hailey v. Bews (1892) 3 I. 481, 31 P. 818.

Where suit is brought to recover the penalty prescribed by statute for failure of the mortgagee to satisfy the mortgage on the record and to procure an adjudication of satisfaction of the mortgage, the mortgagee must assert by counterclaim in said suit any right which he may have for the foreclosure of the mortgage, and can not thereafter maintain an independent action to foreclose the mortgage. Stevens v. Home Savings etc. Assn (1898) 5 I. 741, 51 P. 779, 986.

In an action to cancel a mortgage for fraud, it is the duty of the mortgagee to set up by way of cross complaint or counterclaim any right that he may have for a foreclosure of the mortgage. Givens v. Keeney (1900) 7 I. 335, 63 P. 110.

In an action to contest the foreclosure of a chattel mortgage, the defendant is entitled to file a cross complaint seeking the foreclosure of a real estate mortgage covering property in another county, but given as a part of the same transaction and to secure the same debt for which the chattel mortgage was given. Murphy v. Russell & Co. (1901) 8 I. 151, 67 P. 427.

In an action for unlawful detainer, a claim for unliquidated damages arising out of a breach of covenant made by the lessor, is not a proper matter of counterclaim. Hunter v. Porter (1904) 10 I. 72, 77 P. 434.

Actions on contract: In an action arising on contract, another action arising on contract existing at the commencement of the action, may be pleaded as a counterclaim although it has no relation to the subject matter set out in the plaintiff's complaint. Miller v. Hunt (1899) 6 I. 523, 57 P. 315.

A counterclaim under this section, while it must exist in favor of the defendant and against the plaintiff, may in other respects go further than a cross complaint, and may include any cause of action arising on contract where the complaint states a cause of action arising on contract. Hunter v. Porter, supra.

Unliquidated counterclaims: Where a cause of action arose out of the same contract or transaction, there is no difference between liquidated and unliquidated damages, in considering the essentials of a counterclaim. Wollan v. McKay (1913) 24 I. 691, 135 P. 832.

A claim for unliquidated damages for a tort can not be set off, either under this or the following section or under the bankruptcy act, against a claim upon a judgment. Pindel v. Holgate (1915) 221 F. 342, 137 C. C. A. 158, 349.

§ **6696.** [4185] **Counterclaim must be interposed.** If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor. [R. S. § 4185.]

Hist. (See C. C. P. '81, § 239) R. S. § 185, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 439; Kerr's C. ib.

Cited: First Nat. Bk. of Hailey v. Bews (1892) 3 I. 486, 31 P. 816; Stevens v. Home Savings & Loan Assn. (1898) 5 I. 741, 51 P. 779, 986; Givens v. Keeney (1900) 7 I. 335, 63 P. 110; Pindel v. Holgate (1915) 221 F. 342, 137 C. C. A. 158, 349.

Purposes of section: This section in connection with §§ 6694-5 is intended to prevent a multiplicity of suits and to settle all controversies and causes of action between the parties which arise out of, or are connected with, the transaction upon which the plaintiff's action is founded. Burke and Co. v. Wells Fargo Co. (1900) 7 I. 2, 60 P. 87.

Independent suits prohibited: A cause of action arising out of the transaction set forth in the complaint must be set forth as a counterclaim and can not be made the basis of an independent suit. Murphy v. Russell & Co. (1901) 8 I. 151, 67 P. 427.

In an action to cancel a mortgage on the theory of payment of the principal and usury in the interest, the mortgagee must, by counterclaim, assert his right to foreclose or be forever precluded from so doing. (Dis. op.) Anderson v. Or. Mtg. Co. (1902) 8 I. 418, 69 P. 130.

Equity rule: Construed in harmony with equity rules in federal court. Portland Wood Pipe Co. v. Slick Bros. Const. Co. (1915) 222 F. 528.

Additional reference: See cases under preceding section.

§ **6697.** [4186] **Cross demands compensated.** When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other. [R. S. § 4186.]

Hist. (See C. C. P. '81, § 240) R. S. § 186, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 440; now same, as amended: Kerr's C. ib.

Cited: (In brief of counsel) Bingham Co. v. Fidelity etc. Co. (1907) 13 I. 34, 88 P. 829.

§ **6698.** [4187] **Separate defenses permitted.** The defendant may set forth by answer as many defenses and counterclaims as he may have. They must be separately stated, and the several defenses must

refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue. [R. S. § 4187.]

Hist. (See C. C. P. '81, § 241) R. S. § 4187, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 441; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7450. See also: C. C. P. § 7451.

Defense must be interposed: This section, construed with others of the code, not only permits but requires a defendant to set up any and all defenses he may have, whether legal or equitable in character, by answer in the original action. Utah & N. R. Co. v. Crawford (1880) 1 I. 770.

Inconsistent defenses: A defendant may set forth in his answer as many defenses and counterclaims as he may have, and such defenses, to a certain extent, may be inconsistent with each other, but they must not be so inconsistent that the proof of one would necessarily disprove the other. Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421; Harshbarger v. Eby (1916) 28 I. 753, 156 P. 619.

Remedy for commingling: Where defenses are commingled the plaintiff's remedy is a motion to require the defendant to elect upon which defense he will proceed to trial or to plead the defenses in separate counts. Jones v. Caldwell (1911) 20 I. 5, 116 P. 110, 48 L. R. A. (N. S.) 119.

§ 6699. [4188] **Affirmative relief: Cross complaint.** Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. [R. S. § 4188.]

Hist. (See C. C. P. '81, § 242) R. S. § 4188, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872, § 442; Kerr's C. ib.

Cited: Stevens v. Home Savings etc. Assn. (1898) 5 I. 741, 51 P. 779, 986; Murphy v. Russell & Co. (1901) 8 I. 151, 67 P. 427; Utah Assn. of Credit Men v. Budge (1909) 16 I. 751, 755, 102 P. 691; Collins v. Brown (1911) 19 I. 360, 114 P. 671; Brown v. T. B. Reed & Co., 31 I. 529, 174 P. 136.

Essentials of cross-complaint: A cross-complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but need not necessarily seek relief against all or any of the original plaintiffs or defendants. Hunter v. Porter (1904) 10 I. 72, 77 P. 434.

Incorporation with answer: A cross-complaint may be embodied in the same instrument with the answer. Western Loan etc. Co. v. Smith (1906) 12 I. 94, 85 P. 1084.

Cross-complaint as answer: Where a defendant files a cross-complaint by way of answer this, being in the nature of a bill in equity, must contain all the essential and necessary averments of such a bill, and properly pleaded, it makes the party so pleading an actor and plaintiff with respect to all matters alleged in such affirmative defense; and such defense must be of such a character as may call for a decree in such party's favor. Pennington Lat. Co. v. Clark (1912) 22 I. 397, 126 P. 524.

Matter for cross-complaint: In an action on a note, paragraphs of the answer asking for an accounting and for damages growing out of the transaction in which the note was given, are not properly a part of the answer and should be rejected as surplusage; in order to make them available the defendant should state the matters therein alleged in the form of a cross-bill, separate and distinct from the answer, stating a complete cause of action in itself. First Nat. Bk. of Hailey v. Bewick (1892) 3 I. 486, 31 P. 816.

Damages sustained by reason of the wrongful issuance of an attachment are proper matter for a cross-complaint in the attachment suit. Willman v. Friedman (1894) 4 I. 209, 38 P. 937.

In an action for unlawful detainer a claim for unliquidated damages arising out of a breach of covenant by the lessor is not a proper matter for a cross-complaint. Hunter v. Porter, supra.

In action to quiet title, where the defendant relies upon title in himself, a cross-complaint is not necessary; but where he seeks to enforce an equitable title against the plaintiff as the holder of the legal title, a cross-complaint is proper. Bacon v. Rice (1908) 14 I. 107, 112, 93 P. 511.

ARTICLE 5.

DEMURRER TO THE ANSWER.

§ 6700. [4193] **Demurrer to answer.** The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the

lefendant, or to one or more of the several defenses or counterclaims et up in the answer. [R. S. § 4193.]

Hist. (See C. C. P. '81, § 243) R. S. § 193, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the clause or to one or more of the several defenses or counterclaims set up in the answer" is omitted: C. C. P. 1872, § 443; now same as amended: Kerr's C. ib.

N. D. See C. C. P. § 7452.

Cited: Dunbar v. Griffiths (1908) 14 I. 120, 125, 93 P. 654.

§ 6701. [4194] **Grounds of demurrer.** The demurrer may be taken ıpon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined.
2. That the answer does not state facts sufficient to constitute a lefense or counterclaim.
3. That the answer is ambiguous, unintelligible or uncertain. [R. S. 4194.]

Hist. (See C. C. P. '81, § 244) R. S. § 194, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 444; Kerr's C. ib.

Objection not waived: An objection to n answer on the ground that it states no defense is never waived. Swanholm v. Resser (1892) 3 I. 476, 31 P. 804.

Inconsistent defenses: Where impossible to determine upon which of two affirmative defenses defendant relies demurrer to answer should be sustained. Wolter v. Dixon (1916) 29 I. 26, 157 P. 250.

ARTICLE 6.

SIGNATURE AND VERIFICATION OF PLEADINGS.

§ 6702. [4198] **Pleadings to be signed by resident attorney.** All leadings filed in the district courts or supreme court of this state shall e signed by a resident attorney of the state of Idaho, who shall state is residence or post office address; and the name of a resident attorey shall be indorsed on all summons issued out of the district courts, nd all pleadings required to be verified shall be verified by a party to he action, or any attorney residing in the state of Idaho and regularly dmitted to practice in the courts of this state. ['05, p. 75, § 1.]

Hist. '05, p. 75, § 1, reen. R. C. § 4198, een. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. 7455.

Cited: (In brief of counsel) Beck v. avin (1908) 15 I. 363; Nobach v. Scott 1911) 20 I. 558, 119 P. 295; Richards . Richards (1913) 24 I. 87, 132 P. 576.

Nonresident attorneys: Before a nonresident attorney may appear in the state courts he must have associated with him a resident attorney, whose name shall appear on the pleadings. Anderson v. Coolin (1915) 27 I. 334, 149 P. 286.

§ 6703. Verification of pleadings. Every pleading must be subcribed by the party or his attorney, and, when the complaint is veried, or when the state or any officer of the state, in his official capacity, plaintiff, the answer must be verified unless an admission of the truth f the complaint might subject the party to a criminal prosecution, or nless an officer of the state in his official capacity is defendant.

In all cases of a verification of a pleading, the affidavit of the party ıust state that the affiant believes the facts stated in the pleading to e true, and, where a pleading is verified, it must be by the affidavit of party, unless the parties are absent from the county where the attorey resides or from some cause unable to verify it, or the facts are with- ı the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person, exept one of the parties, he must set forth in the affidavit the reasons why is not made by one of the parties; when a corporation is a party the erification may be made by an officer thereof. ['11, c. 214, p. 687.]

Hist. (See C. C. P. '81, § 245) R. S. § 199, reen. R. C. ib.; am. '11, c. 214, p. 87, reen. C. L. § 4199.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 446; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7456.

Necessity of verification: An answer to an amended complaint need not be verified where the amended complaint is not verified. P. v. Hunt (1872) 1 I. 433.

Actions by officer: This section does not verify the complaint in an action by public officers, etc., in such sense as to require specific denials of the allegations thereof, but merely dispenses with such verification of the complaint and requires the defendant to verify. U. S. v. Shoup (1899) 2 I. 493, 21 P. 656.

Person entitled to verify: Where facts stated in a pleading are within the knowledge of some other person than the party, such other person may verify the same. Pence v. Durbin (1874) 1 I. 550.

In an original proceeding in the supreme court for a writ of mandate to compel a clerk of the district court to file an information presented by the prosecuting attorney, the state is the party interested and the prosecuting attorney, representing the state, may verify the complaint or petition. S. v. Quarles (1907) 13 I. 252, 89 P. 636.

Verification by attorney: An attorney may verify a petition for a writ of review where the petition shows he is better acquainted with the proceedings than the client, and he states in the affidavit that he knows the facts stated in the petition and has examined all the proceedings mentioned therein. Madison v. Piper (1898) 6 I. 137, 53 P. 395.

Where an affidavit is made for the purpose of procuring an injunction the person who knows the facts should make the affidavit if he can be procured to do so, and if he can not, and the affidavit is made by the attorney, the reason why he makes the affidavit should be fully set forth and the affidavit should show why the party who personally knows the facts does not make the same. Wiles v. Northern Star M. Co. (1907) 13 I. 326, 89 P. 1053.

Defective verification: Where the verification of a pleading is not objected to any defect therein is waived and the pleading can not be disregarded for want of a proper verification. Pence v. Durbin (1874) 1 I. 550.

§ 6704. [4200] **Genuineness of instruments deemed admitted.** When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified. [R. S. § 4200.]

Hist. (See C. C. P. '81, § 246) R. S. § 4200, reen. R. C. ib; reen, C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 447; Kerr's C. ib.

Terms defined: The due execution of an instrument in writing goes to the manner and form of its execution by a person competent to execute it according to the laws and customs of the country where executed. The genuineness of an instrument in writing goes to the question of its having been the act of the party, just as represented; or, in other wards, that the signature is not spurious and that nothing has been added to or taken from it which would lay the party signing or changing the instrument liable for forgery. Cox v. Northwestern Stage Co. (1871) 1 I. 376; Austin v. Brown Bros. Co. (1917) 30 I. 167, 164 P. 95.

Specific denial necessary: In order to put in issue the execution or genuineness of a bond in suit a specific verified denial is necessary; a general denial is insufficient. U. S. v. Alexander (1888) 2 I. 386, 17 P. 1746.

§ 6705. [4201] **Same.** When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant. [R. S. § 4201.]

Hist. (See C. C. P. '81, § 247) R. S. § 4201, reen. R. C. ib,; reen. C. L. ib.

Comp. leg.—Cal. Same except time is five days and the last clause is omitted; C. C. P. 1872, § 448; now same as amended: Kerr's C. ib.

Fraud may be shown: The failure of the plaintiff in a personal injury action to deny under oath the genuineness and due execution of a release relied on by the defendants as a bar, does not preclude the plaintiff from showing that the release was obtained by fraud. Cox v. Northwestern Stage Co. (1871) 1 I. 376.

Surrounding circumstances: Failure to file an affidavit denying the execution of a deed, does not preclude evidence of what took place between the parties at the time of the execution and delivery of the deed. Martin v. Dowd (1902) 8 I. 453, 69 P. 276.

Failure to file affidavit does not preclude plaintiff from denying the effectiveness of a release interposed as a defense. Gold Hunter M. & S. Co. v. Bowden, 252 F. 388.

Validity of instrument subject to attack A failure to file an affidavit denying the genuineness or due execution of an instrument does not place a party in the position of admitting its validity and he should be allowed to introduce evidence that the instrument, notwithstanding its genuineness and due execution is invalid. Pettingill v Blackman (1917) 30 I. 241, 164 P. 358.

Failure to deny a written instrumen contained in the answer as required by this section admits the genuineness and due execution of such instrument, but plaintiff is not precluded from taking any position in avoidance of the contract not inconsistent with the admission of its genuinenes and due execution. Austin v. Brown Bros (1917) 30 I. 167, 164 P. 95.

§ 6706. [4202] **Same: Right to inspect original.** But the execution of the instruments mentioned in the two preceding sections, is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same, is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy upon the adverse party or his attorney, and filed with the papers in the case. [R. S. § 4202.]

Hist. (See C. C. P. '81, § 248) R. S. § 4202, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same except last sentence is omitted: C. C. P. 1872, § 449; now same as amended: Kerr's C. ib.

N. D. See C. C. P. § 7457.

ARTICLE 7.

GENERAL RULES OF PLEADINGS.

§ 6707. [4207] **Pleadings liberally construed.** In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. [R. S. § 4207.]

Hist. (See C. C. P. '81, § 249) R. S. § 4207, reen, R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 452; Kerr's C. ib.

N. D. Similar: C. C. P. § 7458.

Cited: Holt v. Spokane etc. Ry. Co. (1893) 3 I. 703, 35 P. 39; Cantwell v. McPherson (1893) 3 I. 721, 34 P. 1095; Shaw v. Manville (1895) 4 I. 369, 39 P. 559; Stuart v. Noble Ditch Co. (1904) 9 I 765, 76 P. 265; Golden v. Spokane etc. Rr. Co. (1911) 20 I. 531, 118 P. 1077.

Purpose of section: The purpose and object of our code of procedure is to have actions tried upon their merits and not to have them dismissed on mere technicalities. Nobach v. Scott (1911) 20 I. 558, 119 P. 295.

Applied: A pleading should be so construed as to allege all of the facts that can be implied by fair and reasonable intendment from the facts expressly alleged. Where a clerical mistake is made in a date and the whole pleading taken together clearly shows the correct date this is sufficient. McCormick v. Smith (1913) 23 I. 487, 130 P. 999.

Where a material fact is only stated inferentially and pleading is not properly demurred to for this reason, it is good after judgment. (On petition for rehearing) The Mode v. Myers (1917) 30 I. 165, 164 P. 91.

§ 6708. [4208] **Sham and irrelevant matter.** Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may in its discretion, impose. [R. S. § 4208.]

Hist. (See C. C. P. '81, § 250) R. S. § 4208, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 453; Kerr's C. ib.

N. D. Similar: C. C. P. § 7451.

Whole answer stricken: A whole answer may be stricken out as irrelevant or sham. Goldstein v. Krause (1887) 2 I. 294, 13 P. 232.

Denials on information: An answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party, is properly stricken out as sham and frivolous. First Nat. Bank v. Martin (1898) 6 I. 204, 55 P. 302.

§ 6709. [4209] **Pleading an account.** It is not necessary for a party to set forth in pleading the items of an account therein alleged, but he must deliver to the adverse party within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or a judge thereof, may order a further account when the one delivered is too general or is defective in any particular. [R. S. § 4209.]

Hist. (See C. C. P. '81, § 251) R. S. § 4209, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same except "five days" for "10 days": C. C. P. 1872, § 454; Kerr's C. ib.

N. D. Similar: C. C. P. Sec. 7457.

Cited: Alexander v. U. S. (1893) 57 F. 628; (In brief of counsel) Pomeroy v. Gorton (1913) 25 I. 279.

Allegation of balance: This section is intended to relieve the pleader from the necessity of specifying the exact amount of each separate item of an account and amply protects the adverse party from surprise at the trial. It is sufficient to allege an indebtedness on a balance of account for money loaned, services performed, goods furnished and money paid between cer-

tain dates. Mills v. Glennon (1885) 2 I 105, 6 P. 116.

Bill of particulars: This section provides the method for an adverse party securing an itemized statement of an account, and in addition to that provision of the statute the court in an equity case has the inherent power to so regulate and control its proceedings as to require the party to furnish a bill of particulars in a proper case. Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 I. 5, 93 P. 789.

Discretion of court: The requirement that the adverse party shall serve an itemized statement of the account sued on within 10 days after demand therefor is not mandatory but directory, and vests a discretion in the trial court as to whether or not it should inflict the extreme penalty of excluding evidence of such an account where the party has failed to serve the statement within the time required. Miller v. Mullan (1909) 17 I. 28, 104 P. 660, 19 Ann. Cas. 1107.

Action for tort: Question whether action for tort falls within the provisions of this section. Miller v. Mullan, supra.

§ 6710. [4210] **Description of real property.** In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it. [R. S. § 4210.]

Hist. (See C. C. P. '81, § 252) R. S. § 4210, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 455; Kerr's C. ib.

§ 6711. [4211] **Pleading a judgment.** In pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction. [R. S. § 4211.]

Hist. (See C. C. P. '81, § 253) R. S. § 4211, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 456; Kerr's C. ib.

N. D. Similar: C. C. P. § 7460.

Allegation of judicial sale: In an action against a bidder at an administrator's sale to recover the difference between the amount of the bid and the sum realized at a resale, an allegation that the sale was made by virtue of an order of sale duly made by the probate court, is equivalent to a complete statement of all the facts which conferred jurisdiction upon the probate court to make the order of sale. Ethell v. Nichols (1879) 1 I. 741.

§ 6712. [4212] **Pleading conditions precedent.** In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. [R. S. § 4212.]

Hist. (See C. C. P. '81, § 254) R. S. § 4212, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 457; Kerr's C. ib.

N. D. Similar: C. C. P. § 7461.

Cited: (In brief of counsel) Anderson v. Council L. Co. (1917) 30 I. 464. See Ida. Irr. Co. v. Pew (1914) 26 I. 272, 141 P. 1099.

§ 6713. [4213] **Pleading statute of limitations.** In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provision of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is so barred. [R. S. § 4213.]

Hist. (See C. C. P. '81, § 255) R. S. § 4213, reen. R. C. ib.; reen. C. L. ib.

Cross ref. Statute of limitations: § 6607 et seq. When objection deemed waived: § 6693. Rogers v. O. W. R. R. & N. Co. (1916) 28 I. 609, 156 P. 98.

Comp. leg.—Cal. Same: C. C. P. 1872, § 458; Kerr's C. ib.

N. D. Similar: C. C. P. § 7460.

Statute must be pleaded: Frantz v. Ida Artes. Well & Dri. Co. (1896) 5 I. 71, 46 P. 1026.

Miscitation of statute: If the pleader cites the wrong section of the statute of limitations he can not urge the question on appeal unless he amended in the court below. Tritthart v. Tritthart (1913) 24 I. 186, 133 P. 121.

Sufficiency of pleading: The statute of limitations is not sufficiently pleaded by general demurrer but should be pleaded by answer in accordance with this section. Kelly v. Leachman (1893) 3 I. 629, 33 P. 4. The statute must be pleaded by answer or special demurrer; a general demurrer is insufficient although the complaint shows on its face that the cause of action is barred. Chemung M. Co. v. Hanley, (1904) 9 I. 786, 77 P. 226.

A statute of limitations may be pleaded either in the demurrer or answer, where it appears on the face of the complaint that the cause of action is barred by such statute, and by answer where it does not appear on the face of the complaint that the cause of action is so barred. The plea of the statute of limitations can not be invoked by general demurrer. Rogers v. O. W. R. R. &. N. Co. (1916) 28 I. 609, 156 P. 98.

Where it clearly appears on the face of the complaint that the cause of action is barred by the statute of limitations the statute must be pleaded by special demurrer. Where, however, this is not true, the plea of the statute must be taken by answer, and, if this is not done, the statute must be regarded as abandoned, and can not be taken advantage of on objection to the admissibility of evidence. McLeod v. Rogers (1916) 28 I. 412, 154 P. 970.

§ 6714. [4214] **Pleading private statutes.** In pleading a private statute or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage. [R. S. § 4214.]

Hist. (See C. C. P. '81, § 256) R. S. § 4214, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 459; Kerr's C. ib.

§ 6715. [4215] **Libel or slander.** In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken. [R. S. § 4215.]

Hist. (See C. C. P. '81, § 257, R. S. § 4215, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 460; Kerr's C. ib.

N. D. Similar: C. C. P. § 7463.

§ 6716. [4216] **Same: Answer: Mitigating circumstances.** In the actions mentioned in the last section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances. [R. S. § 4216.]

Hist. (See C. C. P. '81, § 258) R. S. § 4216, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 461; Kerr's C. ib.

N. D. Identical: C. C. P. § 7464.

§ 6717. [4217] **Uncontroverted allegations deemed admitted.** Every material allegation of the complaint not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party. [R. S. § 4217.]

Hist. (See C. C. P. '81, § 259) R. S. § 4217, reen. R. C. ib.; reen. C. L. ib.

Cross ref. Express reference to this section: Effect of overruling of demurrer to answer: § 6725.

Comp. leg.—Cal. Same: C. C. P. 1872, § 462; Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7467, 7477.

Cited: Parke v. Boulware (1901) 7 I. 190, 63 P. 1045; Schultz v. Rose Lake L. Co. (1915) 27 I. 528, 533, 149 P. 726; Drumheller v. Dayton (1916) 29 I. 552, 160 P. 944.

Affirmative defensive matter: Any affirmative matter which must be plead as a defense is deemed denied. Allen v. Phoenix Assurance Co. (1906) 12 I. 653, 88 P. 245.

The failure of the plaintiff in a personal injury action to deny under oath the genuineness and due execution of a release relied on as a bar by the defendants, does not preclude the plaintiff from showing that the release was obtained by fraud. Cox v. Northwestern Stage Co. (1871) 1 I. 376.

There is a distinction between situation of defendant who fails to plead matters relied upon as an affirmative defense and of a plaintiff under the code which has abolished replication, when it comes to attacking affirmative matter pleaded as

new matter in the answer. Pettingill v. Blackman (1917) 30 I. 241, 164 P. 358.

Statute of limitations: Where an answer interposes the statute of limitations as a defense, the matter therein stated is deemed to be denied, and it is error to render judgment on the pleadings in favor of the defendant. Alspaugh v. Reid (1898) 6 I. 223, 55 P. 300. And this is the rule even though the complaint shows on its face that the action is barred. Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226.

Where statute of limitations is pleaded by answer the question as to whether defendant is not estopped from raising that question may be determined without pleading estoppel in complaint. Powell-Sanders Co. v. Carssow (1915) 28 I. 201, 152 P. 1067.

No proof required: An admission contained in a pleading sustains a finding conformable to such admission. Broadbent v. Brumback (1888) 2 I. 336, 16 P. 555.

Where defendants fail to deny an allegation of the complaint they waive their right to proof thereto, and the plaintiff is justified in not tendering his testimony in support of the same. Burke v. McDonald (1890) 2 I. 679, 33 P. 49.

Admissions made in pleadings are not required to be supported by evidence on the part of the adverse party. Such admissions are taken as true against the party making them, without further proof or controversy. On the other hand, the plaintiff is deemed to have denied all allegations of new matter contained in the answer, but such statutory denials do not impose upon the plaintiff the necessity of proving any such allegations, in the event he desires to rely on or avail himself of any admissions therein contained. Knowles v. New Sweden Irr. Dist. (1909) 16 I. 217, 101 P. 81.

The pleadings in a cause are before the court as part of the proceedings, without being introduced in evidence. Admissions made by a pleading need not be supported by evidence of the opposing party. Wheeler v. Gilmore etc. Rr. Co. (1913) 23 I. 479, 130 P. 801.

§ 6718. [4218] **Material allegation defined.** A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. [R. S. § 4218.]

Hist. (See C. C. P. '81, § 260) R. S. § 4218, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 463, Kerr's C. ib.

§ 6719. [4219] **Supplemental complaint or answer.** The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, or answer, alleging facts material to the case occurring after the former complaint or answer. [R. S. § 4219.]

Hist. (See C. C. P. '81, § 261) R. S. § 4219, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 464; Kerr's C. ib.

N. D. Similar: C. C. P. § 7486.

Supplemental complaint: Matters changing the relation of the parties to a suit, or either of them, in respect to the matter in litigation, which transpired since the filing of the original complaint, are proper matters for a supplemental complaint. Dennison v. Willcut, (1894) 3 I. 793, 35 P. 698.

§ 6720. [4220] **Pleadings to be filed.** All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party, or his attorney. [R. S. § 4220.]

Hist. (See C. C. P. '81, § 262) R. S. § 4220, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 465; Kerr's C. ib.

Cited: (In brief of counsel) Kerney v. Hatfield (1917) 30 I. 90.

Applied to garnishee: The filing and service required by this section should be pursued with reference to pleadings filed by a garnishee, as well as by the plaintiff. Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6721. [4221] **Contributory negligence need not be negatived.** In all actions hereafter brought for damages for injury to person or property, contributory negligence is a matter of defense, and it is not necessary for the plaintiff to either plead or prove the negative of contributory negligence. ['07, p. 323, § 1.]

Hist. '07, p. 323, § 1, reen. R. C. § 4221, reen. C. L. ib.

Cited: Knauf v. Dover L. Co. (1911) 20 I 773, 120 P. 157; (erroneously as § 4421) Staab v. Rocky Mt. Bell T. Co. (1913) 314, 323, 129 P. 1078; Donovan v. Boise (1918) 31 I. 324, 171 P. 670.

Matter of defense: Contributory negligence is a matter of defense in this state. The burden of proving contributory negligence rests on the defendant. Carscallen v. Coeur d'Alene etc. Co. (1908) 15 I. 444, 459, 98 P. 622, 16 Ann. Cas. 544.

Contributory negligence is a defense, to be pleaded and proved by the defendant; but that does not alter the rule that, where the complaint itself shows that the negligence of the plaintiff was one of the contributing causes of the injury, or the proximate cause of the injury, the plaintiff can not recover. Goure v. Storey (1909) 17 I 352, 105 P. 794.

ARTICLE 8.

VARIANCE, MISTAKES AND AMENDMENTS.

§ 6722. [4225] **Material variance defined.** No variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that the party has been so misled, the court may order the pleading to be amended upon such terms as may be just. [R. S. § 4225.]

Hist. (See C. C. P. '81, § 263) R. S. § 225, reen. R. C. ib.; reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, 469; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7478.

Cited: Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co. (1898) 5 I. 793, 51 P. 90; Lewis v. Utah Con. Co. (1904) 10 I. 14, 77 P. 336; Gumaer v. White Pine etc. Co. (1905) 11 I. 591, 83 P. 771; Later v. Haywood (1906) 12 I. 78, 85 P. 494; Western Loan etc. Co. v. Kendrick S. Bk (1907) 13 I. 331, 336, 90 P. 112; Pa. etc. Co. v. Gallagher (1910) 19 I. 101, 112 P. 1044; Joyce v. Rubin (1913) 23 I. 296, 130 P. 793; Sweeney v. Johnson (1913) 23 I. 530, 130 P. 997; Clopton v. Meeves (1913) 24 I. 293, 133 P. 907; Trousdale v. Winona Wagon Co. (1913) 25 I. 130, 136 P. 372; (In brief of counsel) Pomeroy v. Gordan (1913) 25 I. 279; (In brief of counsel) S. v. Am. Surety Co. (1914) 261, 652; Schultz v. Rose Lake L. Co. (1915) 27 I. 528, 532, 149 P. 726; Newman v. Great Shoshone etc Co. (1916) 28 I. 764, 156 P. 111; (In dis. opp.) Snoderly v. Bower (1917) 30 I. 484, 490, 166 P. 265; Riordan v. Equitable Life Ins. Soc. 31 I. 657, 175 P. 586.

Variance: Variance arises when there is a substantial departure from the issue in the evidence adduced, and must be in some matter which in point of law is essential to the charge or claim. Davidson Gro. Co. v. Johnston (1913) 24 I. 336, 133 P. 929. Ann. Cas. 1915C 1129.

Immaterial variance: Where the defendants induced the plaintiff to believe that they were jointly liable on a contract, and the complaint was accordingly drawn on that theory, evidence which showed that the contract was made with but one of the defendants, could not have misled such defendant and was not a material variance. Hewitt v. Maize (1897) 5 I. 633, 51 P. 607.

Mode of objection: In case a variance misleads the adverse party to his prejudice, it is his duty to show the fact to the court, and he can not first raise the objection on motion for new trial or on appeal to the supreme court. Aulbach v. Dahler (1896) 4 I. 654, 43 P. 322; Johnson v. Gary (1910) 18 I. 623, 111 P. 855; Maw v. Coast Lbr. Co. (1911) 19 I. 396, 114 P. 9.

§ 6723. [4226] **Immaterial variance: Amendment.** Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. [R. S. § 4226.]

Hist. (See C. C. P. '81, § 264) R. S. § 226, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 470; Kerr's C. ib.

N. D. Identical: C. C. P. § 7479.

Cited: Aulbach v. Dahler (1896) 4 I. 654, 43 P. 322; (On petition for rehearing) Western etc. Co. v. Kendrick S. Bk. (1907) 13 I. 331, 336, 90 P. 112; (erroneously for 4225) Johnson v. Gary (1910) 18 I. 623, 111 P. 855; Pa. etc. Co. v. Gallagher (1910) 19 I. 101, 106, 112 P. 1044; Maw v. Coast Lbr. Co. (1911) 19 I. 396, 114 P. 9; Joyce v. Rubin (1913) 23 I. 296, 130 P. 793; Sweeney v. Johnson (1913) 23 I. 530, 130 P. 997; Clopton v. Meeves (1913) 24 I. 293, 133 P. 907; Trousdale v. Winona Wagon Co. (1913) 25 I. 130, 136 P. 372; (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652; Schultz v. Rose Lake L. Co. (1915) 27 I. 528, 149 P. 726; (In dis. op.) Snoderly v. Bower (1917) 30 I. 484, 166 P. 265.

Time of amendment: Amendment may be made at any time before judgment. Snowy Peak M. Co. v. Tamarack etc. Co. (1910) 17 I. 630, 107 P. 60.

§ 6724. [4227] **Failure of proof.** Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof. [R. S. § 4227.]

Hist. (See C. C. P. '81, § 265) R. S. § 227, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 471; Kerr's C. ib.

N. D. Similar: C. C. P. § 7480.

§ 6725. [4228] **Amendments of course.** Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial

of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have 10 days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to the complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed. If a demurrer to the answer be overruled the facts alleged in the answer must be considered as denied, to the extent mentioned in section 6717. [R. S. § 4228.]

Hist. (See C. C. P. '81, § 266) R. S. § 4228, reen. R. C. ib., reen. C. L. ib.

Cross ref. Demurrer and answer may be filed at the same time: § 6690. Service of amendments: § 6691.

Comp. leg.—Cal. Same except "section 462" for "section 4217": C. C. P. 1872, § 472; Kerr's C. ib.

N. D. Similar: C. C. P. § 7481.

Cited: Kroetch v. Empire Mill Co. (1903) 9 I. 277, 74 P. 868; (In brief of counsel) Idaho Placer M. Co. v. Green (1908) 14 I. 294; Pa. etc. Co. v. Gallagher (1910) 19 I. 101, 112 P. 1044; (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652.

Amendment of demurrer: A demurrer is a pleading and may be amended; if the amended demurrer is filed without permission of the court, the court may nevertheless, in its discretion, permit the same to remain on file. Kelly v. Leachman (1892) 3 I. 629, 33 P. 44. Leave to file an amended demurrer should first be obtained, but should be granted as of course as to a first amendment prior to hearing. It is not permissible to file a number of demurrers to the same pleading. Dunbar v. Bd. of Comrs. (1897) 5 I. 407, 49 P. 409.

Effect of amendment: Where an amended complaint and answer thereto are filed, the original complaint and answer cease to perform any function as pleadings and are no part of the record. P. v. Hunt (1872) 1 I. 433. An amended complaint renders the original functus officio as a pleading and takes the place of the original and dates back by relation to the time of filing such original. Woody v. Jamieson (1895) 4 I. 448, 40 P. 61.

Though demurrer pending to original complaint, plaintiff may file an amended complaint. Nuestel v. Spokane I. Ry Co. (1915) 27 I. 367, 149 P. 462.

Where a complaint is amended it takes the place of the original complaint, and the action of the trial court in overruling a demurrer to the original complaint becomes of no consequence, and can not be alleged as error on appeal. Andrews v. Moore (1908) 14 I. 465, 94 P. 579.

Service of amendment: When the plaintiff files an amended complaint in which material facts which are not contained in the original complaint are alleged, the amended complaint must be served upon all the defendants against whom judgment is sought upon such amended complaint. Vermont etc Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

Answer to amendment: It is not necessary to deny affirmative allegations in an amended cross-complaint made by defendant when such allegations were contained in substance in the original cross-complaint of said defendant and were denied by the answer of plaintiff thereto. Brossard v. Morgan (1900) 7 I. 215, 61 P. 1031.

Time for amendment: Under this section the parties may amend any pleading once as a matter of course at any time before answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, but such right of amendment without leave of court does not extend beyond the time allowed by law for filing a demurrer or answer where no such pleading has in fact been filed, and the right to thereafter file such a pleading rests in the sound discretion of the court. Dunbar v. Griffiths (1908) 14 I. 120, 93 P. 654.

Amendments under this section should be submitted before the close of the trial and submission of the case. Snowy Pea M. Co. v. Tamarack etc Co. (1910) 17 I. 630, 107 P. 60.

§ 6726. [4229] **General power to permit amendments, relieve from defaults, etc.** The court may, in furtherance of justice and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, and may upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow upon such terms as may be just an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this code, and also relieve a party, or his legal representative, from a judgment, order or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect; and whenever, for any reason satisfactor

to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When in an action to recover the possession of personal property the person making any affidavit did not truly state the value of the property and the officer taking the property or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made. [R. S. § 4229.]

Hist. (See C. C. P. '81, § 267) R. S. § 229, reen. R. C. ib., reen. C. L. ib.

Cross ref. Amendments in justice's court: § 7080.

Comp. leg.—Cal. Same in part, but "not exceeding five months" for "not exceeding six months": C. C. P. 1872, § 473; now same as amended: Kerr's C. ib.; Richardson v. Bohney (1910) 18 I. 328, 109 P. 727.

Mont. Same: C. C. P. § 744. See (Dis. op.) Valley S. Bk. v. Post Falls etc. Co. (1916) 29 I. 587, 604, 161 P. 242.

N. D. Analogous: C. C. P. § 7482. See also C. C. P. § 7483.

Cited: State v. Eves (1898) 6 I. 144, 53 P. 543; McMillen v. Wooley (1898) 6 I. 6, 51 P. 1029, Strode v. Miller (1900) 7 I. 6, 59 P. 893; Hoehman v. N. Y. Dry Goods Co. (1901) 8 I. 66, 67 P. 796; Eagleson v. Rubin (1909) 16 I. 92, 100 P. 735; (In brief of counsel) Simpson v. Pioneer Irr. Dist. (1909) 17 I. 435; Mantle v. Jack Waite M. Co. (1913) 24 I. 613, 135 P. 854; (In brief of counsel) McElroy v. Whitney (1913) 24 I. 210; (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652; Schultz v. Rose Lake L. Co. (1915) 27 I. 528, 149 P. 726; Nelson v. McGoldrick L. Co. (1917) 30 I. 451, 165 P. 1125; Allen v. Williams (1918) 31 I. 309, 171 P. 493.

Applied to probate court: This section applies to practice in the probate court. Connolly v. Probate Court (1913) 25 I. 35, 136 P. 205; Chandler v. Probate Court (1914) 26 I. 173, 141 P. 635; Est. of Blackington (1916) 29 L. 310, 158 P. 492.

Amendment of Pleadings.

Liberal rule: Great liberality should be shown in allowing amendments to pleadings in furtherance of justice between the parties. Kroetch v. Empire Mill Co. (1903) 9 I. 277, 74 P. 868; Dunbar v. Griffiths (1908) 14 I. 120, 93 P. 654; Rankin v. Caldwell (1908) 15 I. 625, 99 P. 108. Unless the exercise of the discretion to permit amendments vested in the trial court deprives the complaining party of some substantial right, it is not error. Havlick v. Davidson (1909) 15 I. 787, 100 P. 91; Panhandle L. Co. v. Rancour (1913) 24 I. 603, 135 P. 558.

The court may permit a defendant to withdraw his answer and cross complaint and file an amended demurrer to the complaint. Murphy v. Russell & Co. (1901) 8 I. 133, 67 P. 421.

It is not prejudicial error to refuse to permit an amendment to a pleading where the facts set forth in the amendment were admissible under the pleading prior to the amendment. Kroetch v. Empire Mill Co. (1903) 9 I. 277, 74 P. 868.

Not error for trial court to allow amendment to complaint where defendant allowed a continuance, if he desired. Lorang v. Randall (1915) 27 I. 259, 148 P. 468.

New issue prohibited: A new complaint and a new cause of action can not be substituted under the guise of an amendment to the original complaint. Hallett v. Larcom (1897) 5 I. 492, 51 P. 108.

Where amendment would change entirely or materially the issues, discretion of the court in refusing amendment will not be questioned. Fralick v. Mercer (1915) 27 I. 360, 148 P. 906.

Showing: An amendment proposed under this section must be supported by a showing sufficient to set in motion the discretion of the court to allow the party to amend. Snowy Peak M. Co. v. Tamarack etc. Co. (1910) 17 I. 630, 107 P. 60.

But it is an abuse of discretion for the court to refuse to permit a party to state to the court his reasons for invoking the court's assistance. Dunbar v. Griffiths (1908) 14 I. 120, 93 P. 654.

Time of amendment: After a case has been reversed on appeal and remanded for a new trial, the allowance of amendments to the pleadings is in the discretion of the court. Park v. Boulware (1903) 9 I. 225, 73 P. 19; Elder v. I. W. N. Rr. (1914) 26 I. 209, 141 P. 982.

Where a cause has been pending for some three or four years and had been finally tried and determined, it was proper for the court to refuse to permit the defendant to amend his answer and to file a cross complaint which would have necessitated a retrial of the case. Kindall v. Lincoln Hardware etc. Co. (1904) 10 I. 13, 76 P. 992.

Where plaintiff's attention is directed by demurrer or answer to the uncertainty or insufficiency of his complaint and he fails for two years to apply for leave to amend, it is not error for the court to refuse an application to amend made at that date. Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226.

An application to amend complaint while motion for nonsuit is pending is addressed to sound discretion of trial court. The Mode v. Myers (1917) 30 I. 159, 164 P. 91.

To conform to proof: The trial court has large discretion in permitting amendments to pleadings, and may permit such amendments at any stage of the proceedings almost as of course to make the pleadings correspond with the proof. Pa. etc. Co. v. Gallagher (1910) 19 I. 101, 112 P. 1044.

It is clearly within the discretion of the trial judge to permit amendments to be made after the close of the evidence to conform to the proof. Rankin v. Caldwell (1908) 15 I. 625, 99 P. 108; Sweeney v. Johnson (1913) 23 I. 530, 130 P. 997; Unfried v. Libert (1913) 23 I. 603, 131 P. 660; Trask v. Boise King Placers Co. (1914) 26 I. 290, 142 P. 1073.

Where, after the close of the evidence in the trial of a case, an amendment is proposed to the answer, and it appears that such proposed amendment would not be supported by the proof, it is not error to disallow the same. Valentine v. Rosenhaupt (1910) 19 I. 130, 112 P. 685.

Where it appears that the amendment offered is made for the purpose of conforming to the proof and does not present any new cause of action or issue, and the opposing party has not been misled or deprived of introducing any evidence which he might desire to offer in consequence of the amendment, it is error for the court to disallow such amendment. Harrison v. Russell & Co. (1909) 17 I. 196, 105 P. 48.

Where application to amend a pleading to conform to the proof is made before the findings and decree are signed by the judge, such application is not too late, and should not for that reason be denied, but otherwise if no proof to support same. Snowy Peak M. Co. v. Tamarack etc. Co. (1910) 17 I. 630, 107 P. 60.

Attachment proceedings: Secs. 6812, 6813, and 6814, expressly directed to the subject to attachments, limit and control the general provisions of § 6726. Heaton v. Panhandle Smelting Co., 32 I. —, 179 P. 510.

Vacation of Judgments.

Application of remedy: If for any excusable neglect a defendant allowed judgment to be taken against him in the lower court, his remedy is in that court under this section, and not in a direct appeal to the supreme court. Kraft v. Greathouse (1869) 1 I. 254.

Plaintiff has no right to have judgment standing on records against defendant, if same is void, and motion to vacate is a proper procedure. Leonard v. Brady (1915) 27 I. 75, 147 P. 286; Leonard v. Brady (1915) 27 I. 78, 147 P. 284.

Where, through mistake, there has been a failure to enter the judgment pronounced, the court has power to correct the matter and to order the proper entry made. Clerical mistakes in judgment may be corrected but judicial errors can only be remedied by motion for new trial or upon appeal. Wylie v. Kent (1915) 28 I. 16, 152 P. 194.

The provisions of this section apply to judgments entered on a trial of the case as well as judgments entered by default. Franklin Co. v. Bannock Co. (1916) 28 I. 653, 156 P. 108.

A void judgment in divorce action may be set aside even after death of one of parties when property interests of survivor are involved. Vincent v. Black (1917) 30 I. 636, 166 P. 923.

An order extending time to plead entered after entry of default operates ipso facto to vacate default. Default judgment entered while cause is at issue is void. Ib.

Discretion of court: An application to vacate a default judgment is entrusted to the discretion of the trial court and such discretion will not be reviewed unless abused. Baker v. Knott (1893) 3 I. 700, 35 P.172; Western Loan etc Co. v. Smith (1906) 12 I. 94, 85 P. 1084; Pease v. County of Kootenai (1901) 7 I. 731, 65 P. 432; Culver v. Mountainhome Elec. Co. (1910) 17 I. 669, 107 P. 65; Green v. Kandle (1911) 20 I. 190, 118 P. 90; Richards v. Richards (1913) 24 I. 87, 132 P. 576; Neustal v. Spokane I. Ry. Co. (1915) 27 I. 367, 149 P. 462; Domer v. Stone (1915) 27 I. 279, 149 P. 505; Leonard v. Brady (1915) 27 I. 78, 147 P. 284; Franklin Co. v. Bannock Co. (1916) 28 I. 653, 156 P. 108.

But the improper exercise of such discretion will be corrected when the essential elements necessary to set such discretion in motion are wanting. Holzemar v. Henneberry (1905) 11 I. 428, 83 P. 497; Valley S. Bk v. Post Falls etc. Co. (1916) 29 I. 587, 161 P. 242.

In determining the question of discretion, the power of the court should be freely and liberally exercised under the statute to mold and direct its proceedings so as to dispose of cases upon their substantial merits. Pittock v. Pittock (1908) 15 I. 47, 96 P. 212; Hamilton v. Hamilton (1912) 21 I. 672, 123 P. 630; Humphrey v. Idaho Gold etc Co. (1912) 21 I. 126, 129 P. 823, 40 L. R. A. (N. S.) 817.

Discretionary power means a sound and impartial discretion and should be resolved in case of doubt, in favor of the application. Hamilton v. Hamilton, supra.

Grounds: The premature entry of judgment or its entry contrary to the terms of a stipulation between the parties may be corrected in the lower court under this section. Grete v. Knott (1881) 2 I. 1, 3 P. 25.

Where a mistake, purely clerical, is nade in entering a judgment, such mis-ake being in the description of land, such nistake may be corrected under the pro-isions of this section. Wilcox v. Wells 1898) 5 I. 786, 51 P. 985.

A mistake in the transmission of a tele-gram sent by the judge setting the date or a hearing, whereby the party is de-prived of a hearing without his fault, is sufficient ground for vacating a judg-nent. Thum v. Pyke (1898) 6 I. 359, 5 P. 864.

To vacate a default defendant must show his mistake was one of fact and not law. Neglect of lawyer to familiarize himself with the practice of the forum wherein ase is pending, is not excusable. Domer . Stone (1915) 27 I. 279, 149 P. 505; Valley S. Bk. v. Post Falls etc. Co. (1916) 9 I. 587, 161 P. 242.

Neglect of attorney acting as agent not ufficient to justify court in setting aside efault against principal. (Davis, D. J., issents.) Kynaston v. Thorpe (1916) 29 . 302, 158 P. 790.

Time for proceedings: A motion to set side a judgment may be made within six nonths after the adjournment of the term t which the judgment was rendered, and eed not necessarily be made within six nonths after the rendition of the judgment. Kerns v. McAulay (1902) 8 I. 558, 69 P. 39. But the court is without power to acate a judgment after the expiration of he prescribed six months unless the court cted without jurisdiction, and such fact ppears from the judgment roll. Vane v. ones (1907) 13 I. 21, 88 P. 1058.

The requirements of this section as to ne time within which proceedings may be aken for the vacation of an order, and s to notice to the adverse party, do not pply to void orders, and judgments. Kerns v. Morgan (1905) 11 I. 572, 83 P. 54; Shumake v. Shumake (1910) 17 I. 49, 107 P. 42.

Same: In probate court: The court or ne judge thereof does not have juris-iction to open up or set aside its decree nore than six months after decree is en-ered. Connolly v. Probate Court (1913) 5 I. 35, 136 P. 205.

Terms of the probate court have been olished by § 6468, but a maximum "reas-nable time" under this section would be x months from the rendering of the de-ee or the making of the order to be set side. Chandler v. Probate Court (1914) 3 I. 173, 141 P. 635.

Showing: Affidavits on motion to set side a default judgment must show that e default occurred through mistake, in-dvertence, surprise or excusable neglect. Western Loan etc. Co. v. Smith (1906) 12 94, 85 P. 1084. And must also set forth cts from which the court can judge hether or not the defendant has a merit-ious defense. Holzeman v. Henneberry 1905) 11 I. 428, 83 P. 497; Holland Bk Lieuallen (1898) 6 I. 127, 53 P. 398; ck v. Lavin (1908) 15 I. 363, 369, 97 P. 28; Council Imp. Co. v. Draper (1909) I. 541, 102 P. 7; Culver v. Mountain ome Elec. Co. (1910) 17 I. 669, 107 P. ; Harr v. Kight (1910) 78 I. 53, 108 539; Hall v. Whittier (1911) 20 I. 120 6 P. 1031.

Proper practice does not permit the facts stated in the applicant's affidavit, which constitute his defense to the action, to be rebutted by counter affidavits. (On rehearing) Beck v. Lavin (1908) 15 I. 369, 97 P. 1028.

A litigant moving for relief under this section on the grounds of mistake, inadvertence, surprise or excusable neglect, must show that he has exercised due diligence in the prosecution and protection of his rights, such as an ordinary prudent man would exercise under similar conditions. Council Imp. Co. v. Draper (1909) 16 I. 541, 102 P. 7.

Where a defendant has been sued in a state court and summons has been served upon him, and prior to the expiration of the time allowed by statute for him to answer, but without appearing or answering he files a petition for removal to the federal court and the removal is ordered and the cause is thereafter remanded by the federal court on the ground that it was not removable from the state court, and in the meanwhile the defendant has allowed his time to elapse in which to appear or answer and he makes no appearance in the state court, and the clerk thereupon enters his default for failure to appear or answer, he can not thereafter move to have the default vacated and the judgment set aside on the ground of his mistake, inadvertence and excusable neglect. Morbeck v. Bradford-Kennedy Co. (1910) 19 I. 83, 113 P. 89; S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097, Ann. Cas. 1916E 209.

Where only documentary evidence is before the court below, and it renders its decision upon such evidence alone, this court will make an original examination of the evidence as contained in the record and will exercise its judgment and discretion, the same as if the case were being presented to it in the first instance. Parsons v. Wrble (1911) 19 I. 619, 115 P. 8, 13.

Where a judgment has been obtained by plaintiff in an action which does not survive and the plaintiff thereafter dies before a motion for a new trial is heard or before the case is heard upon appeal, a clear showing ought to be required from the moving party before the court should set aside or reverse the judgment. Green v. Kandle (1911) 20 I. 190, 118 P. 90.

Where an application is made to open a default and set aside a judgment and the defendant in support of said motion presents and asks to have filed a verified answer, and the answer states a defense to the cause of action stated in the complaint, such answer is sufficient as an affidavit of merits, but a cross-complaint will not be considered as part of the answer. Vollmer Clearwater Co. v. Grunewald (1912) 21 I. 777, 124 P. 278.

If a party stands on his pleadings and a motion is presented which goes to the vitals of the issue, he must abide the result, and the court will not set aside the judgment and allow amendments, where such party is not taken by surprise. Union Trust etc. Bk. v. Idaho S. & R. Co. (1913) 24 I. 735, 135 P. 822.

In an action for divorce, where a default has been taken a much more liberal rule should be followed on motion to vacate the default than in an ordinary action involving property rights, for the reason that the state, as well as the parties, is interested in the marital relationship. (Dis. op.) Darwin v. Darwin (1915) 27 I. 303, 149 P. 467.

Lack of personal service: Where the defendant has not been personally served and an application to set aside a default is made within a year, it is within the legal discretion of the court to grant such application and to open the default and permit the defendant to file an answer on the merits. Brooks v. Orchard L. Co. (1912) 21 I. 212, 121 P. 101.

Where the service of summons is made upon the county auditor and not upon an officer of a company or its designated agent, such summons has not been "personally served" on the defendant within the meaning of the term as used in this section. (Sullivan, J. dissents) Ib.

Service by leaving a notice at the last and usual place of abode of the defendant is not personal service but a substitute for it. Ib.

Other Proceedings.

Cost bills: Where no notice of the filing of a cost bill is given the adverse party may obtain relief from the bill if it is exorbitant. McDonald v. Burke (1892) 3 I. 266, 28 P. 440, 35 A. S. R. 276.

On a motion to strike a cost bill from the files on the ground that such bill was not filed within five days after the notice of the decision of the court, a showing upon opposition to said motion that at the time of the decision plaintiff was in an eastern state and that his attorney did not have sufficient data to make out such bill, is not sufficient to excuse the failure to file such bill. Stickney v. Berry (1900) 7 I. 302, 62 P. 925.

Bill of exceptions: A misunderstanding of an attorney as to the time when a 60-day extension of the time within which to file a bill of exceptions should begin to run is not ground for invoking the provisions of this section in support of an application for still further time in which to prepare and serve the bill of exceptions. Sandstrom v. Smith (1906) 11 I. 779, 84 P. 1060.

The preparation and settlement of a statement or bill of exceptions is a proceeding within the meaning of the term "proceeding" as used in this section, and where application is made to the court to settle a bill of exceptions after the time has expired for serving the same, on the ground of mistake, inadvertence or excusable neglect, and the court finds that the bill was not served in time by reason of mistake, inadvertence, surprise or excusable neglect, it is the duty of the court to grant relief from such default. Richardson v. Bohney (1910) 18 I. 328, 109 P. 727.

Indorsement: Court properly allows amendment changing indorsement by "clerk" to be by "auditor" to conform to requirements of law. O'Connor v. Comrs. of Bear Lake Co. (1909) 17 I. 346, 351, 105 P. 560.

Stipulations: It is within the sound judicial discretion of the trial court, for good cause shown and in furtherance of justice, to relieve parties from stipulations which they have entered into in the course of judicial proceedings, and it is its duty to do so when enforcement thereof would be inequitable and when all parties to the action will, by vacating the stipulation, be placed in exactly the same condition they were in before it was made. Koepl v. Rupert (1916) 29 I. 223, 158 P. 319.

§ 6727. [4230] **Fictitious designation of defendant.** When the plaintiff is ignorant of the name of a defendant he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. [R. S. § 4230.]

Hist. (See C. C. P. '81, § 268) R. S. § 4230, reen. R. C. ib., reen. C. L. ib.

Cross ref. Designation of defendant by fictitious name in proceedings for animal trespass: § 1990.

Comp. leg.—Cal. Same: C. C. P. 1872 § 474; Kerr's C. ib.

Cited: Cleveland v. Wallace (1913) 2 I. 570, 131 P. 10.

§ 6728. [4231] **Immaterial errors disregarded.** The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error o defect. [R. S. § 4231.]

Hist. (See C. C. P. '81, § 269) R. S. § 4231, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 475; different as amended: Kerr's C. ib.

Cited: (Dis. op.) Boise City v. Artes. H. & C. W. Co. (1895) 4 I. 351, 39 P. 562; Wheeler v. Com. Bk. of Moscow (1896) 5 I. 15, 46 P. 830; Bk. of Troy v. Linford (1896) 4 I. 677, 43 P. 680; Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co. (1898) 5 I. 793, 51 P. 990; Reynolds v. Corbus (1901) 7 I. 481, 63 P. 884; White v Johnson (1904) 10 I. 438, 79 P. 455; Che mung M. Co. v. Hanley (1904) 9 I. 78 77 P. 226; Gumaer v. White Pine etc. C (1905) 11 I. 591, 83 P. 771; (Dis. op. Jackson v. Barrett (1906) 12 I. 465, 86 I 270; (In brief of counsel) Morris v. Lem (1907) 13 I. 116, 88 P. 761; Re Shar (1908) 15 I. 120, 96 P. 563, 18 L. R. A (N. S.) 886; Fegtly v. Village Blacksmit M. Co. (1910) 18 I. 536, 111 P. 129; Rov ley v. Stack-Gibbs Lbr. Co. (1910) 19

107, 112 P. 1041; Smith v. Field (1911) 19 I. 558, 114 P. 668, Ann. Cas. 1912C 354; Sweeney v. Johnson (1913) 23 I. 530, 130 P. 997; Richardson v. Bohney (1914) 26 I. 35, 140 P. 1106; (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652; (In brief of counsel) First Nat. Bk. v. Walker (1915) 27 I. 199; Schultz v. Rose Lake Lbr. Co. (1915) 27 I. 528, 149 P. 726; (Dis. op. on rehearing) American M. Co. Ltd. v. Trask (1915) 28 I. 642, 652, 156 P. 1136; Strong v. O. S. L. Ry. Co. (1917) 31 I. 48, 169 P. 175; Smith v. Peterson (1917) 31 I. 34, 169 P. 290.

Harmless errors: The following errors or defects have been disregarded as not prejudicial:

Non prejudicial error in the admission and rejection of evidence. Hawkins v. Pocatello Water Co. (1894) 3 I. 766, 35 P. 711; Work Bros. v. Kinney (1894) 8 I. 771, 71 P. 477; Est. of McVay (1907) 14 I. 56, 93 P. 28; Spongberg v. First Nat. Bk. (1909) 15 I. 671, 99 P. 712; Rosnagle v. Armstrong (1909) 17 I. 246, 105 P. 216; Marysville Merc. Co. v. Home Ins. Co. (1912) 21 I. 377, 121 P. 1026.

Clerical error. Sterrett v. Sweeney (1908) 15 I. 416, 421, 98 P. 418, 128 A. S. R. 68, 20 L. R. A. (N. S.) 963.

Erroneous instruction. Tarr v. O. S. L. Ry. Co. (1908) 14 I. 192, 93 P. 957, 125 A. S. R. 151.

Irregularities in summons. McKnight v. Grant (1907) 13 I. 629, 92 P. 989, 121 A. S. R. 287; Harpold v. Doyle (1909) 16 I. 671, 102 P. 158.

Informality in verdict. Trask v. Boise King Placers Co. (1914) 26 I. 290, 142 P. 1073.

A variance which does not mislead the adverse party. Later v. Haywood (1906) 12 I. 78, 85 P. 494.

A defect in a notice of appeal which in no way affects any substantial right of the respondents. Taylor v. McCormick (1901) 7 I. 524, 64 P. 239.

Even if the judgment in an action of replevin is not in the alternative and makes no provision for the return of the property, if it clearly appears from the record that return can not be had, money judgment will be sustained. Cady v. Keller (1916) 28 I. 368, 154 P. 629.

On appeal: A party to an action will not be permitted to stand by and neglect or refuse to raise seasonable objections to mere defects in pleadings or proceedings and thereafter take advantage of such defects on appeal. Nobach v. Scott (1911) 20 I. 558, 119 P. 295.

Condemnation proceedings: In condemnation proceedings the courts will apply this section. Empire Mill v. Dist. Ct. (1915) 27 I. 383, 149 P. 499; 27 I. 400, 149 P. 505.

Jurisdictional facts material: This section does not authorize the court to disregard a defect in proof of a jurisdictional fact such as service of notice of appeal. Warner v. Teachenor (1884) 2 I. 38, 2 P. 717.

CHAPTER 255.

PROVISIONAL REMEDIES IN CIVIL ACTIONS.

ARTICLE 1.

ARREST AND BAIL.

Cross ref. Discharge of persons imprisoned on civil process: §§ 7308-19.

§ 6729. [4240] Arrest in civil action. No person can be arrested in a civil action except as prescribed in this code. [R. S. § 4240.]

Hist. (See C. C. P. '81, § 270) R. S. § 4240, reen. R. C. ib., reen. C. L. ib.

Cross ref. Arrest of debtor in supplementary proceedings: § 6942. Arrest in justices' court actions: §§ 7082-7. Arrest in forcible entry and unlawful detainer: § 7330. Witnesses privileged from arrest: § 8045.

Comp. leg.—Cal. Same: C. C. P. 1872, § 478; Kerr's C. ib.

N. D. Similar: C. C. P. § 7488.

§ 6730. [4241] Grounds for arrest. The defendant may be arrested as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon a contract express or implied where the defendant is about to depart from the state with intent to defraud his creditors, or when the action is for wilful injury to person, to character, or to property, knowing the property to belong to another.

2. In an action for a fine or penalty, or on a promise to marry, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment, or for a wilful violation of duty.

3. In an action to recover the possession of personal property unjustly detained when the property, or any part thereof, has been concealed, removed or disposed of to prevent its being found or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. [R. S. § 4241.]

Hist. (See C. C. P. '81, § 271) R. S. § 4241, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 479; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7489.

§ 6731. [4242] **Order for arrest.** An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought or from a probate judge. [R. S. § 4242.]

Hist. (See C. C. P. '81, § 272) R. S. § 4242, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 480; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7490.

§ 6732. [4243] **Affidavit for arrest.** The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 6730. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the court. [R. S. § 4243.]

Hist. (See C. C. P. '81, § 273) R. S. § 4243, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 481; Kerr's C. ib.

N. D. Similar: C. C. P. § 7491.

§ 6733. [4244] **Undertaking required of plaintiff.** Before making the order the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least $500, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court. [R. S. § 4244.]

Hist. (See C. C. P. '81, § 274) R. S. § 4244, reen. R. C. ib., reen. C. L. ib.

Cross ref. Common form of undertaking: § 7236. State, county or city need not give bond: § 7238.

Comp. leg.—Cal. Similar: C. C. P. 1872 § 482; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7492.

§ 6734. [4245] **Time of making and contents of order.** The order may be made at the time of the issuing of the summons, or at any time afterward before judgment. It must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum and to return the order at a time therein mentioned to the clerk of the court in which the action is pending. [R. S. § 4245.]

Hist. (See C. C. P. '81, § 275) R. S. § 4245, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 483; Kerr's C ib

N D. Analogous: C. C. P. § 7493.

§ 6735. [4246] **Arrest: How made.** The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest. [R. S. § 4246.]

Hist. (See C. C. P. '81, § 276) R. S. § 4246, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sheriff must indorse time of reception on process: § 3596. Officer must exhibit process on demand: § 3608. Service of process by elisor: §§ 3612-5.

Comp. leg.—Cal. Same: C. C. P. 1872, § 484; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7494.

§ 6736. [4247] Same: Custody of defendant. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law. [R. S. § 4247.]

Hist. (See C. C. P. '81, § 277) R. S. § 4247, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sheriff is justified by, and must execute, process regular on its face, notwithstanding defects in the proceedings: § 3607. Arrest and custody of sheriff: § 3614. Board money to be advanced in case of commitment on execution: § 7319. Security for board of persons committed on civil process: § 9430.

Comp. leg.—Cal. Same: C. C. P. 1872, § 485; Kerr's C. ib.

N. D. Similar: C. C. P. § 7495.

§ 6737. [4248] **Right to bail.** The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or depositing the amount mentioned in the order of arrest. [R. S. § 4248.]

Hist. (See C. C. P. '81, § 278) R. S. § 4248, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 486; Kerr's C. ib.

N. D. Similar: C. C. P. § 7496.

§ 6738. [4249] **Bail: How given.** The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action. [R. S. § 4249.]

Hist. (See C. C. P. '81, § 279) R. S. § 4249, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 487; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7497.

§ 6739. [4250] **Surrender of defendant by bail.** At any time before judgment or within 10 days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested. [R. S. § 4250.]

Hist. (See C. C. P. '81, § 280) R. S. § 4250, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 488; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7498.

§ 6740. [4251] **Same: How made.** For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery or surrender take place before the expiration of 10 days after judgment; but if such arrest, delivery or surrender be not made within 10 days after judgment, the bail are finally charged

on their undertaking, and bound to pay the amount of the judgment within 10 days thereafter. [R. S. § 4251.]

Hist. (See C. C. P. '81, § 281) R. S. § 4251, reen. R. C. ib., reen. C. L .ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 489; Kerr's C. ib.

N. D. Similar: C. C. P. 7499.

§ 5741. [4252] **Proceedings against bail.** If the bail neglect or refuse to pay the judgment within 10 days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment. [R. S. § 4252.]

Hist. (See C. C. P. '81, § 282) R. S. § 4252, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 490; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7500.

§ 6742. [4253] **Exoneration of bail.** The bail are exonerated by the death of the defendant or his imprisonment in the state prison, or by his legal discharge from the obligation to render himself amenable to the process. [R. S. § 4253.]

Hist. (See C. C. P. '81, § 283) R. S. § 4253, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 491; Kerr's C. ib.

N. D. Similar: C. C. P. 7501.

§ 6743. [4254] **Return by sheriff of order and bail bond.** Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court. [R. S. § 4254.]

Hist. (See C. C. P. '81, § 284) R. S. § 4254, reen. R. C. ib., reen C. L. ib.

Cross ref. Return of process is prima facie evidence of facts: § 3598. Penalty for failure to return: § 3599. Return of process after expiration of term of office: § 3619.

Comp. leg.—Cal. Same: C. C. P. 1872, § 492; Kerr's C. ib.

N. D. Similar: C. C. P. § 7502.

§ 6744. [4255] **Justification of bail: Notice.** Within five days after the receipt of notice, the sheriff or defendant may give the plaintiff or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupation of the latter), before the judge of the court or probate judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given there must be a new undertaking. [R. S. § 4255.]

Hist. (See C. C. P. '81, § 285) R. S. § 4255, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 493; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7503.

§ 6745. [4256] **Qualifications of bail.** The qualifications of bail are as follows:

1. Each of them must be resident and householder or freeholder within the state.

2. Each must be worth the amount specified in the order of arrest or the amount to which the order is reduced, as provided in this chapter, over and above all his liabilities, exclusive of property exempt from

execution; but the judge, on justification, may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. [R. S. § 4256.]

Hist. (See C. C. P. '81, § 286) R. S. § 256, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 7504.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 494; as amended: Kerr's C. ib.

§ 6746. [4257] **Justification: How made.** For the purpose of justification each of the bail must attend before the judge at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his insufficiency, in such manner as the judge in his discretion may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. [R. S. § 4257.]

Hist. (See C. C. P. '81, § 287) R. S. § 257, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 7505.

Comp. leg.—Cal. Similar: C. C. P. 1872, 495; Kerr's C. ib.

§ 6747. [4258] **Allowance of bail.** If the judge find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability. [R. S. § 4258.]

Hist. (See C. C. P. '81, § 288) R. S. § 258, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 7506.

Comp. leg.—Cal. Similar: C. C. P 1872, 496; Kerr's C. ib.

§ 6748. [4259] **Deposit with sheriff.** The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody. [R. S. § 4259.]

Hist. (See C. C. P. '81, § 289) R. S. § 259, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 7507.

Comp. leg.—Cal. Same: C. C. P. 1872, 497; Kerr's C. ib.

§ 6749. [4260] **Same: Paid into court.** The sheriff must, immediately after the deposit, pay the same into court and take from the clerk receiving the same, two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited as in other cases of delinquency. [R. S. § 4260.]

Hist. (See C. C. P. '81, § 290) R. S. § 260, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 7508.

Comp. leg.—Cal. Same: C. C. P. 1872, 498; Kerr's C. ib.

§ 6750. [4261] **Substituting bail for deposit.** If money is deposited, as provided in the last two sections, bail may be given and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant. [R. S. § 4261.]

Hist. (See C. C. P. '81, § 291) R. S. § 261, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 7509.

Comp. leg.—Cal. Similar: C. C. P 1872, 499; Kerr's C. ib.

§ 6751. [4262] **Satisfaction of judgment from deposit.** Where money has been deposited, if it remains on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court refund to him the whole sum deposited and remaining unapplied. [R. S. § 4262.]

Hist. (See C. C. P. '81, § 292) R. S. § 4262, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 500; Kerr's C. ib.

N. D. Similar: C. C. P. § 7510.

§ 6752. [4263] **Escape: Liability of sheriff.** If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving bail at any time before judgment. [R. S. § 4263.]

Hist. (See C. C. P. '81, 293) R. S. § 4263, reen. R. C. ib., reen. C. L. ib.

Cross ref. Liability of sheriff for permitting an escape or rescue: §§ 3602-3. Recapture or surrender exonerates sheriff: § 3604.

Comp. leg.—Cal. Same: C. C. P. 1872, § 501; Kerr's C. ib.

N. D. Similar: C. C. P. § 7511.

§ 6753. [4264] **Same: Judgment against sheriff.** If a judgment is recovered against the sheriff upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency. [R. S. § 4264.]

Hist. (See C. C. P. '81, § 294) R. S. § 4264, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 502; Kerr's C. ib.

N. D. Similar: C. C. P. § 7512.

§ 6754. [4265] **Vacation of order of arrest.** A defendant arrested may, at any time before the trial of the action, or if there be no trial before the entry of judgment, apply to the judge of the court in which the action is pending, or to the court, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of defendant, but not otherwise the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made. [R. S. § 4265.]

Hist. (See C. C. P. '81, §295) R. S. § 4265, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 503; similar as amended: Kerr's C ib.

N. D. Analogous: C. C. P. § 7514.

§ 6755. [4266] **Same: Reduction of bail.** If, upon application, it appears that there was not sufficient cause for the arrest, the order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced. [R. S. §4266.]

Hist. (See C. C. P. '81, § 296) R. S. § 4266, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P 1872, § 504; Kerr's C. ib.

N. D. See C. C. P. § 7515.

ARTICLE 2.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Cross ref. Verdict in claim and delivery: § 6863. Judgment: § 6898.

Replevin abolished: The common-law action of replevin is not in force in this state and the provisions of this article take its place. Bates v. Cap. S. Bk. (1912) 21 I. 141 121 P. 561.

§ 6756. [4271] **Delivery of personal property may be claimed.** The plaintiff in an action to recover the possession of personal property

may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter. [R. S. § 4271.]

Hist. (See C. C. P. '81, § 297) R. S. § 4271, reen. R. C. ib., reen. C. L. ib.

Cross ref. Claim and delivery in justices' courts is governed by the provisions of this chapter: § 7092.

Comp. leg.—Cal. Same: C. C. P. 1872, § 509; Kerr's C. ib.

N. D. Similar: C. C. P. § 7516.

Applied: An action for the recovery of mortgage bonds is an action for the recovery of possession of personal property. Bates v. Capital S. Bk. (1910) 18 I. 434, 110 P. 277.

Demand for immediate possession optional: It is left optional with the plaintiff whether he demand immediate possession of the personal property or not. Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

Right to possession: In an action of claim and delivery the right to the possession of the property, and not the ownership thereof, is the main issue. Cunningham v. Stoner (1905) 10 I. 549, 79 P. 228.

Possession not necessary: Under the provisions of the "claim and delivery" statutes of this state an action may be maintained against a person to recover the possession of personal property although he has not the possession of it at the time of the commencement of the action. Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

Gambling devices: An action of claim and delivery will not lie to recover gambling devices incapable of use for any purpose except in violation of the antigambling law. Mullen & Co. v. Moseley (1907) 13 I. 457, 90 P. 986, 121 A. S. R. 277, 13 Ann. Cas. 450, 12 L. R. A. (N. S.) 394.

Property sold on conditional sale: Where the vendee of property under conditional sale is vested with the power to sell and deliver the proceeds to the vendor, and sells but fails to so deliver the proceeds, claim and delivery will not lie against the purchaser by the original vendor. Peasley v. Noble (1910) 17 I. 868, 107 P. 402, 134 A. S. R. 270, 27 L. R. A. (N. S.) 216.

§ 6757 [4272] **Affidavit of claim.** Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, setting forth:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof.
2. That the property is wrongfully detained by the defendant.
3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.
4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.
5. The actual value of the property. [R. S. § 4272.]

Hist. (See C. C. P. '81, § 298) R. S. § 272, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P 1872, 510; Kerr's C. ib.

N. D. Similar: C. C. P. § 7517.

Allegation of ownership: In an action n replevin an averment "that on the 6th of May, 1896, (more than two years before the commencement of the suit) plaintiff was the owner of said property" is not a sufficient averment that plaintiff, at the time of commencing his action, was the owner or in possession or entitled to possession of the property in question. Bingham Co. etc. v. Rogers (1900) 7 I. 63, 59 P. 931.

Cited: Bates v. Capital S. Bk. (1910) 18 I. 429, 110 P. 277; (1912) 21 I. 141, 121 P. 561; Saxton v. Breshears (1912) 21 I. 333, 121 P. 567.

§ 6758. [4273] **Requisition to sheriff.** The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant. [R. S. § 4273.]

Hist. (See C. C. P. '81, § 299) R. S. 4273, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 511; Kerr's C. ib.

N. D. Similar: C. C. P. § 7518.

Purpose: The written direction provided in this section serves the purpose of the writ of replevin under the common law, which was a judicial writ and issued only by the king's chancellor. Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

§ 6759. [4274] **Undertaking: Service of papers.** Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect

that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or, if neither have any known place of abode, by putting them in the nearest post office, directed to the defendant. [R. S. § 4274.]

Hist. (See C. C. P. '81, § 300) R. S. § 4274, reen. R. C. ib., reen. C. L. ib.

Cross ref. Statutory form of undertaking: § 7236. Justification of sureties: § 7237. State, county or city need not give bond: § 7238.

Comp. leg.—Cal. Same: C. C. P. 1872, § 512; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7519.

Cited: Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

§ 6760. [4275] **Exemption to and justification of sureties.** The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he can not reclaim the property as provided in the next section. [R. S. § 4275.]

Hist. (See C. C. P. '81, § 301) R. S. § 4275, reen. R. C. ib., reen. C. L. ib.

Cross ref. Justification of bail on arrest: §§ 6744-7.

Comp. leg.—Cal. Same: C. C. P. 1872, § 513; Kerr's C. ib.

N. D. Similar: C. C. P. 7520.

§ 6761. [4276] **Redelivery to defendant: Undertaking.** At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 6766. [R. S. § 4276.]

Hist. (See C. C. P. '81, § 302) R. S. § 4276, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P 1872, § 514; Kerr's C. ib.

N. D. Similar: C. C. P. § 7521.

§ 6762. [4277] **Same: Justification of sureties.** The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before the judge of the court or probate judge in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property

ıntil that time. If they, or others in their places, fail to justify at the ime and place appointed, he must deliver the property to the plain-iff. [R. S. § 4277.]

Hist. (See C. C. P. '81, § 303) R. S. § 277, reen. R. C. ib., reen. C. L. ib.

Cross ref. Justification of bail on arest: §§ 6744-7.

Comp. leg.—Cal. Similar: C. C. P 1872, § 515; Kerr's C. ib.

N. D. Similar: C. C. P. § 7522.

§ 6763. [4278] **Same: Qualifications of sureties.** The qualifications ıf sureties must be such as are prescribed by this code, in respect to ıail upon an order of arrest. [R. S. § 4278.]

Hist. (See C. C. P. '81, § 304) R. S. § 278, reen. R. C. ib., reen. C. L. ib.

Cross ref. Qualifications of sureties of ail on arrest: § 6745.

Comp. leg.—Cal. Same: C. C. P. 1872, § 516; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7523.

§ 6764. [4279] **Concealed property: How taken.** If the property, r any part thereof, be concealed in a building or inclosure, the sheriff ıust publicly demand its delivery. If it be not delivered, he must cause he building or inclosure to be broken open, and take the property into ıis possession; and if necessary, he may call to his aid the power of ıis county. [R. S. § 4279.]

Hist. (See C. C. P. '81, § 305) R. S. § 279, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 517; Kerr's C. ib.

N. D. Similar: C. C. P. § 7524.

§ 6765. [4280] **Custody of property by sheriff.** When the sheriff .as taken property, as in this chapter provided, he must keep it in a ecure place, and deliver it to the party entitled thereto, upon receiving is fees for taking, and his necessary expenses for keeping the same. R. S. § 4280.]

Hist. (See C. C. P. '81, § 306) R. S. § 280, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 518; Kerr's C. ib.

N. D. Similar: C. C. P. § 7525.

§ 6766. [4281] **Claim by third party: Indemnity to sheriff.** If the roperty taken be claimed by any other person than the defendant or is agent, and such person make affidavit of his title thereto, or right ɔ the possession thereof, stating the grounds of such title or right, and erve the same upon the sheriff, the sheriff is not bound to keep the roperty or deliver it to the plaintiff unless the plaintiff on demand of im or his agent, indemnify the sheriff against such claim, by an under-aking by two sufficient sureties. [R. S. § 4281.]

Hist. (See C. C. P. '81, § 307) R. S. § 281, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P 1872, 519; Kerr's C. ib.

N. D. Similar: C. C. P. § 7526.

§ 6767. [4282] **Return of papers by sheriff.** The sheriff must file ıe notice, undertaking and affidavit, with his proceedings thereon, with ıe clerk of the court in which the action is pending, within 20 days fter taking the property mentioned therein. [R. S. § 4282.]

Hist. (See C. C. P. '81, § 308) R. S. § 282, reen. R. C. ib., reen. C. L. ib.

Cross ref. Return of process is prima cie evidence of facts: §3598. Penalty for ilure to return: § 3599. Return of pro-ss after expiration of term of office: 3619.

Comp. leg.—Cal. Same: C. C. P. 1872, § 520; Kerr's C. ib.

N. D. Similar: C. C. P. § 7527.

Cited: Bates v. Capital S. Bk. (1910) 18 I. 434, 110 P. 277.

ARTICLE 3.

INJUNCTIONS.

§ 6768. [4287] **Injunction defined.** An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge, it may be enforced as the order of the court. [R. C. § 4287.]

Hist. (See C. C. P. '81, § 309) R. S. § 4287, reen. R. C. ib., reen. C. L. ib.

Cross ref. Injunctions may be granted at chambers: § 6493.

Comp. leg.—Cal. Similar: C. C. P 1872, § 525; now same as amended: Kerr's C. ib. Elmore Co. etc. Assn. v. Stockslager (1912) 22 I. 420, 126 P. 616.

N. D. Analogous: C. C. P. § 7528.

Cited: Idaho & Oregon etc. Co. v. Bradbury (1889) 132 U. S. 509, 10 S. C. R. 177, 33 L. ed. 433; Elmore Co. etc. Assn. v. Stockslager (1912) 22 I. 420, 126 P. 616.

Injunction against completed act: An injunction can only issue to restrain the commission of a future or contemplated action, and the writ will not be granted to restrain an act which has already occurred. Wilson v. Boise City (1900) 7 I. 69, 60 P. 84; Roberts v. Kartzke (1910) 18 I. 552, 111 P. 1.

Remedy preventive: Under this section an injunction is a writ to restrain a contemplated act and not a writ commanding a person to do a certain act. Brinton v. Steele (1910) 19 I. 71, 112 P. 319; (On rehearing) Fischer v. Davis (1911) 19 I. 501, 116 P. 414. Beem v. Davis, 31 I. 730, 175 P. 959.

Restraining order: A restraining order under § 6773 is an injunction as defined herein, and is void unless plaintiff gives an undertaking as required by § 6772. Mc Watters v. Stockslager (1917) 29 I. 803, 162 P. 671.

Against officers: Will not lie to restrain a ministerial act by a public official where no property rights are involved. Donovan v. Dougherty, 31 I. 622, 174 P. 701.

Appeal: Completed act: Where it appears that the act sought to be enjoined has been done, the court will not upon appeal review an order of the trial court dissolving a preliminary injunction. Abel v. Turner Trust Co. 31 I. 777, 176 P. 884.

Review of restraining order: Where a temporary restraining order is issued upon a verified complaint, it will not be vacated on appeal, where the allegations of the complaint are sufficient to justify the issuance of the order. Pfirman v. Success M. Co. 32 I. —, 179 P. 50.

§ 6769. Grounds for injunction. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff.

3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

4. When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of his property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

5. An injunction may also be granted on the motion of the defendant upon filing a cross-complaint, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

6. The district courts or any judge thereof sitting in chambers, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which he or the

nay be ousted by force, or violence, or fraud, or stealth, or any combiiation thereof, or from which he or they are kept out of possession by hreats whenever such possession was taken from him or them by entry)f the adverse party on Sunday or a legal holiday, or in the night time,)r while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under he facts of the case, in respect to the manner in which the possession was)btained, leaving the parties to their legal rights on all other questions the ame as though no such writ had issued: *Provided,* That no such writ hall issue except upon notice in writing to the adverse party of at least ive days of the time and place of making application therefor. [C. L. 4288.]

Hist. (See C. C. P. § 310) R. S. § 4288, een. R. C. ib.; compiled and reen. C. L. ib.

Cross ref. Injunction against infringenent of trade labels and trade-marks: § 318; to restrain sales of timber on state ands: § 2931; against working mining laims until security to surface owners is iven: § 5528; to contest foreclosure of hattel mortgage: § 6385; to restrain waste n property sold under execution: § 6937;) restrain transfers pending supplenentary proceedings: § 6947; to restrain njury to land pending foreclosure and afer sale on execution: § 6967. Mandatory njunction may be issued in proceedings elating to drainage districts: § 4524.

Comp. leg.—Cal. Same to § 4, rest mitted: C. C. P. 1872, § 526; Kerr's C. ib.

N. D. Similar: C. C. P. § 7529.

Cited: Thayer v. Bellamy (1903) 9 I. , 71 P. 544; (On rehearing) Fischer v.)avis (1911) 19 I. 501, 116 P. 414.

Discretion of court: Large discretion is ested in the trial court in the granting of temporary injunction to hold property n statu quo pending a determination of ne action, and its exercise of such discreon will not be reversed on appeal unless clear abuse of such discretion is shown. 'eber v. Della Mountain M. Co. (1905) 1 I. 264, 81 P. 931; Shields v. Johnson 1904) 10 I. 454, 79 P. 394. Where the icts are disputed the granting or dissolvig of an injunction is within the discreon of the court, although the answer deies all the equities of the complaint. Price Grice (1904) 10 I. 443, 79 P. 387. Harman v. Woodall, 31 I. 750, 176 P. 565.

Where both parties to an action to quiet tle to certain land are each claiming to the owner, upon a proper showing an junction will be granted to preserve the operty in statu quo pending the litigaon. Castlebury v. Harte (1908) 15 I.)9, 98 P. 293.

Courts should be more liberal in grantg injunctions pendente lite than upon e trial of the case upon its merits. Boise ev. Co. v. Idaho etc. Bk. (1913) 24 I. 133 P. 916; Buena Vista etc. Co. v. oise Basin Imp. Co. (1916) 29 I. 789, 2 P. 330.

Mining cases: Where a title to a mine in litigation and the plaintiff by his comaint shows title thereto, an injunction ay be granted to restrain working the ine pending the determination of the igation. Gilpin v. Sierra Nev. Con. M. Co. (1890) 2 I. 696, 23 P. 547, 1014. The practice is to be liberal in granting injunctive relief in mining litigation in order that neither party may get the advantage of the order during litigation by force or violence. Safford v. Flemming (1907) 13 I. 271, 89 P. 827.

Where an action is brought to determine the right of possession to and the ownership of certain mining ground, and it appears from the complaint and affidavit of one of the plaintiffs that the defendants have threatened to assault the plaintiffs and their employees if they appeared upon or undertook to do any work upon such claim, it is proper for the court to grant an injunction pendente lite, enjoining the defendants, their agents or employees from in any manner interfering with the plaintiffs and their employees in performing the necessary discovery work and other work upon said claim necessary to hold the same, although all of the allegations of the complaint and affidavit are denied by the defendants. Safford v. Flemming (1907) 13 I. 271, 89 P. 827; Stewart M. Co. v. Ontario M. Co. (1913) 23 I. 280, 129 P. 932.

Restraint of trespass: A temporary injunction may issue to restrain a trespasser from removing timber which he has cut upon land claimed by the plaintiff, pending suit to establish plaintiff's title, when the case is one of urgency and where the cutting and removal of such timber would result in great injury to the plaintiff, although the injury might not be irreparable, the defendant being solvent, and notwithstanding that other remedies lie in behalf of the plaintiff. Staples v. Rossi (1901) 7 I. 618, 65 P. 67.

Courts of equity should hesitate before granting injunctions to restrain trespasses committed under color of title or right. In this case it was observed in support of such an injunction that strong evidence was submitted tending to show the inability of the defendants to respond to any judgment for damages. Shields v. Johnson (1904) 10 I. 454, 79 P. 394.

Where the complaint alleges great and irreparable injury to growing crops, the damage to which can not be justly estimated, resulting from checking the flow in the irrigation ditch conveying water to desert lands on which such crops are growing, a temporary injunction to restrain the obstruction of such flow of water, pending litigation, is authorized. Wilson v. Eagleson (1903) 9 I. 17, 71 P. 613.

Nuisances: Where the complaint and affidavits for an injunction against a city allege a nuisance especially injurious to the plaintiff, and the defendant does not deny the existence of the nuisance but alleges that it has taken steps to abate the same, and that it intends to prevent any recurrence thereof, but affidavits are produced showing that conditions have not been materially changed and that the cause of complaint still exists, it is error to deny a temporary injunction. Schreck v. Coeur d'Alene (1906) 12 I. 708, 87 P. 1001.

Restraining sheriffs' sales: The foreclosure of a chattel mortgage executed by the husband alone upon exempt property contrary to Laws of 1899, p. 292, may be enjoined. Kendall v. Lincoln Hdw. & Imp. Co. (1902) 8 I. 664, 70 P. 1056. An injunction will issue to restrain the sheriff from selling personal property where it is shown that the plaintiff has no plain, speedy or adequate remedy at law, or that the defendant is insolvent and not able to respond in damages. Kester v. Schuldt (1905) 11 I. 663, 85 P. 974.

Sale of corporate stock: Where the proposed action of a corporation to sel the stock of an insane stockholder for th payment of an assessment, is founded upo and instigated by the wrongful acts an conduct of a person who controls a major ity of the capital stock, and a part of th stock going to make up such majority wa procured by such person from the insan stockholder, and a cause of action fo fraud and wrongful conduct is charge against the person so controlling a major ity of the stock, a temporary restrainin order against the corporation making suc sale is incidental to the main action, an is a proper relief to be granted in th sound discretion of the court until th case can be heard on its merits. Weber v Della Mountain M. Co. (1905) 11 I. 264 81 P. 931.

Irreparable injury unnecessary: An in junction will issue to temporarily restrai an act which will result in great damag to the plaintiff although the injury is no irreparable, and although other remedie by way of damages are open to the plain tiff. Meyer v. First Nat. Bk. of Coeu d'Alene (1904) 10 I. 175, 77 P. 334; Price v. Grice (1904) 10 I. 443, 79 P. 387.

§ 6770. [4289] **When granted: Complaints and affidavits.** The in junction may be granted at the time of issuing the summons, upon the complaint, and at any time afterwards, before judgment, upon affidavits The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When the application is upon notice or order to show cause, a copy of the moving papers must be served with the notice or order; when granted without notice a copy of the moving papers must be served with the injunction. [R. S § 4289.]

Hist. (See C. C. P. '81, § 311) R. S. § 4289, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same to last sentence: C. C. P. 1872, § 527; additional provision as amended, Kerr's C. ib. Elmore Co. etc. Assn. v. Stockslager (1912) 22 I. 420, 126 P. 616.

N. D. Analogous: C. C. P. § 7530.

Complaint: Sufficiency of verification: A restraining order may be granted on a verified complaint, the principal allegations of which are made on information or belief without stating the source of information and basis of belief, where such source of information and basis of belief are set forth in an affidavit filed by the plaintiffs in the case. Price v. Grice (1904) 10 I. 443, 79 P. 387.

Defendant may by appearance waive a defective verification. Moore v. Hupp (1909) 17 I. 232, 105 P. 209.

Successive writs: Successive writs of injunction may be granted on the complaint alone without any supplementary affidavits, where all are of the same tenor and effect, except that they extend th time within which the defendant may ap pear and show cause, and the reason fo issuing the later writs is the inability o the sheriff to find the defendant or an person upon whom to serve the prior writ Powell v. Springston Lbr. Co. (1906) 12 723, 88 P. 97.

Writ and order: The order directin the writ of injunction to issue is not th writ. (Stewart, J. dissents) Elmore C etc. Assn. v. Stockslager (1912) 22 420, 126 P. 616.

When issued: An injunction may be i sued on a complaint before it has bee filed, though the order allowing the wr does not take effect until the complai and undertaking have been filed. (Stew art, J. dissents) Elmore Co. etc. Assn. Stockslager, supra

Affidavit of attorney: If the affida is made by the attorney good and suf cient reasons should be set forth in t affidavit why he makes it. Wiles v. Nort ern Star M. Co. (1907) 13 I. 326, 89 1053.

§ 6771. [4290] **Injunction after answer.** An injunction can not b allowed after the defendant has answered, unless upon notice, or upo an order to show cause; but in such case the defendant may be re strained until the decision of the court or judge granting or refusing th injunction. [R. S. § 4290.]

Hist. (See C. C. P. '81, § 312) R. S. § 4290, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 528; Kerr's C. ib.

N. D. Similar: C. C. P. § 7531.

§ 6772. [4291] **Undertaking: Justification of sureties.** On granting an injunction, the court or judge must require, except when the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages, and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two or more than five days, must justify before the judge or a probate judge, in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved. [R. S. § 4291.]

Hist. (See C. C. P. '81, § 313) R. S. § 4291, reen. R. C. ib., reen. C. L. ib.

Cross ref. Justification of bail on arrest: §§ 6744-7. Statutory form of undertaking: § 7236. State, county or city need not give bond: § 7238.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 529; as amended except "the people of the state" for "the state," line 2; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7532.

Cited: MacWatters v. Stockslager (1917) 29 I. 803, 162 P. 671.

Requirement is mandatory: This section is mandatory and it is error to grant a temporary injunction without requiring a proper undertaking. Wiles v. Northern Star M. Co. (1907) 13 I. 326, 89 P. 853. But a failure to give a bond before the restraining order becomes operative does not preclude the court from granting a temporary injunction on the hearing of the order to show cause. Price v. Grice (1904) 10 I. 443, 79 P. 387.

Action on bond: Where a claim is made against the sureties on an injunction bond for costs, damages and counsel fees the sureties are entitled to their day in court and to defend against the claim, and it is error to summarily enter judgment against the sureties on the dissolution of the injunction. Dougal v. Eby (1906) 11 I. 789, 85 P. 102.

Municipality not liable: A municipal corporation is not required to give an undertaking on the issuance of an injunction and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation. Doyle v. Sandpoint (1910) 18 I. 654, 112 P. 204, Ann. Cas. 1912A 210, 32 L. R. A. (N. S.) 34.

Attorney's fees: Under this section, in order for a defendant to collect attorney's fees on a bond after dissolution of the injunction, it is necessary that he show that the service rendered was performed in securing the dissolution of the injunction, or that the service was rendered principally and mainly for that purpose. Miller v. Donovan (1907) 13 I. 735, 29 P. 992, 13 Ann Cas. 259.

Reasonable compensation paid or contracted as counsel fees in procuring a dissolution of an injunction may be recovered in an action upon the injunction bond, but the compensation thus allowed must be limited to services rendered in procuring the dissolution. Ferrell v. Coeur d'Alene etc. Co. (1916) 29 I. 118, 157 P. 946.

§ 6773. [4292] **Order to show cause.** If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted, and the defendant may, in the meantime, be restrained. [R. S. § 4292.]

Hist. (See C. C. P. '81, § 314) R. S. § 4292, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 530; same in part as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7533.

Undertaking necessary: A restraining order hereunder is an injunction as defined by § 6768, and is void unless plaintiff gives an undertaking as required by § 6772. MacWatters v. Stockslager (1917) 29 I. 803, 162 P. 671.

Review on appeal: Where, upon a hearing in the district court on an order to show cause why a temporary restraining order should not be continued, the only matters before the court were the verified complaint and an affidavit in support thereof, and the showing so made is sufficient to justify the court in continuing the order in force, the order therefor will not be reversed on appeal. Pfirman v Success M. Co. 32 I. —, 179 P. 50.

§ 6774. [4293] **Suspension of corporate business.** An injunction to suspend the general and ordinary business of a corporation can not be granted except by the court or judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or agent of the corporation, except when the people of this state are a party to the proceeding. [R. S. § 4293.]

Hist. (See C. C. P. '81, § 315) R. S. § 4293, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 531; Kerr's C. ib.

N. D. Similar: C. C. P. § 7534.

Definition: The terms "general" and "ordinary" business of the corporation, as used in this section, include the collection of municipal taxes to be applied to payment for the construction of sewers, and therefore, in an action to enjoin the city from the sale of property at a sewerage assessment sale, it is error to grant such injunction without due notice of application therefor to the proper municipal officers. Wilson v. Boise City (1900) 7 I 69, 60 P. 84.

§ 6775. [4294] **Restraint of state officers.** Where a duty is imposed by statute upon a state officer or officers, an injunction to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the district court, sitting in the county in which the officer or officers are located, or the duty is required to be performed and upon notice of the application therefor to the officer or officers, or other person to be restrained. [R. S. § 4294.]

Hist. R. S. § 4294, reen. R. C. ib., reen. C. L. ib.

§ 6776. [4295] **Dissolution or modification of injunction.** If an injunction be granted without notice, the defendant at any time before the trial, may apply to the judge who granted the injunction, or to the court in which the action is brought to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or the answer or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, it must be upon reasonable notice to the plaintiff, and in that case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted. [R. S. § 4295.]

Hist. (See C. C. P. '81, § 316) R. S. § 4295, reen. R. C. ib., reen. C. L. ib.

Cross ref. Injunction may be dissolved or modified at chambers: § 6493.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 532; as amended, Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7535, 7536.

Definition: The words "or the answer" used in this section, refer to the cross-complaint mentioned in § 6769, subd. 5, which may be filed at the time the answer is filed or subsequently by permission of the court. Thayer v. Bellamy (1903) 9 I. 1, 71 P. 544.

Dissolution on injunction papers: Where the adverse party moves to dissolve a temporary injunction upon the papers upon which it is granted, no notice is required to be given to the party who obtained the injunction and no further showing can be made in opposition to such motion. Meyer v. First Nat. Bk of Coeur d'Alene (190 10 I. 175, 77 P. 334.

General construction: Application dissolve a temporary injunction may made as follows: 1. By the defenda upon the papers on which plaintiff obtain the injunction. 2. By the plaintiff up the papers on which defendant obtain the injunction. 3. By either party up affidavits, with or without answer. Wh the adverse party moves to dissolve temporary injunction upon the papers which it was granted no notice is requir to be given to the party who obtained t injunction, and no further showing can made in opposition to such motion. On t other hand, where any counter showing made by the moving party notice of t time and place of hearing must be give and upon such a hearing the party resi ing the motion may present affidavits opposition thereto, and is entitled to ha such affidavits considered by the court

udge hearing the same. Thayer v. Bellamy, supra.

Grounds for dissolution: Damage resulting to an employee of the real party in nterest by the stoppage of his work and the insufficiency of the undertaking to compensate him, is not ground for a dissolution of the injunction. Smith v. Alberta etc. Rec. Co. (1903) 9 I. 399, 74 P. 1071.

§ 6777. [4296] **Same: When dissolved or modified.** If upon such pplication it satisfactorily appear that there is not sufficient ground or the injunction, it must be dissolved; or if it satisfactorily appear hat the extent of the injunction is too great, it must be modified. [R. S. 296.]

Hist. (See C. C. P. '81, § 317) R. S. § 296, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 533; Kerr's C. ib.

§ 6778. [4297] **Same: Cross-examination of witnesses.** Upon the earing of an application for an injunction upon notice to the adverse arty, or upon return of an order to show cause why an injunction hould not be granted, or upon an application to dissolve or modify an ıjunction granted without notice, where the injunction was granted r is applied for wholly or in part upon affidavits, the party resisting he application or moving to dissolve the injunction may, by three ays' written notice, require the adverse party to produce at the hearıg for cross-examination before the court or judge, the affiants of the ffidavits upon which he relies for the injunction, or to resist the applıation for its dissolution; and any party so requiring his adverse party) produce his witnesses at such hearing must himself produce for cross-xamination, the witnesses upon whom he relies upon such hearing; nd either party may have the same process to secure the attendance of ′itnesses at such hearing, as upon trial of issue of fact in the district ɔurt; and in such case, where the attendance of witnesses shall have een so required, no affidavit shall be read or considered by the court r judge upon such hearing unless the affiant is so produced for cross-xamination: *Provided,* That the court or judge may, at the conclusion f the examination of the witnesses produced by the respective parties, for ood cause shown, adjourn the hearing to enable either party to secure the ttendance of an absent affiant, or may direct his examination to be taken ı writing before such officer and at such time and place as the court or ıdge may designate. The examination of any witness produced before ıe court or judge must, upon request of either party, be reduced to writıg, subscribed by the affiant, certified by the judge and filed in the acon, and, with any examination taken in compliance with the order of the ɔurt or judge, be made a part of the record upon appeal in the same anner as affidavits are made a part of such record. [R. S. § 4297.]

Hist. R. S. § 4297, reen. R. C. ib., reen. L. ib.

Cited: Thayer v. Bellamy (1903) 9 I. 71 P. 544.

Hearing on affidavits: It is not contemated by this section that the hearing on der to show cause, or on application to dissolve the injunction, shall be otherwise than upon the pleadings and affidavits, except where the moving party is required by notice to produce the affiants in the affidavits for cross-examination. Raft River etc. Co. v. Langford, (1898) 6 I. 30, 51 P. 1027.

ARTICLE 4.

ATTACHMENTS AND GARNISHMENTS.

Cross ref. Attachment or levy upon goods for which a negotiable bill has been ised: § 6088.

Issuance and Execution of Writ.

§ 6779. **Attachment: When issued.** The plaintiff at the time of the ɜuing of summons, or at any time afterwards may have the property the defendant attached, as security for the satisfaction of any judg-

ment that may be recovered, unless the defendant gives security to pa such judgment as in this chapter provided in the following cases.

1. In an action upon a judgment, or upon contract, express or in plied, for the direct payment of money, where the contract is not s cured by any mortgage or lien upon real or personal property, or an pledge of personal property; or, if originally so secured, such securit has, without any act of the plaintiff, or the person to whom the securit was given, become valueless.

2. In an action upon a judgment, or upon contract, express or in plied, or for the collection of any penalty provided by any statute o this state, against a defendant not residing in this state. ['13, c. 5 § 1, p. 160.]

Hist. (See C. C. P. '81, § 318) R. S. § 4302, reen. R. C. ib.; am. '13, c. 51, § 1, p. 160, reen. C. L. § 4302.

Cross ref: Attachment in actions for taxes on personal property: § 3321; in actions for license money: § 3348; in actions against peddlers: § 2359.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 537; as amended, Kerr's C. ib.

N. D. Analogous: C. C. P. § 7537. See also: C. C. P. §§ 7538-9.

Cited: Willman v. Friedman (1893) 3 I. 734, 35 P. 37.

Time of issuance: A writ of attachment issued prior to the issuance of any summons or to the appearance of the defendant in the case would be subject to discharge on motion on the ground that the same was improperly issued. Ridenbaugh v. Sandlin (1908) 14 I. 472, 94 P. 827, 125 A. S. R. 175.

The legislature did not intend to allow a plaintiff to commence an action and let his complaint lie in the files of the court for one year, as he may do under § 6671, ante, and at the same time have the defendant's property attached and held under process for the payment of a debt that he has taken no steps to reduce to a final judgment. Ib.

Applied: The contract of an indorser of a promissory note or guarantor of a bill of exchange is a contract "for the direct payment of money," and an attachment may issue against the property of such indorser or guarantor when action is brought to enforce payment of the deb the same as against the acceptor or ma er, under this section. Armstrong v. Slic (1908) 14 I. 208, 93 P. 775.

Nature of attachment lien: Attachme is such a provisional remedy as reach out and lays hold upon the property proceeding in rem and subjects it to t payment of the debt for the recovery which the action was instituted. Potlat Lbr. Co. v. Runkel (1909) 16 I. 192, 101 396, 23 L. R. A. (N. S.) 536, 18 Ann. Ca 591.

Nonresidents: In attachment against t property of a defendant not residing this state it is not necessary to show by t affidavit for attachment that the plaint has no security for the debt. Foore v. S mon Piano Co. (1910) 18 I. 167, 108 1038.

A corporation organized under the la of a foreign jurisdiction, although engag in business in this state and having co plied with the constitution and all the la of this state affecting foreign corporatio is a nonresident and subject to attachme as such. Jennings v. Ida. Ry. etc. C (1915) 26 I. 703, 146 P. 101, Ann. C 1916E 359, L. R. A. (N. S.) 1915D 115.

Attachment wrongfully issued: The st ute provides in what actions an attachme may issue, and if the complaint disclo that the action is not such, and an attac ment is issued, then it was improper issued, and upon proper motion will dissolved. Ross v. Gold Ridge M. (1908) 14 I. 687, 95 P. 821.

§ 6780. Same: Affidavit. The clerk of the court must issue the w of attachment upon receiving an affidavit by or on behalf of plaint setting forth:

1. That the defendant is indebted to the plaintiff (specifying t amount of such indebtedness over and above all legal set-offs or counte claims) and whether upon a judgment or upon a contract for the dire payment of money, and that the payment of the same has not been s cured by any mortgage or lien upon real or personal property, or a pledge of personal property, or if originally secured, that such secur has, without any act of the plaintiff, or the person to whom the secur was given, become valueless.

2. When the defendant is a nonresident of this state, that such fendant is indebted to the plaintiff (specifying the amount of such debtedness over and above all legal set-offs or counterclaims), and th defendant is a nonresident of the state.

3. That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant. ['13, . 51, § 2, p. 160.]

Hist. (See C. C. P. '81, § 319) R. S. § 303, reen. R. C. ib.; am. '13, c. 51, § 2, . 160, reen. C. L. § 4303.

Comp. leg.—Cal. Similar: C. C. P. 1872, 538; as amended: Kerr's C. ib. Foore v. imon Piano Co. (1910) 18 I. 167, 174, 98 P. 1038.

N. D. Analogous: C. C. P. § 7541.

Cited: Ridenbaugh v. Sandlin (1908) I. 472, 94 P. 827, 125 A. S. R. 175.

Must show jurisdiction: Since an affiavit for attachment must show the existnce of the jurisdictional facts at the time the issuance of the writ an affidavit led 28 days before the issuance of the rit is not sufficient to support the writ hen issued, and the same should be disarged. Murphy, Grant & Co. v. Zaspel 1905) 11 I. 145, 81 P. 301.

False affidavit: Where an attachment fidavit is false the court has no jurisdicon to issue the writ. Murphy v. Montanon (1892) 3 I. 325, 29 P. 851, 35 A. S. . 279.

Insufficient affidavit: An affidavit alging two or more grounds of attachment, the alternative, is insufficient, and a rit issued thereon is properly discharged. eaton v. Panhandle Smelting Co., 32 I. , 179 P. 510.

Error in amount claimed: An error in e attachment affidavit in claiming a rger debt than that found due by the dgment does not vitiate the attachment. nney v. Moore (1903) 9 I. 284, 74 P. 6.

Absence of signature: The absence of fiant's signature from the affidavit does t vitiate it where the same is duly veri-d. Simmons Hdw. Co. v. Alturas Com. . (1895) 4 I. 334, 39 P. 550.

Double causes of action: Where an atchment is sought on two causes of action d the affidavit is false as to one cause ated and a single writ is issued to cover th causes of action, the attachment will dissolved on motion as to both causes action. (Sullivan, C. J. dissents) Voller v. Spencer (1897) 5 I. 557, 51 P. 609. here two causes of action are stated and e statutory grounds exist the plaintiff ay have separate writs issued as to each use of action or he may procure one writ r both causes. Ib.

Essentials of affidavit: It is not necesry to allege any other facts than those ecified in the statute. Ross v. Gold Ridge Co. (1908) 14 I. 687, 95 P. 821.

Same: Debt: An affidavit for attachnt which fails to specify the amount of e indebtedness sought to be recovered er and above all legal setoffs or counterims, is fatally defective and does not ve the court jurisdiction to issue the it. Kerns v. McAulay (1902) 8 I. 558, P. 539. The affidavit must state that e debt is due. Ib.; Gatward v. Wheeler 904) 10 I. 66, 77 P. 23.

Same: Security: Failure of an affivit for attachment to state that the debt ed upon is not secured by "any pledge of personal property" does not render the attachment ineffective or void when it does allege that the same has not been secured by any mortgage or lien on real or personal property; lien includes "pledge." Glidden v. Whittier et al. (1891) 46 F. 437.

Where the affidavit partially follows the language of the statute in regard to the debt not being secured but fails to state that it is not secured by "pledge of personal property," and contains no statement equivalent to that, the affidavit is not sufficient. Knutsen v. Phillips (1909) 16 I. 267, 101 P. 596.

A party who holds a secured claim against another can not secure the benefit of the attachment law therefor by procuring an assignment of small unsecured claims and writing such claims in the same complaint with the secured claims. Willman v. Friedman (1893) 3 I. 734, 35 P. 37.

When a debt is secured by mortgage an attachment affidavit in a suit to recover the debt must allege that the mortgage was given and that the same has become valueless without any act of the plaintiff; if it falsely states that the debt is unsecured the attachment should be dissolved on motion, although it is shown that the security has become valueless. (Sullivan, C. J. dissents) Vollmer v. Spencer (1897) 5 I 557, 51 P. 609.

A reservation of title in a vendor in a conditional sale contract until the payment of the purchase price constitutes such a lien as precludes the vendor from obtaining an attachment in an action to recover the unpaid portion of the purchase price. Willman v. Friedman, supra; Mark Means Trans. Co. v. McKenzie (1903) 9 I. 165, 73 P. 135; Barton v. Grossclose (1905) 11 I. 227, 81 P. 623.

An order drawn by the defendant on his debtor, accepted by the latter and placed in the hands of the creditor to secure the debt is such a pledge of personal property as to preclude an attachment. Murphy v. Montandon (1892) 3 I. 325, 29 P. 851, 35 A. S. R. 279. But where an account is assigned as security and accepted on the condition that a note by the debtor in the account shall be substituted therefor, and the account is afterward liquidated by a note which is not executed in the form required by the agreement between the assignor and the assignee, and the assignee refuses to accept the same for that reason, there is no such security as to preclude the attachment. Simmons Hdw. Co. v. Alturas Com. Co. (1895) 4 I. 334, 39 P. 550.

Same: Against nonresidents: Where an attachment is sought against the property of a nonresident it is sufficient to allege in the affidavit just what is required by the second and third subdivisions of this section; the affidavit need not aver the nonresidence of the defendant. Kerns v. McAulay (1902) 8 I. 558, 69 P. 539. The affidavit need not allege that the defendant has property in the state. Ib.

Defects in an affidavit for attachment against a nonresident who is not person-

ally served with process go to the jurisdiction of the court and preclude entry of a valid judgment in the action. Ib.

In an attachment against a defendant not residing in this state it is not necessary to show by the affidavit for attachment that the plaintiff has no security for the debt. Foore v. Simon Piano Co. (1910) 18 I. 167, 108 P. 1038.

Nonresidence of defendant: The no residence of the defendant must be stat positively, and a writ of attachment bas on an affidavit which does not so state it improperly and irregularly issued. Heat v. Panhandle Smelting Co., 32 I. —, 179 510.

§ 6781. [4304] Undertaking: Publication of notice. Before issuin the writ the clerk must require a written undertaking on the part the plaintiff, in a sum not less than $200, and not exceeding the amou claimed by the plaintiff, with sufficient sureties, to the effect that, if th defendant recover judgment, or if the attachment be wrongfully issue the plaintiff will pay all costs that may be awarded to the defendan and all damages which he may sustain by reason of the attachment n exceeding the sum specified in the undertaking; and two days after i suing such writ and delivering it to the proper officer, the clerk mu post at the front door of the courthouse, and cause to be published some newspaper published in the county, if there be one, a notice, se ting out the title of the cause and the fact that an attachment has bee issued against the property of the defendant. Such notice shall be kep posted at least 10 days and shall be published, if in a weekly paper, three issues thereof, and if any other than a weekly paper in at lea six issues. Any creditor of the defendant, who, within 60 days after th first posting and publication of such notice, shall commence and pros cute to final judgment his action for his claim against the defendan shall share pro rata with the attaching creditor in the proceeds of d fendant's property where there is not sufficient to pay all judgments full against him. ['95, p. 75, § 1.]

Hist. (See C. C. P. '81, § 320) R. S. § 4304; am. '95, p 75, § 1, reen. '99, p. 250, § 1, reen. R. C. § 4304, reen. C. L. ib.

Cross ref. No bond required in actions for license money: § 3348. Additional bond on appeal after judgment for defendant: § 7159. Statutory form of undertaking: § 7236. Justification of sureties: § 7237. State, county or city need not give bond: § 7238.

Comp leg.—Cal. Same as to undertaking, no requirement of notice: C. C. P. 1872, § 539; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7543.

Cited: Gatward v. Wheeler (1904) 10 I. 66, 77 P. 23.

Amount of bond: While the clerk has a discretion in fixing the amount of the undertaking yet he should in all cases require an undertaking in not less than the amount of the claim sued for. Willman v. Friedman (1893) 3 I. 734, 35 P. 37; Finney v. Moore (1903) 9 I. 284, 74 P. 866.

But a failure of the clerk to require an undertaking, when the amount sued for is in excess of $200, equal to the amount sued for, is not a ground for dissolving the attachment. Ross v. Gold Ridge M. Co. (1908) 14 I. 687, 95 P. 821.

Clerical errors: A clerical error in the attachment bond, as the insertion of the words "under execution," do not vitia the bond where the same substantia indemnifies the defendant. Simmons Hd Co. v. Alturas Com. Co. (1895) 4 I. 3 39 P. 550.

Application to justice's courts: The pr visions of this section for prorating t proceeds of attached property, adverti ment of notice, etc., do not apply to t justice's court practice. Kimball v. Ra mond (1903) 9 I. 176, 72 P. 957.

Failure to give notice: The notice the issuance of a writ of attachment quired to be given by the clerk is intend for the protection and benefit of oth creditors of the defendant, and a fail to give notice is not available to the fendant in the attachment proceedi and does not enable him to avoid attachment or subsequent execution s thereunder. Foore v. Simon Piano (1910) 18 I. 167, 108 P. 1038.

Conditions precedent to prorating: Jud ment within 60 days: Under this sect a creditor in order to be entitled to pror in the proceeds of attached property m both commence his action within the day period and prosecute the same to fi judgment within the 60-day period. Ha ard v. Grimes Pass P. M. Co. (1911) I. 12, 120 P. 170, Ann. Cas. 1913C 284.

§ 6782. [4305] Writ. The writ must be directed to the sheriff any county in which property of such defendant may be, and must quire him to attach and safely keep all the property of such defenda within his county, not exempt from execution, or so much thereof as m

e sufficient to satisfy the plaintiff's demands, the amount of which ıust be stated in conformity with the complaint, unless the defendant ive him security by the undertaking of at least two sufficient sureties, ı an amount sufficient to satisfy such demand, besides costs, or in an mount equal to the value of the property which has been, or is about to e, attached; in which case, to take such undertaking. Several writs ıay be issued at the same time to the sheriffs of different counties, and ıe plaintiff may have other writs of attachment as often as he may re- ıire at any time before judgment. [R. S. § 4305.]

Hist. (See C. C. P. '81, § 321) R. S. § 05, reen. R. C. ib., reen. C. L. ib.

Cross ref. Property exempt from exe- tion: § 6920. Sheriff must indorse time reception on process: § 3596. Sheriff justified by and must execute process gular on its face, notwithstanding de- cts in proceedings: § 3607.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 540; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7540. See also: C. C. P. § 7542.

Cited: First Nat. Bk. v. Lieuallen (1895) 4 I. 431, 39 P. 1108; Williams v. Olden (1900) 7 I. 146, 61 P. 517.

§ **6783.** [4306] **Shares of stock may be attached.** The rights or ares which the defendant may have in the stock of any corporation or mpany, together with the interest and profit thereon and all debts ıe such defendant, and all other property in this state of such defend- ıt not exempt from execution, may be attached, and if judgment be covered, be sold to satisfy the judgment and execution. [R. S. 4306.]

Hist. (See C. C. P. '81, § 322) R. S. § 06, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 441; Kerr's C. ib.

§ **6784. Execution of writ.** The sheriff to whom the writ is directed d delivered must execute the same without delay, and if the undertak- g mentioned in section 6782 be not given, as follows:

1. Real property standing upon the records of the county in the me of the defendant must be attached by filing with the recorder of e county a copy of the writ, together with a description of the prop- ty attached and a notice that it is attached.

2. Real property or an interest therein belonging to the defendant d held by any other person, or standing on the records of the county the name of any other person, must be attached by filing with the re- rder of the county a copy of the writ, together with a description of e property, and a notice that such real property and any interest of e defendant therein, held by or standing in the name of such other per- ı (naming him), are attached. The recorder must index such attach- nt, when filed, in the names of both of the defendant and of the per- ı by whom the property is held or in whose name it stands on the ords.

3. Personal property capable of manual delivery must be attached taking it into custody.

4. Stock or shares, or interest in stock or shares, of any corporation company must be attached by leaving with the president or other ad of the same, or the secretary, cashier or other managing agent reof, a copy of the writ and a notice stating that the stock or interest the defendant is attached, in pursuance of such writ.

5. Debts and credits and other personal property not capable of nual delivery must be attached by leaving with the person owing h debts, or having in his possession or under his control such credits other personal property, or with his agent, a copy of the writ, and a ice that the debts owing by him to the defendant, or the credits or er personal property in his possession or under his control, belonging

to the defendants, are attached in pursuance of such writ. ['11, c. 162 p. 559.]

Hist. (See C. C. P. '81) R. S. § 4307, reen. R. C. ib.; am. '11, c. 162, p. 559, reen. C. L. § 4307.

Cross ref. Officer must exhibit process on demand: § 3608. Delivery of writ by sheriff to successor on expiration of term of office: § 3617. Attachment of personal property subject to prior mortgage: § 6378. Attachment of toll roads, bridges and ferries: § 1471.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 542; amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7547. See also C. C. P. §§ 7545, 7546.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765; Foore v. Simon Piano Co. (1910) 18 I. 167, 108 P. 1038.

Levy on real property: The filing of a notice of levy together with a copy of the writ and a description of the property attached are a sufficient levy of attachment on real property. First Nat. Bk. v. Lieuallen (1895) 4 I. 431, 39 P. 1108. The description of the property must be sufficient to give notice to a reasonably prudent man of the identity of the property attached. First Nat. Bk. of Hailey v. Sonnelitner (1898) 6 I. 21, 51 P. 993.

(Prior to amendment of '11) Filing with the recorder a writ of attachment, together with a description of the land attached and a notice that it is attached, and leaving a similar copy of the writ, description and notice with the defendant who does not reside on the land, is not a substantial compliance with the provisions of this section, and personal notice to th defendant is not equivalent to posting co ies in a conspicuous place on the lan and is insufficient to create a lien upo the property. Williams v. Olden (1900 7 I. 146, 61 P. 517.

Filing of copy of writ of attachmen description of real property alleged to hav been attached, and notice of attachmen is absolutely necessary to constitute a lav ful levy upon real estate. Long et al. Burley S. Bk. (1917) 30 I. 392, 165 P. 111

Personal property: An attachment o logs in and on the banks of a stream sufficiently levied by the sheriff's takin possession of the logs on the banks an employing men to catch and bank th remainder of the logs. Falk-Bloch Mer Co. v. Branstetter (1896) 4 I. 661, 43 571.

Shares of stock: Shares of stock in corporation can only be subjected to debt by seizure under attachment or exe cution as provided by statute, and do no pass on the sale under execution of th land irrigated by the company by whic the stock is issued. Wells v. Price (189 6 I. 490, 56 P. 266.

Where stock has been pledged an transferred by indorsement and deliver but the transfer is not entered on th books, a subsequent attachment issued the instance of a creditor of the pledg is valid only against the interest of th pledgor remaining after the payment the debt to the pledgee. Mapleton Bk. Standrod (1902) 8 I. 740, 71 P. 119.

Garnishment.

§ **6785.** [4308] **Garnishment.** Upon receiving information in wri ing from the plaintiff or his attorney, that any person has in his posse sion or under his control, any credits or other personal property belon ing to the defendant, or is owing any debt to the defendant, the sher must serve upon such person a copy of the writ, and a notice that suc credits, or other property, or debts, as the case may be, are attached pursuance of such writ. [R. S. § 4308.]

Hist. (See C. C. P. '81, § 324) R. S. § 4308, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 543; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7567.

Cited: Van Ness v. McLeod (1892) I. 439, 31 P. 798; Eagleson v. Rubin (190 16 I. 92, 100 P. 765.

§ **6786.** [4309] **Liability of garnishee.** All persons having in the possession or under their control, any credits or other personal proper belonging to the defendant, at the time of service upon them of a co of the writ and notice, as provided in the last two sections, shall be, u less such property be delivered up or transferred, or such debts be pa to the sheriff, liable to the plaintiff for the amount of such credits, pro erty, or debts, until the attachment be discharged or any judgment covered by him be satisfied. [R. S. § 4309.]

Hist. (See C. C. P. '81, § 325) R. S. § 4309, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or owing any debts to the defendant" are inserted after "defendant"; C. C. P. 1872, § 544; Kerr's C. ib.

N. D. Similar: C. C. P. § 7567.

Cited: Lindenthal v. Burke (1889) 571, 21 P. 419; Simpson v. Remins (1899) 6 I. 681, 59 P. 360; Eaglesor Rubin (1909) 16 I. 92, 100 P. 765.

Garnishee's remedy against debtor: The arnishee is liable to the attaching credi- or to the amount of his indebtedness to he defendant in the attachment suit, and, ' sued by such defendant, may procure a suspension of proceedings until his liability to the attaching creditor is determined by motion based on affidavit setting up the garnishment. Van Ness v. McLeod (1892) 3 I. 439, 31 P. 798.

§ 6787. [4310] Examination of garnishee. Any person owing debts o the defendant, or having in his possession or under his control, any redits or other personal property belonging to the defendant, may be equired to attend before the court or judge, or a referee appointed by ne court or judge, and be examined on oath respecting the same. The efendant may also be required to attend for the purpose of giving in- ormation respecting his property and may be examined on oath. The ourt or judge may, after such examination, order personal property apable of manual delivery to be delivered to the sheriff on such terms s may be just, having reference to any liens thereon or claims against ne same, and a memorandum to be given of all other personal property, ontaining the amount and description thereof. [R. S. § 4310.]

Hist. (See C. C. P. '81, § 326) R. S. § 310, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 545; Kerr's C. ib.

Cited: Eagleson v. Rubin (1909) 16 I. 2, 100 P. 765.

Proceedings against garnishee: While ne court may direct the garnishee to ubmit to an examination with respect the indebtedness claimed and may by proper order authorize the plaintiff to commence an action against the garnishee, and restrain him, pending the action, from transferring or disposing of his interest in the debt in case he denies the indebtedness, it can not direct the entry of judgment against the garnishee without allowing him a hearing upon the issue so raised. Lindenthal v. Burke (1889) 2 I. 571, 21 P. 419.

§ 6788. [4310a.] Notice of garnishment: Discharge of garnishee. ny person who has been served with a copy of the writ and notice as rovided in sections 6784, 6785, 6786, 6917, 7090, 7091 or 7125, shall e deemed a garnishee, and service of copy of writ and the notice there- provided for, shall, for the purpose of this article, be deemed to be otice of garnishment, and whenever any person shall have been served ith notice of garnishment as herein defined, he may discharge himself y paying or delivering to the officer all debts owing by him to the de- ndant, or a portion thereof sufficient to discharge the claim of the aintiff, or any or all money of the defendant in his hands to a similar nount, taking a receipt therefor from the officer, which shall dis- harge such person from any and all liability to the extent of such pay- ent, and which shall be held by the officer subject to the orders of e court out of which the writ issued. ['07, p. 158, § 1.]

Hist. '07, p. 158, § 1, reen. R. C. § 4310a, en. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. 7573.

Constitutionality: The act which comprises §§ 6788-6801 is supplemental to the statutes existing when it was enacted and is not unconstitutional as not providing for due process. Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6789. [4310b.] Interrogatories submitted to garnishee. Written terrogatories which may be in the following form may be delivered the garnishee at the time of serving notice of garnishment:

1. At the time of the service of the garnishment, had you in your ssession, or under your control, any property, money or effects of the fendant? If so, state what property, how much, and of what value, d what money or effects?

2. At the time of the service of the garnishment, did you owe the fendant any money, or do you owe him any now? If so, state how uch, on what account, and when did it become due? If not due, when ll it become due?

To these may be added any other proper and pertinent questions the

answers to which might tend to show a liability on the part of the garnishee to the defendant. ['07, p. 158, § 2.]

Hist. '07, p. 158, § 2, reen. R. C. § 4310b, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7574.

Notice of garnishment: This "notice of garnishment" referred to in this section is a notice that the property levied on is attached as provided in §§ 6784, 6785, 6786, 6917, 7090, 7091 or 7125. Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6790. [4310c.] **Answer to interrogatories: Judgment against garnishee.** Upon a copy of the interrogatories being served upon him, the garnishee shall make full and true answer to the same under oath and filed in the cause within five days thereafter. If he fails to do so, the plaintiff may take judgment against him by default, or the court may upon motion, compel him to answer by attachment. But no final judgment shall be rendered against the garnishee until there shall be a final judgment against the defendant; nor shall judgment be rendered for a greater amount than the debt claimed by the plaintiff with interest and costs, nor for a greater amount than the garnishee shall appear to be liable for to the defendant; nor shall execution issue against a garnishee until the maturity of his debt to the defendant. ['07, p. 158, § 3.]

Hist. '07, p. 158, § 3, reen. R. C. § 4310c, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7576.

Default defined: The default provided for in this section does not mean a default judgment or that judgment may be rendered against the garnishee for the amount claimed by the plaintiff to be due from the garnishee to the defendant, but is a mere declaration that the garnishee failed to appear and answer. Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

The statute does not authorize the court to enter a money judgment against the garnishee upon the mere failure to answer the interrogatories within the time fixed by statute. The case must be proved and the liability fixed under the proof. Shumake v. Shumake (1910) 17 I. 649, 107 P. 42.

§ 6791. [4310d] **Exception to answer: Amendment.** The plaintiff may except to the answer of the garnishee for insufficiency, and if adjudged insufficient, the court may allow him to amend it in such time and on such terms as shall be just. ['07, p. 158, § 4.]

Hist. '07, p. 158, § 4, reen. R. C. § 4310d, reen. C. L. ib.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6792. [4310e] **Denial of answer.** The plaintiff may deny the answer of the garnishee in whole or in part without oath, and allege specially the grounds upon which a recovery is sought against the garnishee, to which the garnishee may reply either generally or specially, and the issue presented by such denial and reply, shall be tried as ordinary issues between plaintiff and defendant, and judgment rendered thereon and execution issued accordingly except as herein otherwise provided. ['07, p. 158, § 5.]

Hist. '07, p. 158, § 5, reen. R. C. § 4310e, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7578.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6793. [4310f] **Judgment on answer: Costs and allowances.** If the answer of the garnishee be not excepted to, or denied within three days after its filing, unless the court, or judge in vacation, for good cause shown, gives longer time, it shall be taken to be true and sufficient, and if in such case any indebtedness or liability is admitted, judgment shall be rendered accordingly, and the garnishee shall be allowed a reasonable sum out of the funds or property confessed in his hand for his trouble and expense in answering. If all liability is denied, and the denial is uncontroverted, the garnishee shall be discharged at the cost of the plaintiff. In contested cases the costs shall be adjudged as in ordinary cases between plaintiff and defendant. ['07, p. 158, § 6.]

Hist. '07, p. 158, § 6, reen. R. C. § 4310f, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7581.

Default: Extension of time: Until the default of garnishee for want of an answer is filed the court possesses power to permit answer to be made or to extend or enlarge the time to plead: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6794. [4310g] **Judgment against garnishee.** If the garnishee admits in his answer that he is indebted to the defendant, or has money or property of the defendant in his hands, or under his control, and fails or refuses to turn the same over to the officer as in section 6788 is provided, the plaintiff may move the court out of which the writ issued, on or before the return day thereof, for judgment against the garnishee for the amount of such admitted debt, or for the delivery to the officer of the money or property of the defendant in his hands, to an amount sufficient to satisfy the plaintiff's claim; serving the garnishee with due notice of the said motion; and at the hearing thereof the court shall render such judgment as shall be conformable to law and the facts shown to exist. ['07, p. 158, § 7.]

Hist. '07, p. 158, § 7, reen. R. C. § 4310g, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. 7583.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6795. [4310h] **Allegation of assignment of debt: Procedure.** If the garnishee shall allege in his answer that he is indebted to the defendant, but declare his belief under oath that the debt has been assigned to some other person (naming him), and the plaintiff shall file a reply, denying the fact, or the force and validity of the alleged assignment, the court shall thereupon make an order requiring the alleged assignee to appear, on a day to be therein named, and show cause why the alleged assignment should not be disregarded. Such order shall be served upon the supposed assignee, if within the jurisdiction of the court, at least 15 days before the return day thereof. But, if he cannot be found, or is out of the jurisdiction of the court, he may be brought in by publication as in other civil cases: *Provided,* That the order shall be published instead of the summons, and that such publication need only be made for three weeks successively, and that the last insertion thereof need not be more than 15 days before the return day thereof. ['07, p. 158, § 8.]

Hist. '07, p. 158, § 8, reen. R. C. § 4310h, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. 7582.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

Mode of assignment: In the absence of statutory provisions prescribing the mode of assignment no particular method or form is necessary to effect a valid assignment of property, claims or debts, so as to defeat the garnishment proceedings by a creditor of assignor; if the intent of the party to effect an assignment be clearly established it is sufficient. Porter v. Title etc. Co. (1912) 21 I. 312, 121 P. 548.

§ 6796. [4310i] **Same: Trial of issue.** Upon the return day of the order of notice, or upon such other day to which the trial may be postponed, if the alleged assignee fails to appear, or appearing fails to assert any claim as such assignee, the alleged assignment shall be disregarded, but if he shall appear and set up a claim as assignee, the existence, force and validity of the alleged assignment shall be tried as similar issues between plaintiff and defendant, and such judgment shall be rendered as shall be conformable to the facts and the law. ['07, p. 158, § 9.]

Hist. '07, p. 158, § 9, reen. R. C. § 4310i, reen. C. L. ib.

§ 6797. [4310j] **Claim of exemption by defendant.** The defendant in the main action may, by proper pleading filed in the garnishment

proceedings, set up any facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for the plaintiff's claim, and if issue thereon be joined by the plaintiff it shall be tried with the issues as to the garnishee's liability, and if the property or debt, or any part thereof, is found to be thus exempt or not liable, judgment shall be rendered accordingly. ['07, p. 158, § 10.]

Hist. '07, p. 158, § 10, reen. R. C. § 4310j, reen. C. L. ib.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 6798. [4310k] **Liability of garnishee on negotiable paper.** The garnishee shall not be held liable on any debt due upon negotiable paper unless such paper is delivered up to him, or he is fully exonerated or indemnified against any liability thereon after he may have satisfied the judgment. But if it shall be made to appear to the satisfaction of the court in which the proceedings are pending, that the paper is in the possession or control of the defendant, he may be compelled to produce it by attachment. ['07, p. 158, § 11.]

Hist. '07, p. 158, § 11, reen. R. C. § 4310k, reen. C. L. ib.

§ 6799. [4310 l] **Liability of officers and executors to garnishment.** No sheriff, constable, or other officer charged with the collection of money shall, prior to the return day of the execution upon which the same may be made, be liable to be summoned as a garnishee, nor shall any county collector or municipal corporation or any officer thereof, nor administrator or executor of any estate, prior to the allowance of a demand found to be due by his estate, or prior to an order of distribution or for the payment of debts and legacies, be liable in their official capacities as garnishee. ['07, p. 158, § 12.]

Hist. '07, p. 158, § 12, reen. R. C. § 4310 l, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7584.

§ 6800. [4310m] **Appeals in garnishment proceedings.** Appeals may be taken, heard and determined in cases arising under this article in the same manner and with like effect as is now, or may hereafter be, provided by law for appeals in ordinary civil actions. ['07, p. 158 § 13.]

Hist. '07, p. 158, § 13, reen. R. C. § 4310m, reen. C. L. ib.

Right to appeal: The fact that respondent was not named as a party to the main proceeding, to which the garnishment proceedings were ancillary, is immaterial. Hanson v. Weniger, 31 I. 540, 173 P. 1085.

§ 6801. [4310n] **Application of preceding sections.** The provisions of sections 6788 to 6800, inclusive, shall apply to all courts of competent jurisdiction. ['07, p. 158, § 14.]

Hist. '07, p. 158, § 14, reen. R. C. § 4310n, reen. C. L. ib.

Custody and Sale of Attached Property.

§ 6802. [4311] **Inventory and memorandum of attached property.** The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to the debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each, and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the cost of any proceedings taken for the purpose of obtaining information re-

specting the amounts and description of such debt or credit. [R. S. § 4311.]

Hist. (See C. C. P. '81, § 327) R. S. § 4311, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7546.

§ 6803. [4312] Sale of perishable property: Collection of debts. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to issuing of the attachment. Debts and credits attached may be collected by him if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid. [R. S. § 4312.]

Hist. (See C. C. P. '81, § 328) R. S. § 4312, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sales of perishable property may be ordered at chambers: § 6493. Payment to sheriff discharges garnishee's debt: § 6788. Sales on execution: § 6922.

Comp. leg.—Cal. Same: C. C. P. 1872, § 547; Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7546, 7554. See also C. C. P. § 7551.

Sale of perishable property: A sheriff has no right to assume to sell attached property as perishable without an order of the court, which order must be predicated upon a sworn statement by the sheriff showing the character of the property claimed to be perishable and the amount thereof. Work Bros. v. Kinney (1898) 5 I. 716, 51 P. 745.

§ 6804. [4313] Order for sale of property. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactory to the court, or a judge thereof, that the interests of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such an order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action. [R. S. § 4313.]

Hist. (See C. C. P. '81, § 329) R. S. § 4313, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sales under execution: §§ 6922-30.

Comp. leg.—Cal. Same except the words "or a county judge" are inserted after "judge thereof": C. C. P. 1872, § 548; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7554.

§ 6805. Claim of property by third person. If any personal property attached be claimed by a third person as his property, the same rules shall prevail as to the contents and making of said claim, and as to the holding of said property, as in the case of a claim after levy upon execution, as provided in section 6918. ['13, c. 109, p. 430.]

Hist. (See C. C. P. '81, § 330) R. S. § 4314; R. C. ib.; am. '13, c. 109, p. 430, reen. C. L. ib.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 549; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7550.

Optional with sheriff: Where conditions arise calling a sheriff's jury it is optional with the sheriff to call or not to call such jury. Fury v. White (1890) 2 I. 662, 23 P. 535.

§ 6806. [4315] Sale of attached property to satisfy judgment. If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or if any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell, under the execution, so much of the property, real or personal as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sale must be given, and the sales conducted as in other cases of sales on execution. [R. S. § 4315.]

Hist. (See C. C. P. '81, § 331) R. S. § 4315, reen. R. C. ib., reen. C. L. ib.

Cross ref. Penalty for neglect or refusal of sheriff to pay over money: § 3601. Sales on execution: §§ 6922-30.

Comp. leg.—Cal. Same: C. C. P. 1872, § 550; Kerr's C. ib.

N. D. Similar: C. C. P. § 7563.

§ 6807. [4316] **Collection of deficiency after sale.** If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment. [R. S. § 4316.]

Hist. (See C. C. P. '81, § 332) R. S. § 4316, reen. R. C. ib., reen. C. L. ib.

Cross ref: Penalty for neglect or refusal of sheriff to pay over money: § 3601.

Comp. leg.—Cal. Same: C. C. P. 1872, § 551; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7563.

§ 6808. [4317] **Action on attachment bond.** If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 6782 or section 6811, or he may proceed as in other cases upon the return of an execution. [R. S. § 4317.]

Hist. (See C. C. P. '81, § 333) R. S. § 4317, reen. R. C. ib., reen. C. L. ib.

Cross ref. Supplementary proceedings: §§ 6941-48.

Comp. leg.—Cal. Same: C. C. P. 1872, § 552; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7563.

Discharge and Return of Attachment.

§ 6809. [4318] **Discharge on judgment for defendant.** If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom. [R. S. § 4318.]

Hist. (See C. C. P. '81, § 334) R. S. § 4318, reen. R. C. ib., reen. C. L. ib.

Cross ref. Appeal does not continue attachment unless new bond is given; § 7159.

Comp. leg.—Cal. Same: C. C. P. 1872, § 553; Kerr's C. ib.

N. D. Similar: C. C. P. § 7534.

§ 6810. [4319] **Discharge of attachment on giving bond.** Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof for an order to discharge the attachment wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment any or all of the property attached, and all of the property so released, and all of the proceeds of the sales thereof, must be delivered to the defendant upon the justification of the sureties on the undertaking, if required by the plaintiff. [R. S. § 4319.]

Hist. (See C. C. P. '81, § 335) R. S. § 4319, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or to a county judge" are inserted after "judge thereof": C. C. P. 1872, § 554; now same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7555. See also C. C. P. § 7565.

Effect of discharge: On redelivery of attached property such property passes into the absolute possession and control of defendant upon the execution of a proper bond. The plaintiff's lien upon the property is annulled and he must rely upon the undertaking given by defendant. The undertaking is a new and independent contract, into which defendant and his sureties enter, regardless of plaintiff's desire in the premises, but for his security. Glidden v. Whittier (1891) 46 F. 437.

§ 6811. [4320] **Same.** Before making such order the court or judge must require an undertaking on behalf of the defendant by at least two sureties, residents and freeholders or householders in the county, to the effect that in case the plaintiff recover judgment in the action defendant will, on demand, redeliver the attached property so released to the proper officer to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and, if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be requested to justify before the court or judge, and the property attached can not be released from the attachment without their justification if the same be required. [R. S. § 4320.]

Hist. (See C. C. P. '81, § 336) R. S. § 320, reen. R. C. ib., reen. C. L. ib.

Cross ref. Statutory form of undertaking: § 7236. Justification of sureties: § 237.

Comp. leg.—Cal. Almost identical: C. P. 1872, § 555; same: Kerr's C. ib.

N. D. Similar: C. C. P. § 7556.

Cited: Glidden v. Whittier (1891) 46 F. 437; S. v. Drury (1914) 25 I. 787, 139 P. 1129.

§ 6812. [4321] **Vacation of irregular attachment.** The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. [R. S. § 4321.]

Hist. (See C. C. P. '81, § 337) R. S. § 321, reen. R. C. ib., reen. C. L. ib.

Cross ref. Attachments may be discharged at chambers: § 6493.

Comp. leg.—Cal. Somewhat similar: C. P. 1872, § 556; now same as amended: Kerr's C. ib.

Cited: Glidden v. Whittier (1891) 46 F. 437.

Grounds for discharge: The only grounds upon which an attachment can be discharged is that the writ is improperly or illegally issued; that the property levied upon is exempt from execution or is a homestead is not ground for discharging the writ. Mason Ehrman & Co. v. Lieuallen (1895) 4 I. 415, 39 P. 1117.

The attachment will not be dissolved for mere irregularity in the issuance of the summons. Ridenbaugh v. Sandlin (1908) 14 I. 472, 94 P. 827, 125 A. S. R. 75.

A motion to dissolve will not be turned into a demurrer. If the complaint fails to state a cause of action, because the facts plead are defectively stated, and it appears from the complaint that a cause of action can be stated by amendment under the ordinary rules governing amendments, then on the hearing of the motion to dissolve, the amendment will be considered as having been made. If, however, the complaint states no cause of action, then a motion to dissolve the attachment, on the ground that the complaint fails to state facts sufficient to constitute a cause of action, will be considered and sustained. Ross v. Gold Ridge M. Co. (1908) 14 I. 687, 95 P. 821.

An affidavit alleging two or more distinct grounds of attachment in the alternative is insufficient, because it is impossible to determine which ground is relied on to sustain the attachment. Heaton v. Panhandle Smelting Co., 32 I. —, 179 P. 510.

Right not waived: The release of attached property by defendant by the execution of a proper undertaking is not a waiver of defects in the original proceeding, and defendant may move for a discharge of the writ of attachment on the ground that the same was irregularly or improperly issued, after the release of his property. Murphy v. Montandon (1892) 3 I. 325, 29 P. 851, 35 A. S. R. 279.

§ 6813. [4322] **Same: Affidavit.** If the motion be made upon affi davits on the part of the defendant, but not otherwise, the plaintiff ma oppose the same by affidavits or other evidence, in addition to those o which the attachment was made. [R. S. § 4322.]

Hist. (See C. C. P. '81, § 338) R. S. § 4322, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 557; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7561.

Construed: This section, together with §§ 6812 and 6814, control the general provisions of § 6726 in regard to courts exercising liberality in permitting amendments to pleadings or proceedings. Hea ton v. Panhandle Smelting Co., 32 I. — 179 P. 510.

Motion without affidavits: Where th motion is not made on affidavits, the dis trict judge is prohibited by this sectio from considering plaintiff's affidavit in op position to the motion. Heaton v. Pan handle Smelting Co., supra.

§ 6814. [4323] **Same: When discharged.** If upon such applicatio it satisfactorily appears that the writ of attachment was improperly o irregularly issued it must be discharged. [R. S. § 4323.]

Hist. R. S. § 4323, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 558; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7561.

§ 6815. [4324] **Return of writ.** The sheriff must return the writ o attachment with the summons, if issued at the same time; otherwis within 20 days after its receipt, with a certificate of his proceedings in dorsed thereon or attached thereto; and whenever an order has bee made discharging or releasing an attachment upon real property, a cer tified copy of such order may be filed in the office of the county re corder in which the notice of attachment has been filed, and be indexe in like manner. [R. S. § 4324.]

Hist. (See C. C. P. '81, § 340) R. S. § 4324, reen. R. C. ib., reen C. L. ib.

Cross ref. Sheriff's return is prima facie evidence of facts: § 3598. Penalty for failure to return: § 3599. Completion and return of process after expiration of term o office: § 3619.

Comp. leg.—Cal. Similar: C. C. P. 187 § 559; now same as amended: Kerr's C. i

N. D. Analogous: C. C. P. § 7566.

§ 6816. [4325] **Discharge of lien on real estate.** Whenever in an action, real estate has been levied upon under writs, either of attach ment of execution, and the lien of the writ has in any manner been los or destroyed, the court out of which the writ issued or the judge there of, may, on application by any person interested, make an order dis charging said lien, and the order or a certified copy thereof may b filed in the office of the county recorder in which the notice of the lev has been filed, and indexed in like manner as said notice. ['9 p. 14, § 1.]

Hist. '95, p. 14, § 1, reen. '99, p. 233, § 1, reen. R. C. § 4325, reen. C. L. ib.

N. D. Analogous: C. C. P. § 7562.

ARTICLE 5.

RECEIVERS.

§ 6817. Grounds for appointment. A receiver may be appointe by the court in which an action is pending or has passed to judgmen or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of pro erty, or by a creditor to subject any property or fund to his claim, or b tween partners or others jointly owning or jointly interested in a property or fund, on the application of the plaintiff or of any par whose right to, or interest in, the property, or fund, or the proce thereof, is probable, and where it is shown that the property or fund in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortga

and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment to carry the judgment into effect.

4. After judgment to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In the case where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. ['09, p. 26, H. B. 60.]

Hist. (See C. C. P. '81, § 341) R. S. § 329, reen. R. C. ib.; am. '09, p. 26, H. B. 0, reen. C. L. § 4329.

Cross ref. Any order relating to receivers may be made at chambers: §6493. Appointment of receiver for insolvent banks n application of department of commerce nd industry: § 5294. In insolvency proeedings: § 7899.

Comp. leg.—Cal. Similar: C. C. P. 1872, 564; Kerr's C. ib.

N. D. Similar: C. C. P. § 7588.

Wash. Similar: Hill's C. § 236. Coml. rust Co. v. Idaho Brick Co. (1913) 25 I. 55, 763, 139 P. 1004.

Jurisdiction to appoint: An action is ot pending in such sense as to authorize ie appointment of a receiver until the omplaint has been placed in the hands f the clerk or in his office for the purpose f receiving the filing mark. Gold Hun-r M. Co. v. Holleman (1891) 3 I. 99, 27 413.

District courts have no jurisdiction to point receivers in all actions which may pending before them but only in the ases of cases mentioned in this section, id then when prior to judgment it is ade to appear that such an appointment necessary in order to protect the rights the parties. Sweeney v. Mayhew (1899) I. 455, 56 P. 85.

A plaintiff is not entitled to the appointment of a receiver where the defendit fully meets and denies the equities his bill by a sworn answer, unless he ercomes the denials in the answer by rther proof in support of his bill. Ib.

This section must be construed with §§ 44-7 relative to proceedings supplemenry to execution and does not authorize e judge before whom supplementary proedings are pending to determine the inests of a garnishee in such proceedings d appoint a receiver to take charge of e property garnished. Spaulding v. eur d'Alene Ry. etc. Co. (1899) 6 I. 638, P. 426.

Courts of equity have the power and auority to appoint receivers of property and ect them to care for, protect and preve the property and decree the charges d expenses therefor as prior and pre-red liens to that of all other liens, mortges or incumbrances, and to direct the perty sold for the payment of the same. lliba v. Winschell (1905) 11 I. 364, 82 P. 107; Hewitt v. Great Western etc Co. (1911) 20 I. 235, 118 P. 296; Coml. Trust Co. v. Ida. Brick Co. (1913) 25 I. 755, 139 P. 1004.

A receiver can not be appointed until an action is pending or has passed to judgment. (Stewart, J. dissents) Elmore Co. etc. Assn. v. Stockslager (1912) 22 I. 420, 126 P. 616.

There are no provisions in the statutes which limit the jurisdiction of the court in appointing trustees and receivers of a foreign corporation which owns valuable property in the state and is making contracts and carrying on business, where such corporation becomes insolvent and has creditors and is unable to pay the debts of the corporation. Such corporation can be sued in the courts of the state, and the courts acquire jurisdiction of such corporation by reason of the fact that such corporation has appointed an agent and a principal place of business in the state, and the district court and the judge thereof has power to make such appointment. Rowe v. Stevens (1913) 25 I. 237, 127 P. 159.

Where all the parties interested in property and having control over it are personally present in court the court may appoint a receiver to take charge of the property (in a proper case) although the property is outside of the jurisdiction of the state. Eureka M. etc. Co. v. Lewiston Nav. Co. (1906) 12 I. 472, 86 P. 49.

In addition to the grounds specified in this section a receiver may be appointed in all other cases where receivers have been appointed by the usages of courts of equity. Riley v. Callahan M. Co. (1916) 28 I. 525, 155 P. 665.

When appointed: Where a party has property in his possession and under his control which he allows to depreciate in value or wrongfully disposes of, in which another party has an interest, it is proper for the court to appoint a receiver. Jones v. Quayle (1893) 3 I. 640, 32 P. 1134.

Where the stockholders of a corporation make application for its dissolution and it appears that the corporation is insolvent or in imminent danger of insolvency, the appointment of a receiver is proper. Security Sav. etc. Co. v. Piper (1895) 4 I. 463, 40 P. 144.

Where the property of a corporation has suffered depreciation by fire and the cor-

poration is not in active operation and its capital stock is equally divided between contending factions, and its assets consist principally of cash, it is proper to appoint a receiver under subdivision 6 of this section, although none of the contingencies mentioned in subdivision 5 of this section have arisen. Gibbs v. Morgan (1903) 9 I. 100, 72 P. 733.

A receiver should be appointed on the application of a stockholder of a corporation where it is shown that the directors and officers of the corporation are mismanaging its affairs for their personal advantage and gain; that the profits of the corporation's business are being absorbed in paying the salaries of favorite employees whose services are unnecessary; and that the corporation is so grossly mismanaged that such mismanagement, if continued, would necessarily result in its insolvency. Hall v. Nieukirk (1906) 12 I. 33, 85 P. 485.

This section authorizes the district court to appoint a receiver to receive and take charge of notes, accounts, certificates of the capital stock of corporations and choses in action, and other personal property, where the necessity and occasion for such appointment is shown. Utah Assn. of Credit Men v. Budge (1909) 16 I. 751, 102 P. 691.

Where a foreign corporation leases its irrigation system to another corporation engaged in the distribution of water for rental and sale and the latter corporation becomes insolvent, the court has jurisdiction to appoint a receiver of the entire property of both corporations pending litigation to determine the interest a purchaser of water may have acquired in such system. Idaho Fruit Land Co. v. Great Western etc. Co. (1909) 17 I. 273, 105 P. 562.

The right to have a receiver appointed is available in an action by a mortgagee for foreclosure where it appears that the property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the debt. Keane v. Kibbie (1915) 28 I. 274, 154 P. 972.

Intervention by mortgagee in creditors' suit where receiver has already been appointed and prayer that income of an insolvent public service corporation be impounded is authorized under this section. Westinghouse E. & M. Co. v. Idaho Ry. L. & P. Co. (1915) 228 F. 972.

This section confers jurisdiction to appoint receiver in foreclosure of chattel mortgage. Skeen v. Dist. Ct. (1916) 29 I. 331, 158 P. 1072.

When not appointed: Appointment of receivers to take charge of real property should never be made until the moving party shows himself clearly entitled thereto; the court should not take charge of real estate through the aid of a receiver as against a party in possession asserting title in himself unless the property is shown to be in imminent danger of great waste or irreparable injury. Kelly v. Steele (1903) 9 I. 141, 72 P. 887.

Where a mortgage requires the mortgagor to keep the property insured but provides that in case he fails to do so the mortgagee may insure and have an additional lien on the property for the amount paid for insurance, the failure of the mortgagor to insure is not such waste as to authorize the appointment of a receiver. Eureka M. etc. Co. v. Lewiston Nav. Co (1906) 12 I. 472, 86 P. 49.

The fact that a mortgaged boat is being used to ply waters without the state is no grounds for the appointment of a receiver on the application of the mortgagee, where the mortgage merely stipulates that the boat is not to be taken without the limits "of the United States" and it does not appear that it is being so taken, nor that the waters in which it is used are any more dangerous than those within the state. Ib

Where the ground alleged for the appointment of a receiver of a corporation is "imminent danger of insolvency," facts must be alleged sufficient to show such imminent danger. Cronan v. Dist. Ct. (1908) 15 I. 184, 96 P. 768.

Effect of appointment: The appointment of a receiver does not necessarily cause the dissolution of the corporation unless the court so directs; the receiver may be appointed simply to manage the affairs of the company during the pendency of the litigation. Hall v. Nieukirk (1906) 12 I. 33, 85 P. 485.

Except so far as the control of the affairs of a domestic or foreign corporation is placed in the hands of the receiver, its officers and directors, except when enjoined by the court appointing the receiver, continue to exercise their functions as if no receiver had been appointed. Rowe v. Stevens (1913) 25 I. 237, 137 P. 159.

Powers of receiver: A receiver is an officer of the court, under its protection and property in his hands is in custodia legis; therefore, no one can sue him concerning such property without leave of the court which appointed him. Martin v. Atchison (1890) 2 I. 634, 33 P. 47.

A receiver in charge of the property of a corporation has no authority to carry on the business of the corporation unless he be so authorized and directed by the court. Dalliba v. Winschell (1905) 11 I. 364, 8 P. 107. A court of equity has no authority to direct its receiver in charge of placer mines to carry on a general mining business, and charge the expenses of the business and operations as a prior and preferred lien against the property over that of prior recorded mortgages and incumbrances on the same property. Ib.

Allowances to receiver: A receiver is not entitled to allowances for fees paid attorneys for making his reports, narrating his acts, receipts and expenditures as receiver and prosecuting claims for his own compensation against the estate he represents. Ib.

Where a receiver has failed to keep correct accounts of the business and transactions of the receivership estate and has failed to take vouchers for numerous and large sums of expenditure, and has made large overcharges and false charges for sums claimed to have been expended by him, and has been generally reckless in his expenditures in connection with the trust and in the employment of servants, and has shown general disregard for the trust he has assumed, a court of equity will refuse to allow him any salary or compensation for services as receiver. Ib.

§ 6818. [4330] **Same: Upon dissolution of corporation.** Upon the dissolution of any corporation the district court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any member or stockholder thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members. [R. S. § 4330.]

Hist. (See C. C. P. '81, § 342) R. S. § 4330, reen. R. C. ib., reen. C. L. ib.

Cross ref. Unless otherwise appointed by court, directors are trustees on dissolution: § 4767. Voluntary dissolution of corporations: §§7397-7403.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 565; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7588.

Cited: Clow v. Redman, 6 I. 568, 57 P. 437.

§ 6819. [4331] **Who may be appointed: Undertaking.** No party, or attorney, or person interested in an action, can be appointed receiver therein, without the written consent of the parties filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking. [R. S. § 4331.]

Hist. (See C. C. P. '81, § 343) R. S. § 4331, reen. R. C. ib., reen. C. L. ib.

Cross ref. Statutory form of undertaking: § 7236. Justification of sureties: § 7237. State, county or city need not give bond: § 7238.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 566; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7589.

Cited: Cronan v. Dist. Ct. (1908) 15 I. 184, 96 P. 768.

Discretion of court: It is within the discretion of the court to require an undertaking before a receiver is appointed, and he may at his discretion require an undertaking at any time after the appointment. (Ailshie, J. dissents) Lee v. Stevens (1912) 22 I. 670, 127 P. 680.

§ 6820. [4332] **Oath and bond of receiver.** Before entering upon his duties the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking, to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. [R. S. § 4332.]

Hist. (See C. C. P. '81, § 344) R. S. § 4332, reen. R. C. ib., reen. C. L. ib.

Cross ref. The provisions of Pol. C., c. 2, apply to bonds of receiver: § 448. Receiver's bonds run to state: § 449. Allowance to receiver of premium paid for company bond: §§ 5106-13.

Comp. leg.—Cal. Same: C. C. P. 1872, § 567; Kerr's C. ib.

N. D. Identical: C. C. P. § 7590.

§ 6821. [4333] **Powers of receiver.** The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize. [R. S. § 4333.]

Hist. (See C. C. P. '81, § 345) R. S. § 4333, reen. R. C. ib., reen. C. L. ib.

Cross ref. Assessment of property in hands of receiver: §§ 3112-3.

Comp. leg.—Cal. Same: C. C. P. 1872, § 568; Kerr's C. ib.

N. D. Identical: C. C. P. § 7591.

Power of court: It was not intended that a court or judge should take charge of the property of a private corporation through its receiver and operate it indefinitely for the benefit of its creditors. Cronan v. Dist. Ct. (1908) 15 I. 184, 96 P. 768.

A court of equity has no power to authorize a receiver to incur indebtedness in carrying on a private business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lien holders, without their consent. Stevens v. The Evening Courier, 31 I. 719, 175 P. 964. Dalliba v. Winschell, 11 I. 364, 82 P. 107.

Liability of receiver: A receiver is charged with knowledge of the general condition of the insolvent business after he has had charge a sufficient length of time to acquaint himself with its affairs. Brown v. Miller (1912) 22 I. 307, 318, 125 P. 981.

Receiver's sale: A district judge at chambers has power to order the sale of property in the hands of a receiver, with instructions to the receiver to report the sale to court for confirmation. First Nat. Bk. of Pocatello v. Bunting & Co. (1900) 7 I. 387, 63 P. 694.

A receiver's sale is a judicial sale, and is required to be made upon not less than five nor more than ten days' notice, as are other judicial sales. A sale by a receiver on an ex parte application at chambers, made upon only three days' notice posted in only three places in the county is void, and an order confirming the same should be set aside. (Dis. op.) Ib.

In order to justify setting aside a judicial sale on behalf of one attacking it on the ground of alleged irregularities in the conduct of such sale, the person attacking such sale should allege and establish injury to himself resulting from the irregularities complained of. Re Great Western etc Co. (1912) 22 I. 328, 125 P. 799, 43 L. R. A. (N. S.) 671.

§ 6822. [4334] **Investment of funds.** Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made except upon the consent of all the parties to the action. [R. S. § 4334.]

Hist. (See C. C. P. '81, § 346) R. S. § 4334, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 569; Kerr's C. ib.

N. D. Identical: C. C. P. § 7592.

ARTICLE 6.

DEPOSIT IN COURT.

§ 6823. [4339] **When deposit may be ordered.** When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court. [R. S. § 4339.]

Hist. (See C. C. P. '81, § 347) R. S. § 4339, reen. R. C. ib., reen. C. L. ib.

Cross ref. Deposit in court in condemnation proceedings: § 7418.

Comp. leg.—Cal. Same: C. C. P. 1872, § 572; Kerr's C. ib.

N. D. Similar: C. C. P. § 7593.

Money held by trustee: Where it appears from the pleadings, and by the admission of a trustee, that the trustee holds certain moneys in trust, and that he holds such moneys subject to the order of the court and has no interest or claim in the same, an application for the deposit of such money into court, made by all parties claiming an interest in the same, will be granted. Reid v. Steele (1901) 7 I. 571, 64 P. 892.

§ 6824. [4340] **Custody of money deposited.** If the money is deposited in court it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe keeping of the money deposited with him the treasurer is liable on his official bond. [R. S. § 4340.]

Hist. (See C. C. P. '81, § 348) R. S. § 4340, reen. R. C. ib., reen. C. L. ib.

Cross ref. Money deposited in court to be assessed for taxation to the clerk: § 3112; may be ordered deposited with a guaranty or trust company: § 4863.

Comp. leg.—Cal. Same: C. C. P. 1872 § 573; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7594.

§ 6825. [4341] **Enforcement of order for deposit.** Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money, or other thing, and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money, or thing, and deposit or deliver it in conformity with the direction of the court. [R. S. § 4341.]

Hist. (See C. C. P. '81, § 349) R. S. § 4341, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7595.

Comp. leg.—Cal. Same: C. C. P. 1872, § 574; Kerr's C. ib.

CHAPTER 256.

TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Cross ref. Judgment by confession: §§ 7301-4.

ARTICLE 1.

JUDGMENT IN GENERAL.

§ 6826. [4350] **Judgment defined.** A judgment is the final determination of the rights of the parties in an action or proceeding. [R. S. § 4350.]

Hist. (See C. C. P. '81, § 350) R. S. § 4350, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7599.

Comp. leg.—Cal. Same: C. C. P. 1872, § 577; Kerr's C. ib.

§ 6827. [4351] **Judgment as between several parties.** Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. [R. S. § 4351.]

Hist. (See C. C. P. '81, § 351) R. S. § 4351, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 578; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7679.

Cited: Shields v. Ruddy (1891) 3 I. 148, 28 P. 405; Hewitt v. Maize (1897) 5 I. 633, 51 P. 607; (In brief of counsel) Zilka v. Graham (1914) 26 I. 163.

Settlement of conflicting claims: Under this statute all conflicting claims should be finally settled when the parties are in court and should be applied in compensation of each other, judgment being rendered in favor of the party proving the largest claim. First Nat. Bk. of Hailey v. Bews (1892) 3 I. 468, 31 P. 816.

§ 6828. [4352] **Same: Against one of several defendants.** In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. [R. S. § 4352.]

Hist. (See C. C. P. '81, § 352) R. S. § 4352, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 579; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7679.

Applied: Where two persons are sued as joint tort-feasors and the evidence clearly shows that only one of them is liable for the tort, judgment may be rendered against the one who is liable for the trespass. Zilka v. Graham (1914) 26 I. 163, 141 P. 639.

Modification of judgment: The court may modify a verdict and judgment against joint defendants by setting the same aside as to one defendant against whom no liability is shown. Gaffney v. Hoyt (1866) 2 I. 199, 10 P. 34.

§ 6829. [4353] **Extent of relief.** The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint embraced within the issue. [R. S. § 4353.]

Hist. (See C. C. P. '81, § 353) R. S. § 4353, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 580; Kerr's C. ib.

N. D. Identical: C. C. P. § 7680.

Cited: Ida. & Ore. Land Imp. Co v. Bradbury et al. (1889) 10 S. C. R. 177, 132 U. S. 509, 33 S. C. R. L., ed. 433; Murphy v. Russell & Co. (1901) 8 I. 151, 67 P. 427; Brunzell v. Stevenson (1917) 30 I. 202, 164 P. 89.

Scope of relief: When an answer is filed the court may grant any relief consistent with the case made by the complaint and embraced within the issue made whether such relief is prayed for or not. Burke Land Co. v. Wells Fargo Co. (1900) 7 I. 42, 60 P. 87. Dover Lbr. Co. v. Case, 31 I. 276, 170 P. 108.

Where an answer is filed to a complaint which prays specifically for an injunction restraining a defendant from filling plaintiff's ditch with debris, from running the same onto his land and for damages, the court, under the further prayer for general relief, may settle an issue raised by the complaint as to the plaintiff's right to certain waters of a creek. Stocker v. Kirtley, (1900) 6 I. 795, 59 P. 891.

In actions in which the demand for an injunction is only incidental and not the main purpose or object of the suit, the suit would not abate and die in case of circumstances arising which would make the granting of the injunction unnecessary. Wilson v. Boise (1900) 7 I. 69, 60 P. 84.

Scope of relief: Judgment consistent with admissions in answer properly entered. Dunn v. Stufflebeam (1910) 17 I. 559, 106 P. 1129.

Default cases: In an action to restrain the sale of property at an assessment sale where no answer is filed and where the relief prayed for is a perpetual injunction, and such other and further relief as may be equitable, the granting of a permanent injunction is the only relief that can be granted, and the prayed for general relief will not warrant a judgment or decree removing any cloud that said sale might cast upon the title to the property, nor can said sale be set aside under such prayer. Ib.

In case the defendant fails to answer the trial court is without power to grant relief not demanded in the complaint, and if there be no prayer accompanying the complaint and no relief demanded, no judgment can be entered in favor of the plaintiff. Washington etc. Co. v. Weiser Nat. Bk. (1915) 26 I. 717, 146 P. 116.

§ 6830. [4354] **Dismissal or nonsuit.** An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1. By the plaintiff himself, at any time before trial, upon the payment of costs: *Provided,* A counterclaim has not been made or affirmative relief sought by the cross complaint or answer of defendant. If a provisional remedy has been allowed the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party, upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it.

5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. [R. S. § 4354.]

Hist. (See C. C. P. '81, § 354) R. S. § 4354, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 581; further amended: Kerr's C. ib. C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687, 693, 112 P. 210.

N. D. Similar: C. C. P. § 7597. See also C. C. P. § 7598.

Cited: Drake v. U. P. Ry Co. (1889) 2 I. 487, 21 P. 560; Fury v. White (1890) 2 I. 662, 23 P. 535; (Dis. op.) Ter. v. Neilson (1890) 2 I. 614, 23 P. 537; Lewis v. Lewis (1893) 3 I. 645, 33 P. 38; Spongberg v. First Nat. Bk. (1909) 15 I. 671, 678, 99 P. 712.

Motion for Nonsuit.

Essentials of motion: The moving party must specify particularly the points relied upon for nonsuit at the time he makes the motion so as to give an opportunity for the removal of the objection or the same will not be sustained on appeal. Idaho Merc. Co. v. Kalanquin (1900) 7 I. 295, 62 P. 925.

Time for motion: A nonsuit should not be granted under this section until the plaintiff has put in or offered all of his evidence and rests his case. Rauh v. Oliver (1904) 10 I. 3, 77 P. 20; Wheeler v. O. R. & N. Co. (1909) 16 I. 375, 102 P. 347.

Effect of motion: On motion for nonsuit after the plaintiff has rested the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove. Bk. of Com. v. Baldwin (1906) 12 I. 202, 85 P. 497. The motion should be denied unless admitting all the facts that may be gathered from every reasonable view of the evidence that no recovery can be had. Later v. Haywood (1906) 12 I. 78, 85 P. 494; Stricker v. Hillis, (1910) 17 I. 646, 648, 106 P. 1128. On motion for a nonsuit the evidence must be interpreted most strongly against the defendant. Pilmer v. Boise Traction Co. (1908) 14 I. 327, 94 P. 432, 125 A. S. R. 161, 15 L. R. A. (N. S.) 254; Shank v. Great Shoshone & T. F. etc. Co. (1913)

205 F. 833, 124 C. C. A. 35; Culver v. Kehl (1912) 21 I. 595, 123 P. 301; S. Ida. Adventists v. Hartford F. Ins. Co. (1915) 26 I. 712, 145 P. 502; Goldensmith v. Snowstorm M. Co. (1916) 28 I. 403, 154 P. 968; McAlinden v. St. Maries Hosp. Assn. (1916) 28 I. 657, 156 P. 115; Donovan v. Boise (1918) 31 I. 324, 171 P. 670.

Waiver of motion: Any error in denying a motion for nonsuit is waived by the subsequent introduction of testimony by the defendant. Chamberlain v. Woodin (1890) 2 I. 642, 23 P. 177. Unless it is renewed at the close of the evidence. Shields v. Johnson (1906) 12 I. 329, 85 P. 972; Barrow v. Lewis L. Co. (1908) 14 I. 698, 95 P. 682.

Where a motion is made for a nonsuit at the close of the evidence on the part of the plaintiff upon the ground that the evidence is insufficient to warrant the submission of the cause to a jury, and the motion is denied, and evidence is thereafter offered by the defendant, the ruling of the trial court upon the motion is not reviewable upon appeal from the judgment or from the order overruling the motion for a new trial. Rippetoe v. Feely (1911) 20 I 619, 119 P. 465; Knauf v. Dover Lbr. Co. (1911) 20 I. 773, 120 P. 157; Smith v. Potlatch Lbr. Co. (1912) 22 I. 782, 128 P. 546; Tonkin Clark Realty Co. v. Hedges (1913) 24 I. 304, 133 P. 669.

When granted: Where the evidence of the plaintiff is such that the trial court would, in the event of a verdict, feel compelled to set the same aside, it is its duty to take the case from the jury by granting a nonsuit. Jacobson v. Bunker Hill etc. Co. (1891) 3 I. 126, 26 P. 396; Blackwell v. Kercheval (1916) 29 I. 473, 160 P. 741.

Where the plaintiff stands on a challenge which he has interposed to the jury panel and refuses to introduce any testimony and defendant has pleaded a cross complaint but introduces no evidence in support thereof the court should order a dismissal or judgment of nonsuit, and should not direct verdict for defendant. Simmons v. Cunningham (1895) 4 I. 426, 39 P. 1109.

Where plaintiff's evidence shows that his demand for damages should have been litigated in a former action between the same parties a motion for nonsuit should be sustained. Shields v. Johnson (1906) 12 I. 329, 85 P. 972.

When not granted: It is reversible error to grant a nonsuit where the plaintiff has made a prima facie case. Kroetch v. Empire Mill Co. (1903) 9 I. 277, 74 P. 868; Adams v. Bunker Hill etc. Co. (1906) 12 I. 337, 89 P. 624; Mineau v. Imperial Dredge etc. Co. (1911) 19 I. 458, 462, 114 P. 23; Culver v. Kehl (1912) 21 I. 595, 123 P. 301.

In an action where the complaint alleges joint liability of three defendants upon a certain contract, and the evidence shows that the contract was made with but one of the defendants, but that plaintiff was led to believe by the acts of all the defendants that they were jointly liable, a nonsuit will not be granted. Hewitt v. Blaize (1897) 5 I. 633, 51 P. 607.

That counsel for the plaintiff fails to state facts in his opening statement to the jury which would entitle the plaintiff to recover is not a ground for granting a nonsuit before evidence is offered to support the plaintiff's claim. Wheeler v. Oregon R. R. etc. Co. (1909) 16 I. 375, 102 P. 347.

The insufficiency of the complaint is not a ground for a nonsuit. Strong v. Western Union Co. (1910) 18 I. 389, 407, 109 P. 910, Ann. Cas. 1912A 55, 30 L. R. A. (N. S.) 409; Ludwig v. Ellis (1912) 22 I. 475, 126 P. 769.

Dismissal.

When permissible: Plaintiff may dismiss his action at any time before a counter claim has been interposed or affirmative relief has been sought by cross complaint or answer. Elliott v. Collins (1898) 6 I. 266, 55 P. 301.

The plea of the statute of limitations does not constitute affirmative relief such as to destroy the plaintiff's right to voluntarily dismiss the action. Boyd v. Steele (1899) 6 I. 625, 59 P. 21.

In an action for divorce, where no cross complaint or counterclaim stating a cause of action and seeking affirmative relief is filed, the plaintiff has a right, as a matter of course, to dismiss the action. Stover v. Stover (1900) 7 I. 185, 61 P. 462.

This section is applicable to actions and proceedings in eminent domain and authorizes the plaintiff to dismiss an action in condemnation after the filing of a report by commissioners appointed to award the damages or at any time before trial. C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687, 112 P. 210.

When not permissible: The granting of a motion by plaintiff to dismiss an action as to defendants who have by their answer sought affirmative relief, is error. N. W. & P. Hypotheek Bk. v. Rauch (1898) 5 I. 752, 51 P. 764.

The trial court has no power or right to dismiss an action over the objection of a defendant who has filed an answer and cross complaint seeking affirmative relief, but is required to enter judgment upon the merits of the issue presented by the cross complaint. Frost v. Idaho Irr. Co. (1911) 19 I. 372, 114 P. 38.

A dismissal by plaintiff of his action under this section does not carry with it a dismissal of the action based upon the cross-complaint, but defendant is entitled to have the issues raised therein determined upon the merits. Brown v. T. B. Reed & Co., 31 I. 529, 174 P. 136.

Taxation of costs: Costs of dismissal only need to be paid at the time. Other costs follow as a matter of law. Under § 7218 it is necessary for defendant to file a cost bill within five days after notice of dismissal. C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687, 112 P. 210.

Judgment: Where the plaintiff pays the costs and dismisses the action before trial the fact that the clerk fails to enter a formal judgment of dismissal, if such judgment is required, does not affect the conclusiveness of the dismissal. Stover v. Stover (1900) 7 I. 185, 61 P. 462.

The concluding sentence of this section, that judgment may be entered accordingly, applies to judgments of nonsuit and not to dismissals. Boyd v. Steele (1899) 6 I. 625, 59 P. 21.

§ 6831. [4355] **Judgment on merits.** In every case other than those mentioned in the last section, judgment must be rendered on the merits. [R. S. § 4355.]

Hist. (See C. C. P. '81, § 355) R. S. § 4355, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 582; Kerr's C. ib.

ARTICLE 2.

JUDGMENT UPON FAILURE TO ANSWER.

§ 6832. [4360] **Entry of judgment by default.** Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs against the defendant, or against one or more of several defendants, in the cases provided for in section 6679.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved, by a reference as above provided.

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. [R. S. § 4360.]

Hist. (See C. C. P. '81, § 356) R. S. § 4360, reen. R. C. ib., reen. C. L. ib.

Cross ref. Proceedings under this section on judgment on issues of law: § 6869. Judgment by default may be given at chambers: § 6493.

Comp. leg.—Cal. Same: C. C. P. 1872, § 585; Kerr's C. ib.

N. D. Similar: C. C. P. § 7600.

Cited: Snake River Valley Irr. Dist. v. Stevens (1910) 18 I. 541, 110 P. 1033.

Defaults sustained: Where a defendant has been served by process, and within the time allowed for answer files a demurrer and thereafter withdraws the demurrer and is given five days in which to further plead, and fails to make any further appearance within the time granted, he is thereafter in default, the same as he would have been had he not appeared within the time originally allowed under the statute after the service of summons, and the clerk or court may properly enter his default, and he is not entitled to any notice of application or motion for default. Hall v. Whittier (1911) 20 I. 120, 116 P. 1031.

If a defendant has his case removed to a federal court but it is remanded on the ground that it is not removable, and the defendant has not answered within the time prescribed by the summons, the clerk of the state court may properly enter his default, after which judgment may be had; his vain endeavor to get out of the state court into the federal court does not extend his time for answering. Morbeck v. Bradford-Kennedy Co. (1910) 19 I. 83, 113 P. 89; S. v. Am. Surety Co. (1914) 26 I. 652, 145 P. 1097; Ann. Cas. 1916E 209.

In order to avoid suffering judgment by default, after service of summons upon him, the defendant must, within the time prescribed in the summons, file his ans

wer with the clerk of the court; the deposit of it in the post office addressed to him will not do. Pendrey v. Brennan (1915) 31 I. 54, 169 P. 174.

Necessity of service: A judgment by default entered without proof of service is void. Vermont Loan & Trust Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

Before any judgment can be entered in the district court in a case where service is had by publication, application must be made to the court, which must first determine whether a good and valid service has been made on the defendant. The fact that the order for publication was made either by the probate or district judge is not conclusive on the court when application is made to him for judgment. McKnight v. Grant (1907) 13 I. 629, 92 P. 989, 121 A. S. R. 287.

Necessity of proof: The plaintiff in a water adjudication after taking default must apply to the court for the relief demanded in the complaint, and must establish by proof the material allegations of his complaint. Joyce v. Rubin (1913) 23 I. 296, 130 P. 793.

Relief limited by prayer: This section limits the plaintiff in his application to the court in case the defendant has not answered to the relief demanded in the complaint. Washington etc. Co. v. Weiser Nat. Bk. (1915) 26 I. 717, 146 P. 116.

Judgment by clerk: This section does not authorize an entry of judgment by the clerk in an action of conversion. Parke v. Wardner, (1887) 2 I. 285, 13 P. 172.

This section does not authorize the clerk to enter default judgment against a garnishee for his failure to answer interrogatories submitted. Shumake v. Shumake (1910) 17 I. 649, 107 P. 42.

Appeal: It is permissible for the supreme court to determine whether or not a default should have been set aside by a district court for reasons not assigned in the motion to set aside such default, where it appears that the district judge considered such reasons at the suggestion of the party resisting such motion. Leonard v. Brady (1915) 27 I. 78, 147 P. 284.

Order under subd. 1 is not appealable, either from default entered or from order setting aside default. Omaha Structural Steel Wks. v. Lemon (1917) 30 I. 363, 164 P. 1011. (Overruling Leonard v. Brady (1915) 27 I. 78, 147 P. 284.)

ARTICLE 3.

ISSUES, MODES OF TRIAL AND POSTPONEMENT.

§ 6833. [4365] **Issues defined.** Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact. [R. S. § 4365.]

Hist. (See C. C. P. '81, § 357) R. S. § 4365, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 588; Kerr's C. ib.

N. D. Identical: C. C. P. § 7603.

§ 6834. [4366] **Issues of law.** An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof. [R. S. § 4366.]

Hist. (See C. C. P. '81, § 358,) R. S. § 4366, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 589; Kerr's C. ib.

N. D. Similar: C. C. P. § 7604.

§ 6835. [4367] **Issues of fact.** An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matters in the answer, except an issue of law is joined thereon. [R. S. § 4367.]

Hist. (See C. C. P. '81, § 359) R. S. § 4367, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 590; Kerr's C. ib.

N. D. Similar: C. C. P. § 7605.

Judgment on pleadings: When any material allegation of the complaint is denied by the answer it is error for the court to render judgment on the pleadings. Johnson v. Manning (1892) 3 I. 352, 29 P. 101; Winehart v. Pocatello Meat etc. Co. (1902) 11 I. 710, 70 P. 1054.

Judgment on the pleadings is allowable not because of lack of proof but because of the lack of an issue. Davenport v. Burke (1915) 27 I. 464, 149 P. 511.

Party moving for judgment on pleadings admits truth of adversary's allegations and untruth of his own controverted allegations. Walling v. Bown (1903) 9 I. 184, 72 P. 960; Davenport v. Burke, supra; First Nat. Bk. v. Callahan M. Co. (1916) 28 I. 627, 155 P. 673.

§ 6836. [4368] **Trial of issues of law.** An issue of law must be tried by the court, unless it is referred upon consent. [R. S. § 4368.]

Hist. (See C. C. P. '81, § 360) R. S. § 4368, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 591; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7608.

Cited: P. v. George (1891) 3 I. 108, 27 P. 680; Johansen v. Looney (1917) 30 I 123, 163 P. 303.

Definition: The word "trial" includes the determination of an issue at law as wel as of issues of fact. Lamkin v. Sterling (1867) 1 I. 120.

§ 6837. [4369] **Trial of issues of fact.** In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where, in these cases, there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court subject to its power to order an issue to be referred to a referee, as provided in this code. [R. S. § 4369.]

Hist. (See C. C. P. '81, § 361) R. S. § 4369, reen. R. C. ib., reen. C. L. ib.

Cross ref. Right to trial by jury: Const. I, 7.

Comp. leg.—Cal. See C. C. P. 1872, § 592; same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. 7606. See also C. C. P. § 7609.

Cited: Idaho etc. Co. v. Bradbury (1889) 132 U. S. 509, 33 L. ed. 433, 10 S. C. R. 177.

Right to jury: An appeal from an order of the board of county commissioners allowing a claim is within the provisions of this section and the issue should be submitted to a jury. Fisher v. Bd. of Comrs. (1895) 4 I. 381, 39 P. 552.

The right to a jury trial can not be denied because it is necessary to show that a deed absolute in form was a mortgage, when the determination of this issue is only incidental to the main object of the action, which is the recovery of money. Johansen v. Looney (1917) 30 I. 123, 163 P. 303.

Equitable actions: In an equitable action for specific performance of a contract the defendant is not entitled to a jury as a matter of right, and the findings of the jury on questions submitted to it are only advisory to the court. Brady v. Yos (1898) 6 I. 273, 55 P. 542.

In determining the question of whether or not parties are entitled to a trial by jury courts must look to the ultimate and entire relief sought, and where, in order for the court to render a judgment which would give adequate relief it would be necessary to decree the cancellation of a mortgage and the surrender of a note, such relief could only be available by the exercise of the equitable jurisdiction of the court, and the parties would not be entitled to a jury trial. Rees. v. Gorham (1917) 30 I. 207 164 P. 88.

Procedure in mixed law and equity actions: Where an action at law is brough and an equitable defense is interposed b a cross complaint, and also in an actio cognizable in equity where a cross com plaint at law is interposed, the prope rule of procedure is for the court to hea and dispose of the equitable cause of actio before proceeding to try the issues of law Penninger Lat. Co. v. Clark (1912) 22 397, 404, 126 P. 524.

Additional ref. See cases cited unde Const. I, 7.

§ 6838. [4370] **Entry of causes on calendar.** The clerk must ente causes upon the calendar of the court according to the date of issue Causes once placed on the calendar must remain upon the calendar fron court to court, until finally disposed of: *Provided,* That causes may b dropped from the calendar by consent of parties, or by order of the court and may be again restored upon notice. [R. S. § 4370.]

Hist. (See C. C. P. '81, § 362) R. S. § 4370, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 593; as amended: Kerr's C. ib.

N. D. See C. C. P. § 7607.

§ 6839. [4371] **Bringing issues to trial.** Either party may bring a issue to trial, or to a hearing, and in the absence of the adverse party unless the court, for good cause, otherwise direct, may proceed with h case and take a dismissal of the action, or a verdict, or judgment, as th case may require. [R. S. § 4371.]

Hist. (See C. C. P. '81, § 363) R. S. § 4371, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 594; proviso added: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7610-1 See also C. C. P. § 7608.

Cited: Storer v. Heitfeld (1909) 17 113, 105 P. 55.

§ 6840. [4372] **Continuance: Absence of evidence.** A motion t postpone a trial on the ground of the absence of evidence can only b

made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. [R. S. § 4372.]

Hist. (See C. C. P. '81, § 364) R. S. § 4372, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 595; Kerr's C. ib.

N. D. Similar: C. C. P. § 7614.

Application to criminal trial: This section applies to an application for a continuance in a criminal case. S. v. Fleming (1910) 17 I. 471, 106 P. 305; S. v. Cannon (1914) 26 I. 182, 140 P. 963.

Discretion of court: A motion for continuance is addressed to the sound discretion of the court and its ruling will not be reviewed unless such discretion has been abused. Reynolds v. Corbus (1901) 7 I. 481, 63 P. 884; Robertson v. Moore (1904) 10 I. 115, 77 P. 218; Rankin v. Caldwell (1908) 15 I. 625, 99 P. 108; Storer v. Heitfeld (1909) 17 I. 113, 105 P. 55; Miller v. Brown (1910) 18 I. 200, 109 P. 139; De Puy v. Peebles (1913) 24 I. 550, 135 P. 264; Torey v. Blackwell Lbr. Co. (1915) 27 I. 460, 149 P. 410.

Self-contradictory testimony: It is not an abuse of discretion to deny a continuance for the absence of a witness whose testimony as offered would conflict with his testimony as given on a previous trial. Huber v. Mother Aurelia (1907) 13 I. 276, 89 P. 942.

Admission of evidence: A party admitting that missing evidence would be given as provided in this section does not thereby admit the absolute truth of such evidence but when the admission is made the affidavit merely becomes evidence in the case. Terr. v. Guthrie (1888) 2 I. 432, 17 P. 39.

Bad faith: Where affidavits are filed tending to show that an application for a continuance is not made in good faith it is proper to deny the continuance. Cox v. N. W. Stage Co. (1871) 1 I. 376.

Absence of witness: It is not error for the trial court to overrule a motion for a continuance on account of the absence of a witness, where the only showing of diligence is that the witness agreed to be present and there was no use of legal means to secure the attendance of such witness. Rankin v. Caldwell (1908) 15 I. 625, 99 P. 108; Walsh v. Winston Bros. Co. (1910) 18 I. 768, 774, 111 P. 1090.

Absence of counsel: It is not an abuse of the legal discretion vested in the trial court to deny an application for a continuance upon the sole ground that the applicant's counsel is ill, where no affidavit of merits is filed showing that the applicant has a meritorious cause or defense and that other counsel can not be procured who are able to try said case. Rankin v. Caldwell, supra.

Showing: Even though case is proper one for postponement showing by affidavit or otherwise than by oral statement is required. Kerney v. Hatfield, (1917) 30 I. 90, 162 P. 1077.

§ **6841.** [4373] **Same: Depositions may be taken.** The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if witnesses were produced. [R. S. § 4373.]

Hist. (See C. C. P. '81, § 365) R. S. § 4373, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 596; Kerr's C. ib.

ARTICLE 4.

TRIAL BY JURY.

§ **6842.** [4378] **Impaneling the jury.** When the action is called for trial by jury the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted. [R. S. § 4378.]

Hist. (See C. C. P. '81, § 366) R. S. § 4378, reen. R. C. ib., reen. C. L. ib.

Cross ref. Formation of trial juries: §§ 5524-39. Right to trial by jury: Const. 7; also § 6837.

Comp. leg.—Cal. Same: C. C. P. 1872, § 600; Kerr's C. ib.

§ **6843.** [4379] **Same: Challenge.** Either party may challenge the jurors, but where there are several parties on either side, they must

join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff. [R. S. § 4379.]

Hist. (See C. C. P. '81, § 367) R. S. § 4379, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same to last sentence, rest omitted: C. C. P. 1872, § 601; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7615.

Cited: Heitman v. Morgan (1905) 10 I. 562, 79 P. 225.

Challenges by joint parties: Where there are several parties on either side the parties on each side have four challenges for their side in which they should join; the statute does not allow challenges to each party. U. S. v. Alexander (1888) 2 I. 386, 17 P. 746.

§ 6844. [4380] **Challenges for cause.** Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror.

2. Consanguinity or affinity, within the fourth degree to any party.

3. Standing in the relation of debtor or creditor, guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner, or united in business with either party, or surety on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action, or being then a witness or subpoenaed therein.

5. Pecuniary interest on the part of the juror in the event of the action or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

6. Having an unqualified opinion or belief as to the merits of the action, or main question involved therein, founded upon knowledge or information of its material facts or of some of them.

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party. [R. S. § 4380.]

Hist. (See C. C. P. '81, § 368) R. S. § 4380, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 602; Kerr's C. ib.

N. D. Similar: C. C. P. § 7616.

Cited: Gibbert v. Wash. W. P. Co. (1911) 19 I. 637, 115 P. 924.

Debtor: "Debtor" means one liable on either an express or implied contract or by operation of law, to respond to another in money, service, goods or chattels, either in the present or at some future date. Hall v. Chattin (1910) 17 I. 664, 106 P. 1132.

Business: The word "business" is employed in this statute in a general sense and refers generally to the commercial, industrial and professional enterprises and engagements into which men jointly enter whether for a brief or considerable length of time. Hall v. Chattin, supra.

Where the party litigant and a juror are jointly and contingently liable for the payment of the expenses of a business venture they are "united in business." Ib.

§ 6845. [4381] **Trial of challenges.** Challenges for cause must be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge. [R. S. § 4381.]

Hist. (See C. C. P. '81, § 369) R. S. § 4381, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 603; Kerr's C. ib.

N. D. Identical: C. C. P. § 7617.

§ 6846. [4382] **Swearing of jury.** As soon as the jury is complete an oath must be administered to the jurors in substance that they and each of them will well and truly try the matter in issue between ..... the plaintiff, and ....., the defendant, and a true verdict render according to the evidence. [R. S. § 4382.]

Hist. (See C. C. P. '81, § 370) R. S. § 382, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 604; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7618.

§ 6847. [4383] **Order of trial.** When the jury has been sworn, the rial must proceed in the following order unless the judge for special easons otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce he evidence on his part.

2. The defendant may then open his defense and offer his evidence n support thereof.

3. The parties may then respectively offer rebutting evidence only nless the court, for good reasons, in furtherance of justice, permits iem to offer evidence upon their original case.

4. When the evidence is concluded and before the case is argued or ubmitted to the jury, either party may request the court to give to the ury instructions in writing on the law arising in the cause which shall e given or refused as asked: *Provided,* That the court may also give ther and further written instructions of its own motion. All of the writ- n instructions given shall be carried by the jury to their room for their uidance in arriving at a correct verdict according to the law and the evi- ence. The instructions shall then be read to the jury by the court, and nless the case is submitted to the jury without argument, the plaintiff ust commence and may conclude the argument.

5. If several defendants having separate defenses appear by differ- nt counsel, the court must determine their relative order in the evidence nd argument.

6. If either party objects to the giving of written instructions and per- itting the jury to take them to their room as provided in the fourth sub- ivision of this section, then instead thereof the course of procedure shall e as follows: The court may then charge the jury, according to the pro- sions of sections 6848 and 6849.

7. *Provided,* That, with the consent of the parties to any suit on trial efore a jury, the court may give his charge to the jury orally, the same be taken down by the court reporter and to be immediately transcribed y him and filed in the suit, and a copy thereof delivered to the counsel for ch party, if requested; the court may in such case embody in his oral in- ructions any requests filed by either party, or he may read such requests the jury as a part of said oral instructions. In all cases of oral instruc- ons, the counsel for either party shall have one day in which to file ritten exceptions to said instructions, or any part thereof, which except- ons when so filed, are to be treated in the same manner and to have the ke effect as near as may be as exceptions in other cases; but if the giv- g or refusal of instructions is excepted to the same may be without any ated reason therefor. ['07, p. 166, § 1.]

Hist. (See C. C. P. '81, § 371) R. S. § 83; am. '07, p. 166, § 1, reen. R. C. § 83, reen. C. L. ib.

Comp. leg.—Cal. Analogous: C. C. P. 72, § 607; Kerr's C. ib.

N. D. Similar: C. C. P. § 7619.

Cited: Hilbert v. Spokane etc. Ry. Co. 911) 20 I. 54, 116 P. 1116.

Right to open and close: Plaintiff has e right to open and close the evidence d argument, and it is error for the urt, over the objection of the plaintiff, to ny such right. Harrison v. Russell & Co. 909) 17 I. 196, 105 P. 48.

The burden of proof, with its incident right to open and close, naturally and necessarily is in the first instance with the plaintiff, and remains with such party so long as it continues incumbent upon him to make any proof whatever. When the defendant, either by an admission in express and absolute terms or by refraining from denial of the plaintiff's cause of action and alleging affirmative matter in avoidance of it, renders it wholly unnecessary for the plaintiff to give any evidence whatever to have a complete recovery of all that he claims, the burden and the right are with the defendant. Grisinger v.

Hubbard (1912) 21 I. 469, 122 P. 853, Ann. Cas. 1913E 87.

It rests in the sound discretion of the trial court to direct the order of addressing the jury, and unless there is a clea abuse of discretion the supreme court wi not disturb the verdict. Exchange S. B v. Taber (1915) 26 I. 723, 145 P. 1090.

§ 6848. [4384] **Charge to jury.** In charging the jury the court ma state to them all matters of law which he thinks necessary for their in formation in giving their verdict; and if it state the testimony of the cas it must inform the jury that they are the exclusive judges of all ques tions of fact. The court must furnish to either party at the time, upo request, a statement in writing of the points of law contained in th charge, or sign at the time a statement of such points prepared and sub mitted by the counsel of either party. [R. S. § 4384.]

Hist. (See C. C. P. '81, § 372) R. S. § 4384, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 608; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7620.

Cited: Hilbert v. Spokane etc. Ry. C (1911) 20 I. 54, 116 P. 1116.

§ 6849. [4385] **Requests for instructions.** Where either party ask special instructions to be given to the jury, the court must either giv such instructions, as requested, or refuse to do so, or give the instruc tions with a modification, in such manner that it may distinctly appea what instructions were given in whole or in part. [R. S. § 4385.]

Hist. (See C. C. P. '81, § 373) R. S. § 4385, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 609; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7621.

Cited: Fury v. White (1890) 2 I. 66 23 P. 535; Hilbert v. Spokane etc. Ry. C (1911) 20 I. 54, 116 P. 1116.

§ 6850. [4386] **View of premises.** When, in the opinion of th court, it is proper for the jury to have a view of the property which i the subject of litigation, or of the place in which any material fact oc curred, it may order them to be conducted in a body, under the charg of an officer, to the place, which shall be shown to them by some perso appointed by the court for that purpose. While the jury are thus ab sent, no person other than the person so appointed shall speak to ther on any subject connected with the trial. [R. S. § 4386.]

Hist. (See C. C. P. '81, § 374) R. S. § 4386, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 610; Kerr's C. ib.

N. D. Identical: C. C. P. § 7622.

Not evidence: Knowledge gained by the jury by means of a view of the premises involved does not supply a want of ev dence and is not evidence upon which verdict may be based, but is to be applie in determining the weight and applicabili of the evidence introduced. Tyson Cre R. Co. v. Empire Mill Co., 31 I. 580, 1 P. 1004.

§ 6851. [4387] **Separation of jury: Admonition by court.** If th jury is permitted to separate, either during the trial, or after the cas is submitted to them, they shall be admonished by the court that it their duty not to converse with or suffer themselves to be addressed b any other person on any subject of the trial, and that it is their duty n to form or express an opinion thereon until the case is finally submitte to them: *Provided, however,* That in all actions involving the title or rig to possession of mines or mining claims, or for damages thereto, if an party to such action shall so request, the court shall not permit the ju to separate during the trial, and in such case, the court shall not di close to the jury which party made such request, and no comment sha be made thereon by either party to the action. ['01, p. 216, § 1.]

Hist. (See C. C. P. '81, § 375) R. S. § 4387; am. '01, p. 216, § 1, reen. R. C. § 4387, reen. C. L. ib.

Comp. leg.—Cal. Same to proviso, r omitted: C. C. P. 1872, § 611; Kerr's C.

N. D. Analogous: C. C. P. § 7623.

§ 6852. [4388] **Taking papers to jury room.** Upon retiring for d liberation the jury may take with them all papers which have been r

eived as evidence in the cause, except depositions, or copies of such pa-ers as ought not, in the opinion of the court, to be taken from the per-on having them in possession, and they may also take with them notes f the testimony or other proceedings on the trial, taken by themselves r any of them, but none taken by any other person. [R. S. § 4388.]

Hist. (See C. C. P. '81, § 376) R. S. § 388, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 612; Kerr's C. ib.

N. D. Identical: C. C. P. § 7624.

Exhibits: It is error to refuse to allow the jury to take with them a certified copy of a writ of attachment under which a seizure was made. Sears v. Lydon (1897) 5 I. 358, 49 P. 122.

§ **6853.** [4389] **Deliberations of jury.** When the case is finally sub-nitted to the jury, they may decide in court or retire for deliberation. If ney retire, they must be kept together in some convenient place under harge of an officer until they agree upon a verdict or are discharged by ne court. Unless by order of the court, the officer having them under is charge must not suffer any communication to be made to them, or nake any himself, except to ask them if they are agreed upon their ver-ict, and he must not, before their verdict is rendered, communicate to ny person the state of their deliberations, or the verdict agreed upon. R. S. § 4389.]

Hist. (See C. C. P. '81, § 377) R. S. § 389, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 613; as amended: Kerr's C. ib.

N. D. Identical: C. C. P. § 7625.

§ **6854.** [4390] **Additional instructions.** After the jury have retired or deliberation, if there be a disagreement between them as to any part f the testimony, or if they desire to be informed of any point of law rising in the cause, they may require the officer to conduct them into ourt. Upon their being brought into court the information required iust be given in the presence of, or after notice to, the parties or coun-el. [R. S. § 4390.]

Hist. (See C. C. P. '81, § 378) R. S. § 390, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 614; Kerr's C. ib.

N. D. Similar: C. C. P. § 7626.

§ **6855.** [4391] **Sickness of juror.** If, after the impaneling of the ury, and before verdict, a juror becomes sick so as to be unable to per-orm his duty, the court may order him to be discharged. In that case ne trial may proceed with the other jurors, or another juror may be vorn and the trial begin anew; or the jury may be discharged and a ew jury then or afterwards impaneled. [R. S. § 4391.]

Hist. (See C. C. P. '81, § 379) R. S. § 391, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 615; Kerr's C. ib.

N. D. Identical: C. C. P. § 7627.

§ **6856.** [4392] **Disagreement of jury: Retrial.** In all cases where ne jury are discharged or prevented from giving a verdict by reason of :cident or other cause, during the progress of the trial, or after the ause is submitted to them, the action may be again tried immediately, · at a future time, as the court may direct. [R. S. § 4392.]

Hist. (See C. C. P. '81, § 380) R. S. § 392, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 616; Kerr's C. ib.

N. D. Identical: C. C. P. § 7628.

§ **6857.** [4393] **Adjournment of court during retirement.** While the ury are absent the court may adjourn from time to time, in respect to her business, but it is nevertheless open for every purpose connected

with the cause submitted to the jury until a verdict is rendered or th jury discharged. The court may direct the jury to bring in a seale verdict at the opening of the court, in case of an agreement during a re cess or adjournment for the day. A final adjournment of the court fo the term discharges the jury. [R. S. § 4393.]

Hist. (See C. C. P. '81, § 381) R. S. § 4393, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 617; as amended: Kerr's C. ib.

N. D. Identical: C. C. P. § 7629.

§ 6858. [4394] **Rendition of verdict: Polling of jury.** When th jury, or three-fourths of them, have agreed upon their verdict, the must be conducted into court, their names called by the clerk and th verdict rendered by their foreman. The verdict must be in writing signed by the foreman, if all the jurors agree, and by those agreeing, i three-fourths or more, but not all, agree, and must be read by the cler to the jury and the inquiry made whether it is their verdict. If mor than one-fourth of the jury disagree, they must be sent out again; but i no such disagreement be expressed, and neither party requires the jur to be polled, the verdict is complete and the jury discharged from th case. Either party may require the jury to be polled, which is done b the court or clerk asking each juror if it is his verdict. If more than one fourth answer in the negative, the jury must again be sent out. [R. S § 4394.]

Hist. (See C. C. P. '81, § 382) R. S. § 4394; am. R. C. ib., reen. C. L. ib.

Cross ref. Three-fourths of the jury may render a verdict: Const. I, 7; also § 6515.

Comp. leg.—Cal. Same: C. C. P. 1872, § 618; Kerr's C. ib.

N. D. Similar: C. C. P. § 7630.

Statute directory: Where a verdict is reached but is not agreed to by the entire jury it should be signed by each member of the jury agreeing to the same; but where this requirement is not observed b the jury is polled in open court and 10 them answer that the verdict returned an signed by the foreman is their verdict, an their names are entered on the minutes the court and no objection or exception taken to the form of the verdict, and r request is made to have it signed by th jurors agreeing to it, the error is n prejudicial, and the objection can not l raised for the first time in the appella court. Keim v. Gilmore etc. Ry. Co. (191 23 I. 511, 131 P. 656.

§ 6859. [4395] **Same: Informal verdicts.** When the verdict is an nounced, if it is informal or insufficient in not covering the issue sul mitted, it may be corrected by the jury under the advice of the cour or the jury may be again sent out. [R. S. § 4395.]

Hist. (See C. C. P. '81, § 383) R. S. § 4395, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 619; Kerr's C. ib.

N. D. Identical: C. C. P. § 7631.

Necessity of objection: An objection to an informal or insufficient verdict must be made at the time the verdict is received and can not be raised afterward. Johns v. Fraser (1888) 2 I. 404, 18 P. 48; see al Fox v. West (1880) 1 I. 782.

Mistake in verdict: When verdict e presses manifest variance with real inte tion of jury it is duty of court to se jury back to return verdict in proper for Bates v. Price (1917) 30 I. 521, 166 P. 2

§ 6860. [4396] **General and special verdicts.** The verdict of a ju is either general or special. A general verdict is that by which the pronounce generally upon all or any of the issues either in favor of th plaintiff or defendant. A special verdict is that by which the jury fi the facts only, leaving the judgment to the court. The special verdi must present the conclusions of fact as established by the evidence, an not the evidence to prove them, and those conclusions of fact must be presented as that nothing shall remain to the court but to draw fro them conclusions of law. [R. S. § 4396.]

Hist. (See C. C. P. '81, § 384) R. S. § 4396, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 624; Kerr's C. ib

N. D. Similar: C. C. P. § 7632.

Cited: Johnson v. Fraser (1888) 2 404, 18 P. 48; Fisher v. Comrs. Banno Co. (1895) 4 I. 381, 39 P. 552; Gwinn

winn (1897) 5 I. 271, 48 P. 295; Menasha . Co. v. Spokane etc. Ry. Co. (1911) 19 586, 115 P. 22; Fodey v. N. P. Ry. Co. 1912) 21 I. 713, 123 P. 835.

Equity cases: This section recognizes a fference between law and equity actions. ı an equity case the verdict of a jury pon a point submitted to it is merely lvisory. Behrensmeyer v. Gwinn (1913) 5 I. 186, 136 P. 623.

General finding: When a general verdict is submitted to the jury and no special verdict is requested, a general finding for either party is sufficient. Campbell v. First Nat. Bk., 13 I. 95, 88 P. 639; Keim v. Gilmore P. R. R. Co., 23 I. 511, 131 P. 656; Tannahill v. Lydon, 31 I. 608, 173 P. 1146.

§ 6861. [4397] **Same: Rendition of special verdicts.** In an action)r the recovery of money only, or specific real property, the jury, in ıeir discretion, may render a general or special verdict. In all other ıses the court may direct the jury to find a special verdict in writing pon all or any of the issues, and in all cases may instruct them, if they ender a general verdict, to find upon particular questions of fact, to be ated in writing, and may direct a written finding thereon.

The special verdict or finding must be filed with the clerk and en- red upon the minutes. Where a special finding of fact is inconsistent ith the general verdict, the former controls the latter, and the court ıust give judgment accordingly. [R. S. § 4397.]

Hist. (See C. C. P. '81, § 385) R. S. § 97, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 625; different as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7633.

Cited: Idaho & Ore. Land Imp. Co. v. radbury et al. (1889) 10 S. C. R. 177, 12 U. S. 509, 33 L. ed. 433; Menasha W. . v. Spokane etc. Ry. Co. (1911) 19 I. 6, 115 P. 22; Calkins v. Blackwell L. Co. 912) 23 I. 128, 129 P. 435.

Discretion of jury: In an action for the covery of money only it is within the scretion of the jury to return a general special verdict, and neither the court instructions nor counsel by stipulation n require them to find a special verdict. law v. Manville (1895) 4 I. 369, 39 P. 9. Though the court may, in a proper se, direct them to bring in special findgs, and would, no doubt be obeyed. Norman v. Rose Lake Lbr. Co. (1912) 22 I. 1, 128 P. 85, Ann. Cas. 1913E 673.

It is within the discretion of the jury ı an appeal from an order of the board county commissioners allowing a claim render a general or special verdict. sher v. Comrs. of Bannock Co. (1895) I. 381, 39 P. 552.

Inconsistency of findings: The true test to whether special findings are consisnt or contradictory either in themselves with the general verdict is whether they)uld authorize a different verdict or judg- nt from that given. Gwinn v. Gwinn 897) 5 I. 271, 48 P. 295. When a genal verdict is not sustained by a special ıding of facts, or the special findings are contradictory that no conclusion can based thereon, such general verdict can t be sustained. Ib.

When there is an inconsistency between ecial findings and the general verdict judgment in accordance with the special ıdings is proper although it is for a different amount than the sum specified in the general verdict. Bradbury v. Ida. & Ore. Land Imp. Co. (1886) 2 I. 239, 10 P. 620.

Discretion of court: It is the province of the court to determine what particular facts the jury shall find specially, and neither party has a right to dictate the terms of such questions nor to assign error on the refusal of the court to comply with such dictation. Lufkins v. Collins (1886) 2 I. 256, 10 P. 300. But such discretion is not absolute but must be properly exercised; thus it is error to refuse to submit special issues when a proper request therefor is made and the issues are such as to make their special submission desirable. Burke v. McDonald (1890) 2 I. 679, 33 P. 49.

Same: Complicated cases: The power of the court is a discretionary power. In complicated cases where the issues are numerous and difficult the court has a discretionary power whether special issues should be submitted to the jury; in such cases and where the jury is likely to become confused, the court should insist on a special verdict and should formulate the issues into distinct propositions and logical and concise questions. Fodey v. N. P. Ry. Co. (1912) 21 I. 713, 123 P. 835.

Where actions in law and equity and defenses and counter defenses in law and equity are interposed in the same cause, special and separate verdicts should be found upon each particular question and issue raised. Penninger Lat. Co. v. Clark (1912) 22 I. 397, 407, 126 P. 524.

Sufficiency of general verdict: Where suit is brought on a note for a definite sum and the jury finds generally for the plaintiff without stating for what amount, the court may enter judgment for the amount of the note. Betts v. Butler (1868) 1 I. 185.

§ 6862. [4398] **Verdict in money actions.** When a verdict is found)r the plaintiff in an action for the recovery of money, or for the de- ndant, when a counterclaim for the recovery of money is established,

exceeding the amount of the plaintiff's claim as established, the ju must also find the amount of the recovery. [R. S. § 4398.]

Hist. (See C. C. P. '81, § 386) R. S. § 4398, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 626; Kerr's C. ib.

N. D. Similar: C. C. P. § 7634.

§ 6863. [4399] **Verdict in claim and delivery.** In an action for th recovery of specific personal property, if the property has not been d livered to the plaintiff, or the defendant, by his answer, claim a retu thereof, the jury, if their verdict be in favor of the plaintiff, or if bei in favor of the defendant, they also find that he is entitled to a retu thereof, must find the value of the property, and if so instructed, th value of specific portions thereof, and may at the same time assess th damages, if any are claimed in the complaint or answer, which the pr vailing party has sustained by reason of the taking or detention of suc property. [R. S. § 4399.]

Hist. (See C. C. P. '81, § 387) R. S. § 4399, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal Same except the words "and if so instructed, the value of specific portions thereof" are omitted: C C. P. 1872, § 627; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7635.

Value of specific articles: The verdict in an action of claim and delivery need not find the value of specific articles of the property claimed, or that defendant is entitled to the return of such specific articles in terms, except when the court in its instructions requires the jury to so find; the matter of requiring such a finding is within the discretion of the court. Johnson v. Fraser (1888) 2 I. 404, 18 P. 48.

Measure of damages: Where personal property is seized and taken possession of unlawfully and without authority of law and is thereafter retained and converted to the use and benefit of the person taking such possession, in an action for damages by the owner of such property for conversion of the same, the plaintiff is entitled to recover, as a general rule, t market value of such property at the ti the same was taken. Unfried v. Libe (1911) 20 I. 708, 119 P. 885.

Exemplary or punitive damages can r be recovered unless the evidence sho clearly that the action of the wrongdo is wanton or gross or outrageous, or whe the facts are such as to imply malice a oppression. Ib.

Where the property has a usable val the measure of damages is the value the property at the time of the taki with the reasonable value of the use fr the time of the taking to the date of t judgment. Tannahill v. Lydon, 31 I. 6 173 P. 1146.

Verdict: The verdict need not be in t alternative. Tannahill v. Lydon, supra

Judgment: A judgment which awa the plaintiff the return of the property the value of it, and also awards an ad tional sum as damages, is in the alternat and is not void for indefiniteness as the amount upon which interest is to paid. Tannahill v. Lydon, supra.

§ 6864. [4400] **Entry of verdict.** Upon receiving a verdict, an ent must be made by the clerk in the minutes of the court, specifying t time of trial, the names of the jurors and witnesses, and setting out t verdict at length; and where a special verdict is found, either the jud ment rendered thereon, or if the case be reserved for argument or fu ther consideration, the order thus reserving it. [R. S. § 4400.]

Hist. (See C. C. P. '81, § 388) R. S. § 4400, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 628; Kerr's C. ib.

N. D. Identical: C. C. P. § 7636.

ARTICLE 5.

TRIALS TO THE COURT.

§ 6865. [4405] **Waiver of trial by jury.** Trial by jury may waived by the several parties to an issue of fact in actions arising contract, or for the recovery of specific real or personal property, w or without damages, and with the assent of the court, in other actions the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the cle
3. By oral consent, in open court, entered in the minutes. [R. § 4405.]

Hist. (See C. C. P. '81, § 389) R. S. § 405, reen. R. C. ib., reen. C. L. ib.

Cross ref. Court case may be tried at hambers by consent of the parties: § 6493.

Comp. leg.—Cal. Analogous: C. C. P. 872, § 631; same as amended: Kerr's . ib.

N. D. Identical: C. C. P. § 7637.

Cited: Idaho & Ore. Land Imp. Co. v. radbury (1889) 10 S. C. R. 177, 132 U. 509, 33 L. ed. 433.

Agreement for reference: Where the parties stipulate and agree to the appointment of a referee to take testimony and report the same to the court without making any demand for a jury they will be deemed to have waived a jury even if the case were one in which they would otherwise be entitled to a jury trial. Lindstrom v. Hope Lbr. Co. (1906) 12 I. 714, 88 P. 92.

§ 6866. [4406] **Written decision to be filed.** Upon a trial of a question of fact by the court, its decision must be given in writing and filed ith the clerk within 20 days after the cause is submitted for decision. R. S. § 4406.]

Hist. (See C. C. P. '81, § 390) R. S. § 406, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judges can not claim salies where they hold submitted matters er 30 days: Const. V, 17.

Comp. leg.—Cal. Same except the words nd unless the decision is filed within at time the action must again be tried" e added: C. C. P. 1872, § 632; same as nended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7638.

Cited: McCormick v. Friedman (1901) I. 686, 65 P. 440; Shurtliff v. Extension tch Co. (1908) 14 I. 416, 94 P. 574.

Construed: This section is directory and t mandatory and does not avoid a judgent which is not rendered within 20 days ter the submission of the cause or within ch time as may be stipulated by the parts. Idaho Comstock etc. Co. v. Lundom (1903) 9 I. 257, 74 P. 975.

This section is mandatory. A failure, wever, to render a decision within 20 ys after the cause is submitted does not alidate or avoid the judgment entered reafter; but in the event of such faile, a writ of mandate will lie to require decision to be made. McGary v. Steele 911) 20 I. 753, 119 P. 448.

The failure of counsel to furnish the trial irt with a brief is not a sufficient reason justify the court in delaying a decision ger than the period prescribed. Ib.

Decision defined: Decision means the dings of fact and conclusions of law de by the court and not the judgment. ldwell v. Wells (1909) 16 I. 459, 101 P. 2.

The decision of a court consists of findgs of fact and conclusions of law, which st be in writing and be filed with the rk. An oral opinion announced by the irt from the bench prior to making of dings of fact and conclusions of law, a written opinion addressed to counsel ich is not in the nature of findings and nclusions, is not the decision of the irt. Stewart M. Co. v. Ontario M. Co. 913) 23 I. 724, 132 P. 787, aff. 35 S. C. R. 237 U. S. 350, 59 L. ed. 989; Smith v. ris-Kesl Const. Co. (1915) 27 I. 407, P. 25.

Findings of fact: When required: The tute does not require findings by the irt when a cause is tried to a jury. The dict of the jury is the finding upon ich judgment should be rendered. Findgs are made by the court only upon the trial of questions of fact by the court. Jenkins v. Coml. Nat. Bk. (1911) 19 I. 290, 113 P. 463.

Necessity of findings: There must be a finding upon every material issue whether raised on the complaint or upon an affirmative defense alleged in the answer. Carson v. Thews (1886) 2 I. 176, 9 P. 605, And failure to find upon all the material issues is ground for reversal. First Nat. Bk. of Lewiston v. Williams (1890) 2 I. 670, 23 P. 552; Standley v. Flint (1905) 10 I. 629, 79 P. 815. The rule applies to issues raised by affirmative defenses. Wood v. Broderson (1906) 12 I. 190, 85 P. 490.

Sufficiency of findings: A finding that all the issues of fact raised by the pleadings are hereby found and decided in favor of defendant and against the plaintiff, is indefinite and insufficient. Ib. Where an affirmative defense is interposed, a general finding that all the allegations and denials of the answer in conflict with the findings are found to be unsupported, is insufficient. Stoneburner v. Stoneburner (1905) 11 I. 603, 83 P. 938.

A general finding that all the material allegations of the answer were supported by the evidence and true, and that all the material allegations of the plaintiff's complaint in conflict with the foregoing findings were unsupported by the evidence and untrue, is not sufficient. Sterrett v. Sweeney (1908) 15 I. 416, 98 P. 418, 128 A. S. R. 68, 20 L. R. A. (N. S.) 963.

Where all of the findings of fact made by the cross-complaint alleging a resulting trust are that the court finds "that there is no competent evidence to sustain the facts as stated in the allegation" it is not a sufficient finding of fact. Pittock v. Pittock (1908) 15 I. 426, 98 P. 719.

In a proceeding to remove a public officer from office under R. S. § 7459 the fact that the court does not find as a fact that the wrongful acts of the officer were committed fraudulently, wilfully or corruptly, is not ground for reversal of judgment for removal where such facts are found under conclusions of law. Miller v. Smith (1900) 7 I. 204, 61 P. 824.

Where, in an action on a bail bond, the issue of the rearrest of the principal obligor is raised by the pleadings and evidence, the failure of the court to find on that issue is reversible error. S. v. Baird (1907) 13 I. 126, 89 P. 298.

Where the findings and the decree are

not responsive to the case made by the complaint the judgment will be reversed. Uhrlaub v. McMahon (1908) 15 I. 346, 97 P. 784.

Extraneous references: The practice of referring to extraneous matters, such as maps and plats, in the findings and judgment for any matter which should be incorporated in the findings and judgment, should be discouraged, but indulgence therein is not of itself ground for a reversal of the judgment. Murry v. Nixon (1905) 10 I. 608, 79 P. 643.

Appeal cases: Findings should be made on an appeal tried by the court from an order of the county commissioners fixing the salaries of county officers. Reynolds v. Comrs. Oneida Co. (1899) 6 I. 787, 59 P. 730.

Mode of objection: A party desiring to avail himself of error or defect in a fin ing should request the court before or the time the case is finally submitted, make findings in writing, and see th the request is entered in the minutes the court, and should further except the findings when made and filed. Peop v. Hunt (1872) 1 I. 433.

Presumptions: In the absence of fin ings from the record it will be presum that such findings were made and are n included in the record, or that they we waived, unless some showing is made the contrary. Bunnell & Eno etc. C v. Curtis (1897) 5 I. 652, 51 P. 767.

Amended findings: The trial judge m file amended findings after exceptions ha been taken to his general findings. M Guire v. Lamb (1888) 2 I. 378, 17 P. 74

§ 6867. [4407] **Same: Findings of law and fact.** In giving the d cision, the facts found and the conclusions of law must be separatel stated. Judgment upon the decision must be entered accordingl [R. S. § 4407.]

Hist. (See C. C. P. '81, § 391) R. S. § 4407, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judgment may be entered in vacation: § 6460.

Comp. leg.—Cal. Same: C. C. P. 1872, § 633; Kerr's C. ib.

N. D. Identical: C. C. P. § 7639.

Cited: Bunnell & Eno etc. Co. v. Curtis (1897) 5 I. 652, 51 P. 767; McCornick v. Friedman (1901) 7 I. 686, 65 P. 440; (On petition for rehearing) Ryan v. Rogers (1908) 14 I. 320, 94 P. 427; Caldwell v. Wells (1909) 16 I. 459, 101 P. 812; Buster v. Fletcher (1912) 22 I. 172, 125 P. 226; Jensen v. Bumgarner (1913) 25 I. 355, 137 P. 529; Smith v. Faris-Kesl Co. (1915) 27 I. 407, 150 P. 25.

Form of findings: The decision of the court should not contain a statement of the case and the reason for the decision but should contain only the ultimate fac established by the evidence and the co clusions of law resulting therefrom; opinion of the lower court is not a decisi within the meaning of this section, a when made should be separate from t findings of fact and conclusions of la Hamilton v. Spokane etc. Ry. Co. (189 3 I. 164, 28 P. 408.

The judgment and findings are not r quired to be on separate pieces of pap all that is required is to state the findir and conclusions of law separately, a to follow them by a judgment based the on. Dukes v. Comrs. of Boise Co. (191 17 I. 736, 107 P. 491.

The judge is not required to sign t findings of fact and conclusions of la but it is customary to do so. Shurtliff Extension Ditch Co. (1908) 14 I. 416, P. 574.

§ 6868. [4408] **Waiver of findings.** Findings of fact may be waiv by the several parties to an issue of fact:

1. By failing to appear at the trial.
2. By consent in writing, filed with the clerk.
3. By oral consent in open court, entered in the minutes. [R. § 4408.]

Hist. (See C. C. P. '81, § 392) R. S. § 4408, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 634; Kerr's C. ib.

N. D. Similar: C. C. P. § 7640.

Presumptions of waiver: Where the record does not show affirmatively t findings of fact were not waived it be presumed that they were waived. Squ v. Lowenberg (1880) 1 I. 785; Parker Beagle (1895) 4 I. 453, 40 P. 61; McC nick v. Friedman (1901) 7 I. 686, 65 440.

§ 6869. [4409] **Judgment upon issues of law.** On a judgment the plaintiff upon an issue of law, he may proceed in the manner p scribed by the first two subdivisions of section 6832 upon the failure the defendant to answer. If judgment be for the defendant upon issue of law, and the taking of an account, or the proof of any fact necessary to enable the court to complete the judgment, a reference m be ordered, as in that section provided. [R. S. § 4409.]

Hist. (See C. C. P. '81, § 393) R. S. § 4409, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 636; Kerr's C. ib.

N. D. Similar: C. C. P. § 7642.

ARTICLE 6.

REFERENCES AND TRIALS BY REFEREES.

§ 6870. [4414] Agreement for reference. A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes:

1. To try any or all the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon.
2. To ascertain a fact necessary to enable the court to determine an action or proceeding. [R. S. § 4414.]

Hist. (See C. C. P. '81, § 394) R. S. § 414, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 638; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7645.

Assent to reference: Where a party proceeds in a case which has been referred though the record showed the authority the referee, his assent to the reference as binding as if he had agreed in writing to the reference. (Dis. op.) Taylor Peterson (1873) 1 I. 513.

Resubmission for additional findings: here a referee is called to examine all the evidence in the case and to report a judgment subject to the approval of the court on all the issues, but fails in his report to find upon all the issues of fact, the court may remand the case to the referee to bring in further findings covering the omitted issues without any further consent of the parties. Robinson v. Nelson (1895) 4 I. 567, 43 P. 64.

Waiver of jury: A reference under this section in an action at law is a waiver of a jury and the referee's findings of fact have the effect of a special verdict. U. S. v. Ramsey (1907) 158 F. 488.

§ 6871. [4415] Motion for reference. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue or report upon any specific question of fact involved therein.
2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.
3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.
4. When it is necessary for the information of the court in a special proceeding. [R. S. § 4415.]

Hist. (See C. C. P. '81, § 395) R. S. § 415, reen. R. C. ib., reen. C. L. ib.

Cross ref. Subdivision 1 of this section must be read in connection with Const. I. guaranteeing the right to a jury trial. See cases cited infra.

Comp. leg.—Cal. Same: C. C. P. 1872, ; Kerr's C. ib.

N. D. Similar: C. C. P. § 7646.

Unauthorized reference: In an action at law the parties are entitled as of right to a trial by jury, and the court can not refer the case against the objection of the parties even though it requires the examination of a long account. Russell v. Alt (1907) 12 I. 789, 88 P. 416.

§ 6872. Number and appointment of referees. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the state of Idaho, and against whom there is no legal objection. ['11, c. 18, sec. 1, p. 43.]

Hist. (See C. C. P. '81, § 396) R. S. § 416, reen. R. C. ib.; am. '11, c. 18, § 1, p. 43, reen. C. L. § 4416.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 640; Kerr's C. ib.

N. D. Similar: C. C. P. § 7647.

§ 6873. [4417] Objections to referees. Either party may object to the appointment of any person as referee on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2. Consanguinity or affinity within the third degree to either par
3. Standing in the relation of guardian and ward, master and s vant, employer and clerk, or principal and agent to either party, or b ing a member of the family of either party; or a partner in business wi either party; or being security on any bond or obligation for eith party.
4. Having served as a juror or been a witness on any trial betwe the same parties for the same cause of action.
5. Interest on the part of such person in the event of the action, in the main question involved in the action.
6. Having formed or expressed an unqualified opinion or belief to the merits of the action.
7. The existence of a state of mind in such person evincing enm against or bias to either party. [R. S. § 4417.]

Hist. (See C. C. P. '81, § 397) R. S. § 4417, reen. R. C. ib., reen. C. L. ib.

Cross ref. Qualifications of juror: § 6518.

Comp. leg.—Cal. Same: C. C. P. 18 § 641; Kerr's C. ib.

N. D. Similar: C. C. P. § 7648.

§ 6874. [4418] **Same: Hearing of objections.** The objections tak to the appointment of any person as referee must be heard and dispos of by the court. Affidavits may be read and witnesses examined as such objections. [R. S. § 4418.]

Hist. (See C. C. P. '81, § 398) R. S. § 4418, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 642; Kerr's C. ib.

N. D. Similar: C. C. P. § 7649.

§ 6875. [4419] **Report of referees.** The referees must report th findings in writing to the court within 20 days after the testimony closed; and the facts found and conclusions of law must be separat stated therein. [R. S. § 4419.]

Hist. (See C. C. P. '81, § 399) R. S. § 4419, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or commissioner" are inserted after "referee": C. C. P. 1872, § 643; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7650.

Notice not required: No provisior made for notice to the parties of the fi of the report. U. S. v. Ramsey (19 158 F. 488, 493.

§ 6876. [4420] **Same: Judgment on findings.** The finding of referee upon the whole issue must stand as the finding of the court, a upon filing the finding with the clerk of the court, judgment may entered thereon in the same manner as if the action had been tried the court. [R. S. § 4420.]

Hist. (See C. C. P. '81, § 400) R. S. § 4420, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or commissioner" are inserted after "referee": C. C. P. 1872, § 644; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7650.

Setting aside findings: The court can not set aside findings of the referee and substitute findings on its own motion, in the absence of any exceptions to the referee's findings, or appropriate motion attacking the same. Walker v. Campbell (1891) 3 I. 13, 26 P. 123.

The judge, upon rejecting the find of the referee in an action at law, can make findings of his own and enter ju ment thereon over the objection of ei party. U. S. v. Ramsey (1907) 158 F.

Judgment: This section apparently thorizes entry of judgment by the c without awaiting any action on the of the judge. Better practice for succ ful party to move, after giving no that report be accepted and judgment tered accordingly. U. S. v. Ramsey, su

§ 6877. [4421] **Exceptions to findings.** The finding of the refe upon the whole issue may be excepted to and reviewed in like man as if made by the court. When the reference is to report the facts, finding reported has the effect of a special verdict. [R. S. § 4421.]

Hist. (See C. C. P. '81, § 401) R. S. § 4421, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or commissioner" are inserted after eree": C. C. P. 1872, § 645; Kerr's C.

N. D. Analogous: C. C. P. §§ 76

Exceptions: Referee's findings may be cepted to on the grounds of nonconrmity to order of reference or to pleadgs, uncertainty, incompleteness, fraud, c. U. S. v. Ramsey (1907) 158 F. 488, 2.

Time for exceptions: No time prescribed ithin which exceptions may be filed. U. v. Ramsey, supra.

Review: In an action at law the court can not, upon exception to the findings, review the evidence to determine whether it supports the findings. Such review can be had only upon motion for new trial or upon appeal. U. S. v. Ramsey, supra.

ARTICLE 7.

EXCEPTIONS.

§ 6878. [4426] **Definition and manner of taking.** An exception is a objection upon a matter of law, to a decision made either before or ter judgment, by a court, tribunal, judge or other judicial officer in a action or proceeding.

Except as provided in the next section, the exception must be taken id settled at the time the decision is made, and no order of court shall e made for the settlement of such exception at any other time, except the agreement of both parties.

When an exception is taken, the court, judge, tribunal or judicial ofer shall allow sufficient time for the reduction to writing, and settlent of the same, and in case such time shall not be allowed, or such exption shall not be fairly settled, the facts may be shown by affidavit, id the party taking such exception may apply to the court, or tribunal, which an appeal lies, in the action or proceeding, to settle the same irly, according to the facts, and when so settled the same shall beme a part of the record in such action or proceeding. [R. S. § 4426.]

Hist. R. S. § 4426, reen. R. C. ib., reen. L. ib.

Comp. leg.—Cal. Different: C. C. P. 72, § 646; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7652.

Cited: Warren v. Stoddart (1899) 6 I. 2. 59 P. 540; Hole v. Van Duzer (1905) I. 79, 81 P. 109; Spongberg v. First Nat. . (1909) 15 I 671, 99 P. 712; Storer v. itfield (1909) 17 I. 113, 105 P. 55.

Necessity of exception: Whenever a case called to dispose of any issue whether law or fact, exceptions must be taken d incorporated into a bill of exceptions order to procure a review in the sueme court of rulings made by the trial rt. Lamkin v. Sterling (1867) 1 I. . The supreme court will not review charge of the trial court unless the ge's attention has been called by exceptns directed specifically to the particular rtion of the charge complained of. ck v. Lewiston (1887) 2 I. 276, 13 P.

Sufficiency of settlement: Where exceptns are settled at the time they are de, in accordance with the provisions his section, nothing further is required the hands of the trial court as to their settlement, but each exception, when so settled, is a bill of exceptions and as such may be embodied in the statement on motion for new trial or may be the sole basis for such a motion. Rumpel v. O. S. L. Ry. Co. (1894) 4 I. 13, 35 P. 700.

Settlement on stipulation: A stipulation agreeing that exceptions to error committed on the trial may be settled at another time authorizes the settlement of the same by the judge at any time within the terms of the stipulation. Sebree v. Smith (1888) 2 I. 359, 16 P. 915.

Waiver of objections: The action of parties in participating without objection in the settlement of a bill of exceptions after the trial is equivalent to an agreement that they may be so settled, and constitutes a waiver of any objection to the failure to settle the same at the time of making the decision. Lockhart v. Rollins (1889) 2 I. 540, 21 P. 413.

Review of settlement: The improper settlement of a bill of exceptions after trial without any agreement for such settlement being made, can not be reviewed as error in the absence of an appeal by the respondent presenting the question. Coffin v. Bradbury (1894) 3 I. 770, 35 P. 715.

§ 6879. **Same: Matters deemed excepted to.** The instructions of e court to the jury, the refusal to give requested instructions where ch refusal is noted in writing by the judge or court, the verdict of the ry, any interlocutory order, ruling or decision appearing upon the recds and files in the action or minutes of the court, the final decision in action or proceeding, an order or decision made in the absence of a rty, and rulings, orders and decisions upon objections to evidence or y contested proceedings at a trial reported in the stenographer's notes

of the evidence and proceedings upon a trial are deemed excepted t Rulings, orders and decisions appearing upon the records, files or mi utes need not, unless desired by the party objecting thereto, be embodie in a bill of exceptions, but the same appearing in the records, files o minutes may be reviewed upon appeal as though settled in such bi of exceptions. ['11, c. 229, § 1, p. 781.]

Hist. (See C. C. P. '81, § 403) R. S. § 4427, reen. R. C. ib.; am. '11, c. 229, § 1, p. 781, reen. C. L. § 4427.

Comp. leg.—Cal. Different: C. C. P. 1872, § 647; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7653.

Cited: Sebree v. Smith (1888) 2 I. 359, 16 P. 915; Coffin v. Bradbury (1894) 3 I. 770, 35 P. 715; Simmons Hdw. Co. v. Alturas Com. Co. (1896) 4 I. 386, 39 P. 553.

Construction: Any party aggrieved by the verdict has his exceptions saved by this section, although the verdict, while it does not satisfy him, is in his favor. Fox v. West (1880) 1 I. 782.

Exceptions must be preserved: It was formerly held that the exceptions saved by this section must be preserved in a bill of exceptions in order to be available on appeal. Ainslie v. Ida. World Ptg. Co. (1877) 1 I. 641; Graham v. Linehan (1880) 1 I. 780; Fox v. West (1880) 1 I. 782; Purdum v. Taylor (1886) 2 I. 167, 9 P. 607; Berry v. Alturas Co. (1887) 2 I. 296, 13 P. 233; Guthrie v. Phelan (1885) 2 I. 95, 6 P. 107.

But these decisions were rendered prior to the enactment of this section as it now stands and they are therefore no longer in point. See Palmer v. Pettingill, 6 I. 346, 55 P. 653.

Bill of exceptions unnecessary: No formal exception need be taken to an order denying a new trial. Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 831. A bill of exceptions is not necessary on an appeal from an order taxing costs after judgment. Thiessen v. Riggs (1897) 5 I. 487, 51 P. 107. Nor to obtain a review of an order overruling a demurrer. Palmer v. Pettingill (1898) 6 I. 346, 55 P. 653. Nor to review an order striking out a portion of a pleading. Warren v. Stoddart (1899) 6 I. 692, 59 P. 540; (On petition for rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696. Nor in case of an order sustaining or overruling a demurrer. Taylor v. McCormick (1901) 7 I. 524, 64 P. 239; Corcoran v. Sonora etc. Co. (1902) 8 I. 651, 71 P. 127.

Since an exception is allowed as a matter of law to an order denying new trial, error in such order will be reviewed by the supreme court although not specifica ly assigned as error in that court, whe the appellant assigned his errors in t statement used on the hearing of the m tion for a new trial, and pointed out t particulars of insufficiency of evidence a errors of law on which he relied. Whi ney v. Dewey (1905) 10 I. 633, 80 P. 111

Under this section the papers used the hearing of a motion, which are ma a part of the records and files in the a tion, need not be embodied in a bill exceptions, and if the same appear in t records or files they may be review upon appeal as though settled in a b of exceptions, if certified or identified provided by law. Hall v. Jensen (190 14 I. 165, 93 P. 962.

The certificate of the trial judge ce tifying to the different papers and doc ments used upon a motion to dismiss appeal, although incorporated into t record and designated as a bill of exce tions, is not strictly a bill of exceptio but is a certificate of identification und the statute, as to the papers used up the hearing of the motion, and will considered only as such certificate. bill of exceptions is not required. Lib v. Spokane Valley etc. Co. (1908) 15 467, 98 P. 715.

Nature of exception: The exception a verdict which is saved by this secti is an exception to the verdict as receiv and such a verdict, if sufficient to susta a judgment, will not be disturbed becau informal or insufficient. Johnson v. Fi ser (1888) 2 I. 404, 18 P. 48.

Appellate review: The respondent c not procure a review on appeal of an ception to a ruling of the court denyi the respondent permission to file cert papers as part of the transcript on appe unless such exception is saved by stat or duly saved in a bill of exceptions. G den v. Lemp. (1901) 7 I. 677, 65 P. 44

Interlocutory orders: The word "int locutory," as used in this section, ref to all orders, rulings and decisions made the trial court from the inception of action to its final determination, and such orders, rulings and decisions deemed excepted to. Steinour v. Oak S. Bk., 32 I. —, 177 P. 843.

§ 6880. [4428] **Same: Form of exception.** No particular form exception is required. But when the exception is to the verdict or cision, upon the grounds of the insufficiency of the evidence to sustain the objection must specify the particulars in which such evidence is leged to be insufficient. The objection must be stated, with so much the evidence or other matter as is necessary to explain it, and no mo Only the substance of the reporter's notes of the evidence shall stated. Documents on file in the action or proceeding may be copi or the substance thereof stated, or a reference thereto, sufficient to id tify them may be made. [R. S. § 4428.]

Hist. (See C. C. P. '81, § 404) R. S. § 128, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, 648; as amended: Kerr's C. ib.

Cited: Stoddard v. Fox (1909) 15 I. 94, 99 P. 122.

Repeal: There is a question as to whether or not this section is in force. Ulright v. Baslington (1911) 20 I. 546, 119 294.

Specification of errors: A specification errors on which a party relies is not required in a bill of exceptions, except when is claimed that the evidence is insufficient to justify the verdict or decision. arren v. Stoddard (1899) 6 I. 692, 59 P. 0. But if the exception is to the verdict decision upon the ground of insufficien- of evidence, the bill will be stricken it does not specify the particulars of inefficiency. Hole v. Van Duzer (1905) I. 79, 81 P. 109.

A bill of exceptions will not always be ricken for lack of specifications but may retained to review questions of law arising during trial. Humphrey v. Whitney, (1909) 17 I. 14, 103 P. 389.

Before the supreme court on an appeal can consider the sufficiency of the evidence to support the findings and judgment, the appellant must specify the particulars in which it is alleged the evidence is insufficient, and such specifications must be embodied in the bill of exceptions. Later v. Haywood (1908) 14 I. 45, 93 P. 374; Humphrey v. Whitney (1909) 17 I 14, 103 P. 389.

It is the common practice, and that which is apparently contemplated by the statute and court rule, for the appellant to specify the particular things that he conceives it was necessary for the adverse party to prove and which he has failed to prove, and thereby call the attention of the court and the opposing counsel to the specific insufficiency of the evidence or lack of evidence in the case. Spongberg v. First Nat. Bk. (1910) 18 I. 524, 110 P. 716, Ann. Cas. 1912A 95, 31 L. R. A. (N. S.) 736.

§ 6881. [4429] **Settlement of bill of exceptions.** A bill containing ıe exception to any decision may be presented to the court or judge ›r settlement at the time the decision is made, and after having been ettled, shall be signed by the judge and filed with the clerk. When ıe decision excepted to is made by a tribunal other than a court, or by judicial officer, the bill of exceptions shall be presented to, and settled nd signed by such tribunal or officer. [R. S. § 4429.]

Hist. (See C. C. P. '81, § 405) R. S. § 29, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. P. 1872, § 649; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7653a.

Cited: Steffy v. Esler (1898) 6 I. 228, 55 P. 239; Stevens v. Hall (1903) 9 I. 233, 73 P. 527.

§ 6882. [4430] **Same: Settlement after judgment.** When a party esires to have exceptions taken at a trial settled in a bill of exceptions e may, within 10 days after the entry of judgment, if the action were ied with a jury, or after receiving notice of the entry of judgment, if ıe action were tried without a jury, or such further time as the court which the action is pending, or a judge thereof may allow, prepare ıe draft of a bill, and serve the same or a copy thereof, upon the adrse party. Within 10 days after such service the adverse party may ropose amendments thereto, and serve the same or a copy thereof upon ıe other party. The proposed bill and amendments must within 10 ays thereafter, by the party seeking the settlement of the bill, be dered to the clerk of the court for the judge who tried or heard the ıse. When received by the clerk, he must immediately deliver them the judge, if he be in the county; if he be absent from the county, and ithin the state, and either party desire the papers to be forwarded to ıe judge, the clerk must, upon notice in writing of such party, immeately forward them by mail or other safe channel; if not thus forarded, the clerk must deliver them to the judge immediately after his turn to the county. When received from the clerk, the judge must esignate the time at which he will settle the bill, and the clerk must mediately notify the parties of such designation. At the time desigıted the judge must settle the bill. If the action was tried before a ref'ee, the proposed bill, with the amndments, if any, must be presented such referee for settlement within 10 days after service of the amendents, and thereafter, upon notice of five days to the adverse party, the

referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments if any, to the judge or referee, for settlement without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk. [R. S. § 4430.]

Hist. (See C. C. P. '81, § 406) R. S. § 4430, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 650; similar, by amendment: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7655.

Cited: Coffin v. Bradbury (1894) 3 I. 770, 35 P. 715; Steffy v. Esler (1898) 6 I. 228, 55 P. 239; Hoehnan v. N. Y. Drygoods Co. (1901) 8 I. 66, 67 P. 796; Stevens v. Hall (1903) 9 I. 233, 73 P. 527; Van Camp v. Emery (1907) 13 I. 202, 89 P. 752; U. S. v. Ramsey (1907) 158 F. 488, 492; Storer v. Heitfeld (1909) 17 I. 113, 105 P. 55.

Construction with § 6878: This section does not conflict with § 6878, but exceptions may be settled under either section. Rumpel v. O. S. L. Ry. Co. (1894) 4 I. 13, 35 P. 700.

Nomenclature immaterial: A statement of the case containing the matters objected to at the trial, duly authenticated by the trial judge, will be considered by the supreme court as a bill of exceptions whether it is called a statement or a bill of exceptions. Schultz v. Keeler (1887) 2 I. 333, 13 P. 481. A paper denominated a statement on motion for new trial will be treated as a bill of exceptions when certified as such. United States v. Alexander (1888) 2 I. 386, 17 P. 746.

Service of bill: A draft of a bill of exceptions, into which are incorporated exceptions taken at the trial, must be proposed and served within 10 days after entry of judgment, if the action were tried without a jury, or such further time as the court or judge may allow. Then the adverse party, within 10 days after such service, must propose such amendments thereto, if any, as he may desire, and serve the same upon the other party. Stickney v. Hanrahan (1900) 7 I. 424, 63 P. 189.

Time for service: The district judge has no jurisdiction to settle a bill of exceptions which is not served on the adverse party within the time allowed by law or by stipulation for such service, and which is presented to him without notice to the adverse party, and if he inadvertently does so it is proper for him afterward to strike the bill from the files. Lydon v. Piper (1897) 5 I. 541, 51 P. 101.

Extension of time: After the time has expired for serving and filing a proposed statement or bill of exceptions, the judge or court has no power to extend the time. Swartz v. Davis (1903) 9 I. 238, 74 P. 800; Sandstrom v. Smith (1906) 11 I. 779, 84 P. 1060.

Stipulations for settlement: It is usual and proper for the parties when starting into a trial to stipulate as to the time a bill of exceptions may be proposed and served, but they can not dispense with the necessity of incorporating the exceptions into a bill of exceptions. Lydon v. Piper supra.

When parties agree by stipulation that either party has a certain number of days after the rendition of the decision in which to prepare and serve a bill of exceptions such stipulation is a waiver by both parties of notice of rendition of the judgment and the bill of exceptions must be proposed and served within the stipulated time from the date of entering judgment unless the time therefor be properly extended. Ib.

Contents of bill: Documentary evidence to be used upon an appeal must be incorporated into a statement or a bill of exceptions and documentary evidence which has not been so incorporated into a statement or bill of exceptions will, upon motion, be stricken from the files. Stickney v. Hanrahan (1900) 7 I. 424, 63 P. 189.

It is not reversible error that the bill of exceptions contains questions and answers. Gray v. Pierson (1901) 7 I. 540, 64 P. 233.

Certificate: A bill of exceptions or statement can not be considered on appeal unless it has been signed and certified by the trial judge; the attorneys can not settle a bill or statement by joining in a stipulation or certificate thereto. Hays v. Crutcher (1904) 10 I. 260, 77 P. 620.

Settlement: If no amendments are served within the time designated, or if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge for settlement without notice to the adverse party. Coast I. Co. v. Wood (1910) 18 I. 28, 108 P. 336.

There is no statutory limit within which the judge must settle a bill of exceptions but the statute contemplates that the party moving to settle the bill will prosecute the motion with due diligence. An unreasonable delay deprives the court of jurisdiction. (Ailshie, C. J. dissents) Behrensmeyer v. Gwinn (1913) 25 I. 186, 133 P. 623.

Resettlement: Where an omission or mistake has occurred in the settlement of a bill the judge may allow a resettlement thereof, provided the transcript has not been sent to the supreme court and the error is shown by documentary evidence or is admitted; but if such an omission or mistake rests in the recollection of the judge or counsel and it is not admitted by the adverse party, a correction or resettlement should be denied. Griffiths v. Montandon (1895) 4 I. 329, 39 P. 195.

Sufficiency: It is within the discretion of the trial court to say that a bill of ex-

eptions is sufficient to control its action n granting or refusing a new trial, and if he trial court finds a bill of exceptions ufficient and acts upon it, it is not for the upreme court to say it was error. Gray . Pierson (1901) 7 I. 540, 64 P. 233.

Amendments: The allowance of amendents to a statement and bill of exceptons, consisting of a number of specifications of insufficiency of the evidence to upport certain findings, six months after ne proposed statement and bill of exceptons had been served, and without service f such proposed amendments, is error. tickney v. Hanrahan (1900) 7 I. 424, 63 . 189.

Where amendments are proposed to a ill of exceptions indication should be givn as to where such amendments are to e inserted, and where alterations or hanges are proposed by the amendment ne amendment should indicate just what ne changes consist of, and in such cases ne proposed bill with the amendments nould be engrossed so as to show the nange or alteration and the insertion of ne amendments in their proper place, and nereby make the bill of exceptions intelliible. Shumake v. Shumake (1910) 17 I. 49, 659, 107 P. 42.

Striking bills from transcript: Where ne transcript shows that the bill of exeptions was not settled and filed until fter the hearing of the motion for new ial, such bill of exceptions will be strickn from the transcript. Buckle v. McConghy (1905) 11 I. 533, 83 P. 525; Wood v. anner (1909) 15 I. 689, 99 P. 123.

Where a proposed statement is not pre-nted and settled within the time required y law and is inserted in the transcript, n motion, it will be stricken therefrom. eatherstone v. Keane (1910) 18 I. 24, 08 P. 337.

Annotations to § 6890 prior to its amendent: Before its amendment in '11, c. 18, § 2, p. 377, § 6890 provided for bills f exceptions and statements of the case n motions for new trial. The following nnotations, now obsolete under the mended § 6890, are transferred here, here they may be useful by way of anogy.

Service of statement: Under this section statement must be proposed and served ithin 10 days after entry of judgment, nd after service of such proposed statement, any proposed amendments must be rved within 10 days. Stickney v. Hanhan, supra.

When a proposed statement, on motion or a new trial, is served on the adverse arty within the statutory time and no nendments thereto are proposed, the atement as proposed may be presented the judge or delivered to the clerk for ttlement within any reasonable time nereafter; the provisions of this section not limit the time within which to prent the statement for settlement. Miller Hunt (1901) 7 I. 486, 63 P. 803; Hoehn v. N. Y. Drygoods Co. (1901) 8 I. 66, 7 P. 796.

Extension of time: Where any objecon or protest to the settlement of the atement is made because of lapse of statory time the court has no jurisdiction to extend the time or settle the statement. Hoehnan v. N. Y. Dry Goods Co. (1901) 8 I. 66, 67 P. 796.

When parties agree by stipulation that either party may have 60 days after the rendition of the decision in which to prepare and serve a statement, such stipulation is a waiver by both parties of notice of entry of judgment, and the statement must be prepared and served within 60 days from the date of judgment unless the time therefor be properly extended. Ib.

Contents of statement: It is not necessary to incorporate exhibits or other papers in the statement in haec verba where such exhibits or papers are inserted in the transcript and are referred to in the statement by letter or number. Moore v. Taylor (1875) 1 I. 583.

Documentary evidence to be used upon an appeal must be incorporated into a statement or a bill of exceptions, and documentary evidence which has not been so incorporated into a statement or a bill of exceptions will, upon motion, be stricken from the files. Stickney v. Hanrahan, supra.

Orders extending time for the preparation of the statement or bill of exceptions are not a necessary part of the record on appeal, and it is not necessary that they be included in the statement on motion for a new trial. Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363.

Settlement of statement: The statement should be made and settled prior to the decision of the motion. Stevens v. N. W. Stage Co. (1875) 1 I. 604.

The trial judge should not settle a statement where amendments are allowed until after the engrossment thereof. Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 831. An authentication prior to engrossment certifying that the statement is settled "in the manner marked by me in pencil allowing the proposed amendments where so marked and disallowing them where so marked," is insufficient. Crowley v. Croesus Gold etc. M. Co. (1906) 12 I. 530, 86 P. 536.

The trial judge should see that all statements of the case signed by him conform to the facts and should eliminate from them any matter which is false or untrue, whether amendments are offered or not; errors made after the settlement of the statement may still be corrected by the judge, but such corrections should not be made without first giving notice to counsel on both sides. Humbird Lbr. Co. v. Kootenai Co. (1904) 10 I. 490, 79 P. 396.

By the provisions of this statute it is incumbent upon the judge to strike from a proposed statement all redundant and useless matter, regardless of whether the parties have agreed to it or not, and to insert any matter necessary to make the statement speak the truth. Coast Lbr. Co. v. Wood (1910) 18 I. 28, 108 P. 336.

It is the duty of counsel for appellant to secure a settlement of the case within a reasonable time, and such want of diligence may be ground for dismissing the appeal. Smith v. American Falls etc. Co. (1908) 15 I. 89, 95 P. 1059.

Specifications: Bills of exceptions are not required to specify the errors relied upon except in the case of insufficiency of

evidence to sustain the verdict. Warren v. Stoddart (1899) 6 I. 692, 59 P. 540.

Certificate: Where a statement is not certified by the trial judge in the manner provided in this section, it should be disregarded on the hearing of the motion for new trial, and it becomes no part of the record on appeal. Hyde v. Harkness (1876) 1 I. 623.

Only the judge or referee is authorized to settle and certify a statement on motion for a new trial: it can not be certified by the attorneys for the parties. Van Meter v. Squibb (1903) 9 I. 160, 72 P. 884.

Where a certificate of the judge to the statement recites that it contains all the evidence introduced or considered, the supreme court will treat the statement as containing all the evidence, although it appears that some evidence was introduced that is not contained in the record, as in that case it will be assumed that what was left out is immaterial. Van Camp v. Emery (1907) 13 I. 202, 89 P. 752.

When a statement on motion for a new trial has been duly settled it is presumed to show exactly what occurred at the trial, including the exceptions reserved to the rulings of the court upon questions of law, and as to those matters it is in substance the same as a bill of exceptions. (On rehearing) Steve v. Bonners Ferry L. Co. (1907) 13 I. 392, 92 P. 363.

Amendment of statement: A statement on motion for a new trial may be amended by the insertion of the specifications of particulars wherein it is claimed that the evidence is insufficient to justify the verdict. Miller v. Hunt (1901) 7 I. 486, 63 P. 803.

The allowance of amendments, consisting of a number of specifications of insufficiency of the evidence to support certain findings, six months after the proposed statement had been served, and without service of such proposed amendments, is error. Stickney v. Hanrahan (1900) 7 I. 424, 63 P. 189.

Where the moving party prepares statement and the adverse party proposes amendments to which no objection is made within 10 days, it was too late for counsel for the adverse party to ask for anything additional that would result in the amendment of the statement, and it was also too late for the moving party to insist that he had not adopted all of the amendments, and the court erred in holding that he had lost jurisdiction, and should have directed the proposed statement, with all of the amendments that had been proposed in time, to be engrossed and settled. After that was done, if said engrossed statement then truly represented the case, it was the judge's duty to settle it. Coast Lbr. Co. v. Wood (1910) 18 I. 28, 108 P. 336.

Custody of statement: When a statement is settled it is the duty of the judge to deliver it to the clerk and cause it to be filed, and it is improper to permit counsel or any one else to take possession of the settled statement until it has been filed, but the fact that the statement is not filed until several months after the date of settlement is not ground for rejecting the same in the absence of a showing of fraud or misconduct on the part of the party seeking to use it. Van Camp v. Emery (1907) 13 I. 202, 89 P. 752.

Appellate review: An objection to a verdict can not be raised in the supreme court where no motion for new trial is made, under this section, and no motion was made on the trial to correct the verdict. Fox v. West (1880) 1 I. 782.

Exceptions to rulings of the court in the admission or rejection of evidence when embodied in the statement to be used on motion for new trial may be reviewed on appeal to the supreme court. Bradbury v. Ida. etc. L. I. Co. (1886) 2 I. 239, 10 P. 620.

Where a statement on motion for a new trial is insufficient the appeal from the order denying the motion will be dismissed. Robson v. Colson (1903) 9 I. 215, 72 P. 951.

§ 6883. [4431] **Same: Decisions made after judgment.** Exceptions to any decision made after judgment may be presented to the judge at the time of such decision and be settled or noted as provided in section 6881, and a bill thereof may be presented and settled afterward, as provided in section 6882, and within like periods after entry of the order upon appeal from which such decision is reviewable. [R. S. § 4431.]

Hist. (See C. C. P. '81, § 407) R. S. § 4431, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 651; now same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7656.

§ 6884. [4432] **Settlement by supreme court.** If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill when proven, must be certified by a justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause. [R. S. § 4432..]

Hist. (See C. C. P. '81, § 408) R. S. § 4432, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 652; Kerr's C. ib. Hansen v. Boise Payette Lbr. Co. (1917) 30 I. 801, 168 P. 16

N. D. Similar: C. C. P. § 7657.

Construed: The supreme court has no power to settle an entire bill of exceptions but its power is restricted to those cases where the trial court failed to allow an exception, and not where the court refused to settle the transcript as a whole. Hansen v. Boise Payette Lbr. Co. (1917) 30 I. 801, 168 P. 163.

Applications to supreme court: Where an application is made to the supreme court to settle exceptions under this section and the rules of the court, and the applicant prays for the settlement of such exceptions as are set out by a certain exhibit, but fails to submit such an exhibit, there is nothing on which the court may act, and the application will be denied. Dernham v. Lieuallen (1895) 4 I. 528, 43 P. 74.

Remedy for delay: If the judge in any case refuse to allow an exception in accordance with the facts the party desiring the bill settled may apply by petition to the supreme court to prove the same. Smith v. American Falls etc. Co. (1908) 15 I. 89, 95 P. 1059.

§ 6885. [4433] Same: Settlement by judicial officer. When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer and be settled and signed by him, in the same manner as it is required to be presented to, settled and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct. Judges, judicial officers, and the supreme court shall respectively possess the same power, in settling and certifying statements as is by this section conferred upon them in settling and certifying bills of exceptions. [R. S. § 4433.]

Hist. (See C. C. P. '81, § 409) R. S. § 4433, reen. R. C ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 653; now same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7658.

Cited: Warren v. Stoddart (1899) 6 I. 692, 59 P. 540.

§ 6886. Reporter's transcript. Any party desiring to procure a review on appeal to the supreme court of any ruling of the district court made during the trial, or the sufficiency of evidence to sustain the verdict or decision, in an action or special proceeding, may, in lieu of preparing, serving and procuring the settlement of a bill of exceptions as in this chapter provided, procure a transcript of the testimony and proceedings, including the instructions given or refused, and exceptions thereto, on the trial, or such part thereof as may be necessary, in the following manner:

1. He shall first procure from the district judge an order directing the reporter to prepare said transcript or specified portion thereof, which order shall limit the time within which the reporter shall complete and lodge the same. He shall then file said order with the clerk of the district court, and serve a copy thereof upon the reporter, paying to him at the time such sum as he shall demand, as the estimated cost of transcribing such part of his notes and of the proceedings as may be desired, at the rate of 10 cents per folio of 100 words, which fee shall be in full payment for all services of the reporter in preparing and certifying an original and four carbon copies of said transcript, and shall be covered into the state treasury as are other fees paid to the reporter, and any balance of the estimate shall be returned by the reporter to the party depositing the same, and said party shall likewise be liable to, and shall, on demand of the reporter, pay any deficiency not covered by said estimate. It shall be the duty of the reporter, upon service of said copy of order and receipt of his estimated fees, to forthwith prepare said transcript and to complete the same and lodge the original and copies

with the clerk of the district court within the time allowed by said order or within such further time as the district judge may, by order, allow and the reporter shall append to the transcript his certificate that the same is a true and correct copy of the testimony taken at the trial, or of such part thereof as is designated by the order.

2. Upon receipt of said transcript, the clerk shall mark the original and two copies as lodged on the date of said receipt, and shall deliver the remaining copies to the party procuring the same to be made, or to his attorney, and such party or his attorney shall, within five days from receipt thereof, serve one copy, together with a notice particularly designated by page and line any errors or omissions which he claims to be disclosed by the transcript, in the event he claims that there are any such errors or omissions, upon the adverse party or his attorney, or if there be more than one adverse party appearing by separate attorney then on one of those attorneys, in which latter case, however, he shall notify, in the manner that notices are required to be served, the other adverse parties or their attorney, of the party on whom he has made such service. The adverse parties, or any of them, shall have 10 days after such service had been completed within which likewise to point out by notice any errors in said transcript and to file said notice with the clerk of the court, and serve a copy thereof on the party serving the transcript.

3. At the expiration of the time limited for designating errors, the transcript, with any notice designating errors shall be transmitted to the judge who tried the cause, by the clerk, on application of either party and such judge shall forthwith settle the same, notifying the parties by such notice as he deems adequate of the time and place of settlement in the event of any error designated by notice and not agreed to, and when so settled said transcript shall have the force and effect of a bill of exceptions duly settled and allowed, and shall be deemed adequate to present for review any ruling appearing therein to have been excepted to, or by statute deemed excepted to, or any question of insufficiency of evidence which may afterward be properly presented by specification of insufficiency in the brief on appeal, and the original transcript and copies thereof lodged with the clerk shall be by him marked filed and retained by him for transmission to the clerk of the supreme court in the event an appeal is afterward perfected.

4. Exhibits introduced in the trial may be certified to the supreme court by the clerk without incorporating the same in the transcript, or making any copies, unless said exhibits consist of some part of the public records, in which event the same shall be copied into the record at the appropriate place by the reporter, or a copy certified by the party having lawful custody of the records may be substituted and transmitted with the exhibits. ['11, c. 119, p. 379.]

Hist. R. C. § 4434, as enacted '11, c. 119, p. 379, reen. C. L. § 4434.

Cross ref. Express reference to this section: Reporter's transcript constitutes part of record on appeal: §§ 6892-3. Stenographer's fees for copy of record: § 6560. Record on appeal: § 7163.

Cited: (In brief of counsel) Lee v. Hanford (1912) 21 I. 327; First Nat. Bk of American Falls v. Shaw (1913) 24 I. 134, 140, 132 P. 802; Behrensmeyer v. Gwinn (1913) 25 I. 186, 191, 136 P. 623. Newport Water Co. v. Kellogg, 31 I. 574, 174 P. 602.

Purpose: The transcription of the stenographer's notes prepared and settled in accordance with the provisions of this section is made for the purpose of being used as a part of the record on appeal, and takes the place of the statement and bill of exceptions prepared under the prior law. Kelley v. Clark (1912) 21 I. 231, 121 P. 9[illegible].

On appeal from a final judgment, where appellant furnishes the supreme court with a copy of the notice of appeal, judgment roll, reporter's transcript as prepared and settled as provided by this section, and the insufficiency of the evidence is properly presented by specification in the brie[illegible]

the court has full power under § 7163 to determine whether the evidence is sufficient. Buster v. Fletcher (1912) 22 I. 172, 125 P. 226.

This section, with others, was intended to cheapen and expedite appeals, transferring the duty of preparing appeals from the attorneys to the court officers. Fischer v. Davis (1913) 24 I. 216, 133 P. 910.

It was the intention of the legislature to render the preparation of records and transcripts on appeal less technical and perhaps in some instances to broaden the scope of review on appeal. Steinour v. Oakley State Bk. 32 I. —, 177 P. 843.

Strict compliance: Supreme court will require strict compliance in furtherance of speedy prosecution of appeals. Fischer v. Davis, supra.

Decision: The word "decision" means where a cause is tried to the court and includes the trial court's findings of fact and conclusions of law. Buster v. Fletcher, supra.

Transcripts: This section does not prohibit or forbid the printing of transcript on appeal, and costs may be taxed for printed transcripts. Ulbright v. Baslington (1911) 20 I. 546, 119 P. 294.

Where separate appeals by different parties are taken one of these parties can secure a transcript and the others avail themselves of it for the basing of their appeals, thus saving expense. Where one party obtains a transcript, other appellants refusing to pay for same may not use same on appeal. Morris-Roberts Co. v. Marinr (1913) 24 I. 788, 135 P. 1166.

Failure on part of officer to prepare and deliver transcript within stipulated time will not work a dismissal of the appeal, unless the appellant has been guilty of laches or contributed to the delay. Fischer v. Davis, supra.

Service: The service provided for in this section is mandatory, and failure to make such service divests the supreme court of jurisdiction to entertain the appeal. Bohannon Dredging Co. v. England (1917) 30 I. 721, 168 P. 12. The failure to make the service required by this section divests the supreme court of jurisdiction to consider on appeal the record or that portion thereof involved in the failure of service. Boise Payette Lbr. Co. v. McCarthy (1918) 31 I. 305, 170 P. 920.

Service of copies of the clerk's transcript of the record and the reporter's transcript of the testimony, bound together, within the time required by this section, is compliance with the mandatory requirements of this section and § 7166 as to service, and in case the respondent's attorney fails to return his copy to the clerk for completion prior to the time of settlement of the reporter's transcript by the trial judge, the appellant is not required to make any additional service of the record. Stine Lbr. & Shingle Co. v. Hemenway, 32 I. —, 179 P. 505.

Extension of time: Under this section district judge has authority to control the getting out of the reporter's notes and to grant necessary extensions of time for the reporter to transcribe his notes and to make all orders in relation thereto. Fischer v. Davis, supra. Junction Placer M. Co. v. Reed (1915) 28 I. 219, 153 P. 564.

Settlement of transcript: Reporter's transcript is not required to be settled or filed prior to hearing of motion for new trial. Kelley v. Clark (1912) 21 I. 231, 121 P. 95; Bohannon Dredging Co. v. England (1917) 30 I. 721, 168 P. 12.

The statute has left it to the judge alone to settle the transcript, and the mere failure of counsel to designate errors does not limit the power of the judge or excuse the necessary statutory requirement of a settlement of such transcript. Grisinger v. Hubbard (1912) 21 I. 469, 122 P. 853, Ann. Cas. 1913E 87.

The transcript of the evidence certified to by the stenographer must be settled by the trial judge to have the same reviewed upon appeal to the supreme court. Furey v. Taylor (1912) 22 I. 605, 127 P. 676; Chapman v. A. H. Averill Mach. Co. (1915) 27 I. 213, 147 P. 785; Wells v. Culp (1917) 30 I. 438, 166 P. 218; Minn. Threshing Mach. Co. v. Peterson, 31 I. 745, 176 P. 99.

An order overruling a motion for a new trial can not be considered on appeal where the record fails to contain a transcript of the evidence, duly certified and settled. Wells v. Culp, supra.

Where the stenographer's transcript is not settled, on motion made within proper time the appeal must be dismissed. Edwards v. Anderson (1913) 23 I. 508, 130 P. 1001.

Transcript not settled by judge will be stricken on motion. Strand v. Crooked River etc. Co. (1913) 23 I. 577, 131 P. 5; Chapman v. A. H. Averill Mach. Co. (1915) 28 I. 121, 152 P. 593.

Order overruling motion for a new trial, which was based in part on the minutes of the court, cannot be reviewed in the absence of the trial judge's certificate to the transcript of evidence. Bumpas v. Moore, 31 I. 668, 175 P. 339.

ARTICLE 8.

NEW TRIALS.

§ 6887. [4438] New trial defined. A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury or court or by referees. [R. S. § 4438.]

Hist. (See C. C. P. '81, § 410) R. S. § 4438, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 656; Kerr's C. ib.

N. D. Identical: C. C. P. § 7659.

Definition: No new trial can be had unless there is to be a reexamination of an issue of fact; thus the supreme court will not entertain a motion for a new trial of mandamus proceedings instituted in that court and disposed of on an issue of law raised by demurrer. P. v. George (1891) 3 I. 108, 27 P. 680. Tucker v. Hypotheek etc. Co., 31 I. 466, 173 P. 749.

Decision defined: The "decision" here

referred to means the findings of fact and conclusions of law, and not the judgment. Caldwell v. Wells (1909) 16 I. 459, 101 P. 812.

This and the following section authorize the granting of a new trial only in case former hearing has proceeded to a ver dict or a decision of an issue, or issue of fact by a court or referee. Tucker Hypotheek etc. M. Co., supra.

§ 6888. [4439] **Grounds for new trial.** The former verdict or othe decision may be vacated and a new trial granted on the application o the party aggrieved, for any of the following causes, materially affectin the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either part was prevented from having a fair trial.

2. Misconduct of the jury; and when any one or more of the juror have been induced to assent to any general or special verdict, or to finding on any question submitted to them by the court, by a resort t the determination of chance, such misconduct may be proved by the af fidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not hav guarded against.

4. Newly discovered evidence, material for the party making th application, which he could not, with reasonable diligence, have dis covered and produced at the trial.

5. Excessive damages, appearing to have been given under the in fluence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other de cision, or that it is against law.

7. Error in law, occurring at the trial, and excepted to by the part making the application. [R. C. § 4439.]

Hist. (See C. C. P. '81, § 411) R. S. § 4439; am. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 657; Kerr's C. ib. Griffiths v. Montandon (1895) 4 I. 377, 39 P. 548; Brown v. Macey (1907) 13 I. 451, 90 P. 339.

N. D. Similar: C. C. P. § 7660.

Cited: Curtis v. Walling (1888) 2 I. 416, 18 P. 54; Young v. Tiner (1894) 4 I. 269, 38 P. 697; Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363; Storer v. Heitfeld (1909) 17 I. 113, 105 P. 55.

Discretion of court: Appellate review: An order granting a new trial will not be disturbed in the absence of abuse of discretion. Jacksha v. Gilbert (1896) 4 I. 738, 44 P. 555; Brossard v. Morgan (1899) 6 I. 479, 56 P. 163; Wolfe v. Ridley (1909) 17 I. 173, 104 P. 1014; Say v. Hodgin (1911) 20 I. 64, 116 P. 410.

Where a motion for a new trial is heard before the successor of the judge who tried the case, the supreme court will pass upon the evidence in the same way that a nisi prius court would do. Van Camp v. Emery (1907) 13 I. 202, 89 P. 752.

An appellate court will not interfere with orders granting a new trial for newly discovered evidence in the absence of an abuse of discretion. Heilner v. Brown (1887) 2 I. 263, 12 P. 903. But such an application should be looked upon with suspicion and disfavor. Black v. Lewiston (1887) 2 I. 276, 13 P. 80.

Where a motion for a new trial has been made on several grounds and the trial court grants the same without designating the ground upon which the order is made, the order will not be disturbed on appe if it could have properly been granted o any ground mentioned in the motio Gray v. Pierson (1901) 7 I. 540, 64 P. 23 Penninger Lat. Co. v. Clark (1911) 20 166, 117 P. 764. But it would be in the i terest of good practice and the dispatch business if trial courts when making o ders granting new trials would specify t particular grounds on which such orde are made. Wolfe v. Ridley (1909) 17 173, 104 P. 1014.

Substituting new findings and decre Where findings of fact, conclusions of la and decree have been made and enter by the trial court and recorded, in fav of one of the parties, it is reversible err for the court upon motion for new tri and of its own motion to set aside pr vious judgment entered and substitute ne findings of fact, conclusions of law a decree in favor of the other party, witho granting a new trial. Lawrence v. C beille (1916) 28 I. 329, 154 P. 495.

Subd. 2. Misconduct of Jury.

This subdivision should be punctuat the same as Cal. C. C. P. § 657. Griffit v. Montandon (1895) 4 I. 377, 39 P. 54

Entertaining jury: The action of t father of plaintiff in liberally patronizi during the trial a saloon conducted by o of the jurors in the presence of the oth jurors in the case is such misconduct the adverse party as to require a new tri Palmer v. Utah N. R. Co. (1887) 2 I. 3 13 P. 425. The act of parties to an acti in entertaining the jury while the lat are viewing premises in controversy, w

uncheon and refreshments, beer and cigars, is such misconduct as to require a new trial. Burke v. McDonald (1892) 3 I. 96, 29 P. 98. It is error to permit a juror o use intoxicating liquors during the trial of a case, or during the deliberations of he jury, unless it is done by permission of he court upon the prescription of a practicing physician. (Modifying S. v. Reed, I. 754, 35 P. 706) Bernier v. Anderson 1902) 8 I. 675, 70 P. 1027.

Quotient verdict: A quotient verdict obained by the addition of the several mounts to which each juror thinks the arty entitled, and division of the sum by 2, is a chance verdict and should be set side. Flood v. McClure (1893) 3 I. 587, 2 P. 254; Beakley v. Optimist P. Co. 1915) 28 I. 67, 152 P. 212. But where urors make a quotient determination of he amount of the verdict which they shall ender, and, after arriving at such determination, continue their discussions further and finally determine by majority ote the sum to be awarded, the verdict nally rendered is not a chance verdict. uch a verdict is, however, of doubtful ropriety. Giffin v. Lewiston (1898) 6 I. 31, 55 P 545; Newman v. Great Shoone etc. Co. (1916) 28 I. 764, 156 P. 111.

Proof of misconduct: Affidavits of jurrs should not be received to impeach the erdict except when the same has been obtined by a resort to chance. Affidavits of urors may not be received to show that quor was furnished to them. Berner v. nderson, supra. Griffiths v. Montandon, upra. The affidavits of jurors are cometent to impeach a verdict obtained by hance. Giffin v. Lewiston, supra. Beaky v. Optimist P. Co., supra. Affidavit of ttorney that jurors had told him verdict as result of chance, met by counter affiavits of two jurors that such was untrue, sufficient to show misconduct authorizing new trial. Graham v. Coeur d'Alene etc. o. (1915) 27 I. 454, 149 P. 509.

Subd. 3. Surprise.

In order to obtain a new trial on the ound of surprise, the surprise should be own by the best and most satisfactory idence within the reach of the applicant. illienthal v. Anderson (1877) 1 I. 673.

The facts constituting accident or surise must be set forth in the affidavit. all v. Jensen (1908) 14 I. 165, 93 P. 962.

Subd. 4. Newly Discovered Evidence.

It is not error to refuse a new trial on e ground of discovery of alleged evidence ntirely irrelevant to the issue. Gaffney Hoyt (1886) 2 I. 199, 10 P. 34; St. Regis Co. v. Turner etc. Co. (1917) 30 I. 555, 6 P. 254. Alleged newly discovered evince which is mainly cumulative and hich was not beyond the reach of the rties at the time of the trial, is not ound for a new trial. Knollin v. Jones 909) 7 I. 466, 63 P. 638; Heckman v. spey (1906) 12 I. 755, 88 P. 80; Hall v. nsen (1908) 14 I. 165, 93 P. 962.

The newly discovered evidence must be t forth and it must also appear from the affidavit that the party could not with reasonable diligence have discovered the same and produced it at the trial. Hall v. Jensen (1908) 14 I. 165, 93 P. 962; Stolz v. Scott (1916) 28 I. 417, 154 P. 982; Amonson v. Stone (1917) 30 I. 656, 157 P. 1029.

Subd. 5. Excessive Damages.

On an appeal from an order granting a new trial the record showing that there was only a difference of some $20 or $30 between the amount of damages shown by the defendant's proofs and that allowed by the jury, and that the expenses of a new trial would greatly exceed the amount of the difference, a new trial should not be granted. Wood etc. Co. v. Woodmansee (1900) 7 I. 250, 61 P. 1029.

Subd. 6. Insufficiency of Evidence.

Exceptions to findings of facts on the grounds that they are contrary to the evidence can only be reviewed on a motion for new trial. Toulouse v. Burkett (1866) 2 I. 184, 10 P. 26; Buster v. Fletcher (1912) 22 I. 172, 125 P. 226.

The trial court may and should grant a new trial regardless of the existence of a conflict in the evidence, if he concludes that the verdict of the jury is improper. Jones v. Campbell (1906) 11 I. 752, 84 P. 515. Where there is a substantial conflict in the evidence, an order of the trial judge granting a new trial will not be disturbed on appeal. Buckle v. McConaghy (1906) 12 I. 733, 88 P. 100; Wolfe v. Ridley (1909) 17 I. 173, 104 P. 1014; Penninger Lat. Co. v. Clark (1911) 20 I. 166, 117 P. 764.

A motion for a new trial should be directed at the verdict of the jury or the "decision" of the court, and not at the judgment; otherwise, the sufficiency of the evidence to support an order overruling such motion can not be reviewed on appeal. Caldwell v. Wells (1909) 16 I. 459, 101 P. 812.

Subd. 6. Decision Against Law.

Where a judgment is entered upon findings which do not determine all the material issues raised by the pleadings with respect to which evidence was introduced, the decision is against law and a new trial may be granted on that ground. Brown v. Macey (1907) 13 I. 451, 90 P. 339.

Indefiniteness of a verdict is not ground for granting a new trial under the provisions of this section. Trask v. Boise King Placers Co. (1914) 26 I. 290, 142 P. 1073.

Subd. 7. Errors in Law.

An error of the trial court in granting or refusing a new trial is an order made after trial, and is addressed to the discretion of the court, and is not an error occurring at the trial. Baillie v. Wallace (1912) 22 I. 702, 127 P. 908.

Nonsuit not ground: A motion for nonsuit presents only a question of law, and if it is granted and a judgment of dismissal is entered, it is error to grant a new trial. Tucker v. Hypotheek etc. M. Co., 31 I. 466, 173 P. 749.

§ 6889. Application for new trial: How made. When an applica tion is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section it must be made upon affidavits; for any other cause it may be made, at the option of the moving party, either upon the records and files in the action or the minutes of the court. ['11 c. 118, § 1, p. 377.]

Hist. (See C. C. P. '81, § 412) R. S. § 4440, reen. R. C. ib.; am. '11, c. 118, § 1, p. 377, reen. C. L. § 4440.

Comp. leg.—Cal. Different: C. C. P. 1872, § 658; as amended; Kerr's C. ib.

N. D. Similar: C. C. P. § 7661. See also C. C. P. § 7662.

Cited: Buster v. Fletcher (1912) 22 I. 172, 125 P. 226.

Purpose of amendment: The amendment of '11 was intended to both cheapen and expedite appeals. Fischer v. Davis (1913) 24 I. 216, 133 P. 910.

Motion for new trial: The statute does not require a formal motion to be made for a new trial; yet when such motion is put in writing and filed as a part of the records in the case the same will not be stricken. Storer v. Heitfeld (1909) 17 I. 113, 105 P. 55.

§ 6890. Same: Notice of intention. The party intending to move for a new trial must, within 10 days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his motion designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the records and files in the action, or the minutes of the court.

1. If the motion is to be made upon affidavits, the moving party must, within 10 days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk and serve a copy upon the adverse party, who shall have 10 days to file counter affidavits, a copy of which must be served upon the moving party.

2. When the motion is to be made upon minutes of the court, and the ground of the motion is the insufficiency of evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party or deemed excepted to, the notice must specify the particular errors upon which the party will rely. If the notice of motion does not contain the specifications herein designated the moving party may at any time within twenty days after filing such notice of motion, or within such further time as the court may allow, file a notice containing such specifications and serve a copy of the same upon the adverse party, and unless he do so the motion must be denied. ['19 c. 108, p. 390.]

Hist. (See C. C. P. '81, § 413) R. S. § 4441, reen. R. C. ib.; am. '11, c. 118, § 2, p. 377, reen. C. L. § 4441; am. '19, c. 108, p. 390.

Comp. leg.—Cal. See C. C. P. 1872, § 659; amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7663.

Cited: Hole v. Van Duzer (1905) 11 I. 79, 81 P. 109; S. v. Fleming (1910) 17 I. 471, 106 P. 305; Buster v. Fletcher (1912) 22 I. 172, 181, 125 P. 226; U. S. v. Ramsey, 158 F. 488, 492; Fischer v. Davis (1913) 24 I. 216, 133 P. 910; Behrensmeyer v. Gwinn (1913) 25 I. 186, 192, 136 P. 623; Zilka v. Graham (1914) 26 I. 163, 141 P. 639.

Decisions prior to amendment: Before its amendment in '11 this section provided for bills of exceptions and statements of the case on motion for new trial. Annotations in relation to these matters now obsolete as to this amended section have been transferred to § 6882. Citations thereto are as follows:

Moore v. Taylor (1875) 1 I. 583; Stevens v. N. W. Stage Co. (1875) 1 I. 60; Hyde v. Harkness (1876) 1 I. 623; Fox v. West (1880) 1 I. 782; Bradbury v. Ida. et L. I. Co. (1886) 2 I. 239, 10 P. 620; Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 83; Warren v. Stoddart (1899) 6 I. 692, 59 540; Stickney v. Hanrahan (1900) 7 I. 42 63 P. 189; Miller v. Hunt (1901) 7 I. 48 63 P. 803; Hoehnan v. N. Y. Drygoods C (1901) 8 I. 66, 67 P. 796; Van Meter Squibb (1903) 9 I. 160, 72 P. 884; Robs v. Colson (1903) 9 I. 215, 72 P. 951; Hun

bird L. Co. v. Kootenai Co. (1904) 10 I. 490, 79 P. 396; Crowley v. Croesus Gold etc. Co. (1906) 12 I. 530, 86 P. 536; Van Camp v. Emery (1907) 13 I. 202, 89 P. 752; Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363; Smith v. American Falls etc. Co. (1908) 15 I. 89, 95 P. 1059; Coast L. Co. v. Wood (1910) 18 I. 28, 108 P. 336.

Notice of intention: A notice of intention to move for a new trial need not contain specific assignments of the grounds wherein the decision is against law. Brown v. Macey (1907) 13 I. 451, 90 P. 339.

The fact that the trial court has entertained a motion for new trial, considered and passed upon same, implies that the proper notice of intention to make such motion has been served and filed. Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363.

The statement in the notice of the grounds in the disjunctive does not render the notice insufficient where the notice does state that such motion is to be heard upon "either or all of them." Andregg v. O. S. L. Rr. Co. (1912) 22 I. 437, 126 P. 528.

The notice provided for by this section is a notice of the motion for a new trial, and such notice must designate the grounds upon which the motion will be made. Kelley v. Clark (1912) 21 I. 231, 121 P. 95.

There is a substantial compliance with the provisions of this section as amended, even though the words "intends to move for a new trial" are used instead of the words "will move," provided the motion in other respects complies with the statute and adequately informs the defendant as to its grounds. Times Printing etc. Co. v. Babcock, 31 I. 770, 176 P. 776.

Motion for new trial: The motion for new trial follows after the notice and may be oral or in writing, and is not required to be in any particular form or to state the grounds upon which the same is made. Kelley v. Clark (1912) 21 I. 231, 121 P. 95.

Extension of time: An order extending the time to move for a new trial does not extend the time for serving notice of intention to move for a new trial. Stevens v. N. W. Stage Co. (1875) 1 I. 604.

A judge of one district called into another district to try a case pending in that district, has all the powers of the judge of that district for the purposes of the case and may make an order extending the time for preparing and presenting statements and bills of exceptions or for filing affidavits on motion for a new trial. Morris v. Lemp (1907) 13 I. 116, 88 P. 761.

Where a decision is made in open court in the presence of counsel and at the request of counsel the time is extended to file his motion for a new trial, such order does not extend the time for filing the notice of intention to move for a new trial. Howes v. Dols (1915) 27 I. 576, 150 P. 38.

The filing of notice of motion for new trial within the time required by statute continues the jurisdiction of the trial court to rule upon the motion, which, in the absence of lack of diligence, is not affected by the expiration of the time within which an appeal may be taken from the judgment. Times Printing etc. Co. v. Babcock, 31 I. 770, 176 P. 776.

Hearing on affidavits: In order for a party to obtain a new trial on the ground of error in refusing a continuance for an absent witness it is necessary for him upon the motion for a new trial to produce the affidavit of the absent witness showing that he could testify to the facts sought to be proved by him, or to show that such an affidavit could not be procured. Lillienthal & Co. v. Anderson (1877) 1 I. 673.

An objection to an affidavit read on motion for a new trial on the ground of newly discovered evidence, predicated on the want of a proper jurat, must be made in the trial court and an exception be taken to the ruling, in order to be available on appeal. Heilner v. Brown (1887) 2 I. 263, 12 P. 903.

A motion for a new trial based on affidavits can not be heard and considered prior to the expiration of the 10 days allowed the adverse party in which to file and serve counter affidavits, and an order made pursuant to such a premature hearing will be reversed, although the order itself was not made until some time after counter affidavits were in fact filed. Peter v. Kalez (1905) 11 I. 553, 83 P. 526.

Where the notice of intention to move for a new trial does not state that the motion will be based upon affidavits, it is improper to file affidavits, and if filed, the same will be stricken from the records. Where the notice does so state such affidavits must be filed within 10 days after the service of such notice, unless the court or judge allow further time to file same. Storer v. Heitfeld (1909) 17 I. 113, 105 P. 55.

Court has discretionary power to allow counter affidavits to be filed at any time, under liberal construction, even after statutory time has expired. (Ailshie, J. dissents) Darling v. Fremstadt (1912) 22 I. 684, 127 P. 674.

Sufficiency of specifications: Specifications that the evidence does not support the "judgment" and that the "judgment" is contrary to law, can not be considered on a motion for a new trial. Curtis v. Walling (1888) 2 I. 416, 18 P. 54.

An assignment that the verdict is against law does not include an assignment of the insufficiency of the evidence to sustain the verdict. Young v. Tiner (1894) 4 I. 269, 38 P. 697.

Specifications of insufficiency of evidence which designate some particular fact and aver that it is not justified by or not sustained by or is contrary to the evidence are sufficient. Bernier v. Anderson (1902) 8 I. 675, 70 P. 1027; Palmer v. N. P. Ry. Co. (1905) 11 I. 583, 83 P. 947. On an issue as to whether a road was a private road or a public highway, a specification of insufficiency of evidence stating that "the evidence is undisputed that the road in question was a private road" is sufficient. Palmer v. N. P. Ry. Co. (1905) 11 I. 583, 83 P. 947. A specification that the evidence is insufficient and that the plaintiff is not entitled to 185 inches of water, but is entitled to 15 inches of water, is not a sufficient specification of the

insufficiency of the evidence. Robson v. Colson (1903) 9 I. 215, 72 P. 951.

Notice of motion: A notice of motion for new trial need not designate the time when the motion will be made. The motion is a mere formality and may be made at any time prior to the hearing. Times Printing etc. Co. v. Babcock, 31 I. 770, 176 P. 776.

§ 6891. Hearing of motion. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of court on file, and when the motion is made on the minutes, reference may be had to any depositions, documentary evidence and phonographic report of the testimony on file. ['11, c. 118, § 3, p. 378.]

Hist. (See C. C. P. '81, § 414) R. S. § 4442, reen. R. C. ib.; am. '11, c. 118, § 3, p. 378, reen. C. L. § 4442.

Comp. leg.—Cal. Different: C. C. P. 1872, § 660; amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7667. See also C. C. P. § 7666.

Cited: Brown v. Macey (1907) 13 I. 451, 90 P. 339; Stickney v. Hanrahan (1900) 7 I. 424, 63 P. 189; Fischer v. Davis (1913) 24 I. 216, 133 P. 910; Behrensmeyer v. Gwinn (1913) 25 I. 186, 136 P. 623; Zilka v. Graham (1914) 26 I. 163, 141 P. 639; Bohannon Dredging Co. v. England (1917) 30 I. 721, 168 P. 12; Times Printing etc. Co. v. Babcock, 31 I. 770, 176 P. 776.

Time for hearing: A motion for new trial should not be heard until after the statement has been settled and filed, and an order granting a new trial prior to the settlement and filing of the statement will be set aside as premature. Buckle v. McConaghy (1905) 11 I. 533, 83 P. 525. (Not now applicable.)

Under this section an application for a new trial shall be heard at the earliest practicable time after the notice of the motion, if the motion is to be heard upon the minutes of the court, or in other cases after the affidavits are filed, and may be brought to a hearing upon motion of either party. Kelley v. Clark (1912) 21 I. 231, 121 P. 95.

As a motion for a new trial may be brought to a hearing upon motion of either party, if appellant does not ask that the motion be heard until after the stenographer's notes are transcribed and the respondent makes no objection to the hearing of the motion at the time it is made on the ground of unreasonable delay, he waives such objection. Ib.

Notice of hearing: The adverse party is entitled to notice of hearing the motion for new trial, and has the right to be heard and to be present when the moving party is presenting his side of the case. Peter v. Kalez (1905) 11 I. 553, 83 P. 526. But where the attorneys for the parties sign a stipulation waiving notice of the time and place of hearing and passing upon a motion for a new trial, the trial judge may hear and pass on the motion without notice to the adverse party. Buckle v. McConaghy, supra.

Referring to evidence: Upon a hearing upon motion for a new trial, when made upon the minutes of the court, the sufficiency of the evidence and the questions arising during the trial and the matters contained in the reporter's notes may all be referred to, and the court may determine such questions from his recollection of what took place and from his own minutes kept of the proceedings, and by reference to the stenographer's notes, without waiting for a transcript of the proceedings and evidence as transcribed by the stenographer. Kelley v. Clark, supra.

Phonographic report: The phonographic report of the testimony on file, as the words are used in this section, means the stenographic report or shorthand notes of the stenographer and not the transcription of the testimony taken by such stenographer. Ib.

Unreasonable delay: Unless good cause for the delay is shown, an appeal from an order denying a new trial, taken more than a year after the entry of judgment, will be dismissed on motion. McCrea v. McGrew 9 I. 382, 75 P. 67. Smith v. American Falls Canal etc. Co. 15 I. 89, 95 P. 1059 Wood v. Tanner, 15 I. 689, 99 P. 123, 1053 Livingstone v. Aberdeen-Springfield C. Co 31 I. 592, 173 P. 1086.

§ 6892. Record on appeal. The judgment roll and the affidavits, or the records and files in the action, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a reporter's transcript prepared in the manner prescribed by section 6886 of these codes, with a copy of the order, shall constitute the record on appeal. ['11, c. 118, § 4, p. 378.]

Hist. (See C. C. P. '81, § 415) R. S. § 4443, reen. R. C. ib.; am. '11, c. 118, § 4, p. 378, reen. C. L. § 4443.

Cross ref. Express reference to this section: Record on appeal: § 7165.

Matters deemed excepted to: § 6879

(On petition for rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696.

Comp. leg.—Cal. Different: C. C. P. 1872, § 661; am. Kerr's C. ib. See (On rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696.

N. D. Analogous: C. C. P. § 7822.

Cited: Rumpel v. O. S. L. Ry. Co. (1894) 4 I.13, 35 P. 700; Steffy v. Esler (1898) 6 I. 228, 55 P. 239; Stevens v. Hall (1903) 9 I. 233, 73 P. 527; Williams v. Boise Basin M. etc. Co. (1905) 11 I. 233, 81 P. 646; (On petition for rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696; (In brief of counsel) Leggett v. Evans (1909) 16 I. 760; Zilka v. Graham (1914) 26 I. 163, 141 P. 639; Bumpas v. Moore, 31 I. 668, 175 P. 339.

Decisions before amendment: Where it does not appear that the motion for a new trial was made, or that any statement was filed in pursuance of this section, the supreme court, in reviewing the case, may consider only the judgment roll. W. & I. Rr. Co. v. Osborne (1889) 2 I. 557, 21 P. 421.

Where the order denying a new trial recites that a bill of exceptions was used on the hearing, the bill will be considered by the supreme court although not filed within the time required by statute, in the absence of any objection or exception by respondent to the settlement or submission of the bill to the trial court. Stufflebeam v. Montgomery (1891) 3 I. 20, 26 P. 125.

Under this section and § 7165, notice of intention to move for a new trial is not made a part of the record on appeal from the order granting or denying the motion, and it is not necessary that such notice be incorporated in the statement unless the adverse party objects to its sufficiency for some reason, and has his objection settled and incorporated in a bill of exceptions or statement. Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363; Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573.

All errors properly saved and assigned in a statement of the case, not used on motion for a new trial, may be reviewed upon appeal from the judgment although it be taken more than 60 days after the rendition of such judgment. (On rehearing) Steve v. Bonners Ferry L. Co. (1907) 13 I. 392, 92 P. 363.

Specification of grounds for new trial: Where the record does not show the grounds upon which a new trial was granted, and no error warranting a new trial as apparent from the record, the order granting a new trial will be reversed. Lowe v. Long, 5 I. 122, 47 P. 93; Sweetzer v. Mellick (1898) 5 I. 783, 51 P. 985; Smith v. Wallace Nat. Bk. (1915) 27 I. 441, 150 P. 21.

The grounds upon which a new trial is granted should be stated in the order. Cox v. Cox (1912) 22 I. 692, 127 P. 679, and if not so stated, the supreme court in reviewing the order will examine the record and sustain the order if there is sufficient error to warrant the granting of a new trial. Bernier v. Anderson (1902) 8 I. 675, 70 P. 1027. Where the grounds on which the order is based are not stated, the supreme court will only examine the assignments of error made in the lower court so far as to ascertain whether or not the order can be sustained on any ground named in such assignments. Buckle v. McConaghy (1906) 12 I. 733, 88 P. 100.

What constitutes record: The judgment roll does not become a part of the record on appeal from an order granting or denying a motion for a new trial, unless the same was used on the hearing of the motion in the lower court. Johnston v. Bronson (1911) 19 I. 449, 114 P. 5.

Where the appellate court is unable to determine from the record what papers were used on the hearing in the lower court, and consequently unable to tell what papers, files and records should be contained in the transcript, the appeal from an order overruling a motion for a new trial will be dismissed. Ib.

The notice of motion for a new trial is a part of the files and part of the record required to be furnished to this court on appeal and is used upon the hearing. Kelley v. Clark (1912) 21 I. 231, 121 P. 95.

The action of trial court in overruling motion for new trial, based in part on minutes, can not be reviewed where record fails to contain a transcript of evidence duly settled by the trial judge. Wells v. Culp (1917) 30 I. 438, 166 P. 218.

Certificate of papers used: The certificate of the clerk of the district court that certain affidavits were used on the application for a new trial and that they were all the affidavits used, is not sufficient to authorize the supreme court to consider such affidavits; but such certificate must be made by the trial judge or in an authenticated record certified by the judge, showing what papers were used on the application. Crowley v. Croesus Gold etc. M. Co. (1906) 12 I. 530, 86 P. 536; Doust v. Rocky Mt. Bell Tel. Co. (1908) 14 I. 677, 95 P. 209.

§ 6893. New trial on motion of court. The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice. The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a reporter's transcript to be used on such appeal may be prepared in the same manner as provided in section 6886. ['11, c. 118, § 5, p. 378.]

Hist. (See C. C. P. '81, § 416) R. S. § 4444, reen. R. C. ib.; am. '11, c. 118, § 5, p. 378, reen. C. L. § 4444.

Comp. leg.—Cal. No such section in C. C. P. 1872; similar: Kerr's C. § 663.

N. D. Similar: C. C. P. 1872, § 7665.

Discretion of court: Where the trial court in granting or refusing a new trial exercises a legal and not an arbitrary discretion, in conformity with the spirit of the law and in such a manner as will subserve rather than impede or defeat the ends of justice, avoiding technicalities, same will not be disturbed on appeal. Baillie v. Wallace (1912) 22 I. 702, 709, 127 P. 908.

§ 6894. [4445] **Hearing in court or at chambers.** The motion for a new trial may be brought to a hearing before the judge who tried or heard the case, at chambers, or in open court, in any county of the state. [R. S. § 4445.]

Hist. R. S. § 4445, reen. R. C. ib., reen. C. L. ib.

Cross ref. Motion for new trial may be passed upon at chambers: § 6493.

Comp. leg.—Cal. Same: C. C. P. 1872, § 664; Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7667-77.

Cited: (In brief of counsel) Morris v. Lemp (1907) 13 I. 116.

ARTICLE 9.

MANNER OF GIVING AND ENTERING JUDGMENT.

Cross ref. Judgment in action against executor or administrator: § 7592.

§ 6895. [4450] **Time for entering judgment.** When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within 24 hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. [R. S. § 4450.]

Hist. (See C. C. P. '81, § 418) R. S. § 4450, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judgment may be entered in term or vacation: § 6460. Entry of judgment made at chambers: 6494. Entry of judgment given in another county affecting title of real property: § 6669. Entry of judgment in controversy submitted without action: § 7306.

Cited: Buster v. Fletcher (1912) 22 I. 172, 125 P. 226; Darling v. Fremstadt (1912) 22 I. 684, 127 P. 674.

Duties of clerk: Duties of clerk after verdict discussed. Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116.

§ 6896. [4451] **Argument on reserved points.** When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument. [R. S. § 4451.]

Hist. (See C. C. P. '81, § 419) R. S. § 4451, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 665; Kerr's C. ib.

§ 6897. [4452] **Affirmative judgment for defendant.** If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly. [R. S. § 4452.]

Hist. (See C. C. P. '81, § 420) R. S. § 4452, reen. R. C. ib., reen. C. L. ib.

Cross ref. Counterclaims and cross complaints: §§ 6695-6699.

Comp. leg.—Cal. Same: C. C. P. 1872, § 666; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7679.

§ 6898. [4453] **Form of judgment.** In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery can not be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return can not be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or

currency, judgment for the plaintiff, whether it be by default or after verdict, or decision, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein, and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood or agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by the evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such a person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person. [R. S. § 4453.]

Hist. (See C. C. P. '81, § 421) R. S. § 4453, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judgment to be computed in dollars and cents: § 2550. Judgment on usurious contract: § 2554.

Comp. leg.—Cal. Same except the words "or decision" after "verdict" are omitted: C. C. P. 1872, § 667; Kerr's C. ib.

N. D. Similar: C. C. P. § 7682.

Judgment in claim and delivery: Where in claim and delivery the property has been delivered to the plaintiff and the defendants claim the return thereof, the judgment for the defendant may be for the return of the property or the value thereof, in case the return can not be had, and for damages for taking and withholding the possession of the same. Campbell v. First Nat. Bk. of Rexburg (1907) 13 I. 95, 88 P. 639. But this provision is not mandatory and the court has a discretion to omit from the judgment an order for the return of the property, where the substantial rights of both parties may be subserved thereby. Johnson v. Fraser (1888) 2 I. 404, 18 P. 48.

If on the trial plaintiff shows that he is entitled to the possession of the property, a judgment in the alternative must be entered for the possession of the property or the value thereof in case a delivery can not be had, and for damages for the detention. Bates v. Capital S. Bk. (1912) 21 I. 141, 121 P. 561.

§ 6899. Judgment book. The clerk must keep with the records of the court a book to be called a judgment book in which judgments must be entered, and a judgment shall be deemed to be entered when, being duly rendered, it is deposited in the office of the clerk of the court with the proper officer for entry, and upon such deposit the clerk shall indorse upon such judgment the date of the filing of the same under or following the word "entered." ['17, c. 110, p. 389.]

Hist. (See C. C. P. '81, § 422) R. S. § 4454, reen. R. C. ib.; am. '17, c. 110, p. 389, reen. C. L. § 4454.

Cross ref. Record of judgment affecting title to real property: §§ 3639, 5414.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 668; Kerr's C. ib.

N. D. Similar: C. C. P. § 7685.

Cited: Durant v. Comegys (1891) 3 I. 37, 35 A. S. R. 267, 26 P. 755; Buster v. Fletcher (1912) 22 I. 172, 125 P. 226; Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116.

Mandamus: Mandamus will lie to compel clerk to enter judgment. Santti v. Hartman (1916) 29 I. 490, 161 P. 249.

Effect of record: The clerk's record of the judgment here provided for is not only actual notice to the parties to the action who are named in the judgment, but it is constructive notice to both these and to persons in privity with them, if it is made to appear that the latter have succeeded to the same right or title adjudicated by the judgment. Smith v. Kessler (1912) 22 I. 589, 127 P. 172.

Entry must precede appeal: Appeal will not lie until judgment has been entered. Santti v. Hartman, supra.

§ 6900. [4455] **Death after verdict: Entry and effect of judgment.** If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration in his estate. [R. S. § 4455.]

Hist. (See C. C. P. '81, § 423) R. S. § 4455, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 669; Kerr's C. ib.

N. D. Similar: Pro. C. § 8808.

§ 6901. Judgment roll: Contents. Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment.

2. In all other cases, the pleadings, a copy of the verdict of the jury, or findings of the court, or referee, a copy of any order made on demurrer, or relating to a change of the parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision.

3. In case of service of the summons by publication and the jurisdiction of the court depends upon a seizure of property under writ of attachment, a copy of the affidavit for attachment, undertaking on attachment, or certificate of the clerk of the deposit of a cash bond, and writ of attachment and return thereon. ['09, p. 76, S. B. 98.]

Hist. (See C. C. P. '81, § 424) R. S. § 4456; reen. R. C. ib.; am. '09, p. 76, S. B. 98, reen. C. L. § 4456.

Cross ref. Judgment roll on writ of review: § 7252. Judgment roll in controversy submitted without action: § 7306. Judgment roll in proceedings for the dissolution of a corporation: § 7403.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 670; am. Kerr's C. ib. O'Neil v. Potvin (1907) 13 I. 721, 93 P. 20; Harpold v. Doyle (1909) 16 I. 671, 102 P. 158.

N. D. Analogous: C. C. P. § 7688.

Cited: Durant v. Comegys (1891) 3 I. 67, 35 A. S. R. 267, 26 P. 755; Vermont Loan and Trust Co. v. McGregor (1897) 5 I. 510; 51 P. 104; Applington v. G. V. B. Mining Co. (1898) 6 I. 216, 55 P. 241; Zion's Cooperative etc. Inst. v. Armstrong (1899) 6 I. 464, 56 P. 168; Walling v. Bown (1904) 9 I. 740, 76 P. 318; Williams v. Boise Basin M. etc. Co. (1905) 11 I. 233, 81 P. 646; U. S. v. Ramey (1907) 158 F. 488, 492; Fouch v. Bates (1910) 18 I. 374, 110 P. 265; Fairview Investment Co. v. Lamberson (1913) 25 I. 72, 82, 136 P. 606; Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116.

Matters constituting judgment roll: Paragraphs of a pleading which are stricken out remain, nevertheless, a part of the judgment roll and of the record on appeal. Warren v. Stoddard (1899) 6 I. 692, 59 P. 540. But a notice of motion to strike out a part of a pleading and the order granting the motion, form no part of the judgment roll. Graham v. Linehan (1880) 1 I. 780; Swanson v. Groat (1906) 12 I. 148, 85 P. 384.

Where no statement of the case or bill of exceptions has been settled by the lower court, the notice of intention to move for a new trial, the notice of settlement of statement, the order refusing such settlement and the purported statement and affidavits on motion for a new trial will be stricken from the transcript. Rich v. French (1893) 3 I. 727, 35 P. 173.

Affidavits purporting to show errors in impaneling the jury, and the instructions given on the trial, are no part of the judgment roll and such matters can only be reviewed when saved by a bill of exceptions. Crowley v. Croesus Gold etc. Min. Co. (1906) 12 I. 530, 86 P. 536.

Where the record in a divorce suit in which service was made by publication, fails to show that a copy of the summons was mailed to the defendant, as required by the order of publication, the court has no jurisdiction to enter a decree of divorce. Strode v. Strode (1898) 6 I. 67, 52 P. 161.

This section names the specific papers that go to make up the judgment roll. Under subd. 1 the affidavit for the order of publication and the order of publication do not constitute a part of the roll. O'Neill v. Potvin (1907) 13 I. 721, 93 P. 20; Harpold v. Doyle (1909) 16 I. 671, 102 P. 158.

The minutes of the court, as such, are not properly a part of the judgment roll, except in so far as they may contain any order or judgment, a copy of which is by statute made a part of the judgment roll. (On petition for rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696.

A bill of exceptions is not now made a part of the judgment roll, but that fact does not prevent it from becoming a part of the transcript on appeal from the judgment. Haas v. Teters (1911) 19 I. 182, 113 P. 96.

An order entered on the minutes denying the relief prayed for is no part of the judgment roll and can be brought before the supreme court only by incorporation in a bill of exceptions. Bissing v. Bissing (1911) 19 I. 777, 115 P. 827.

The affidavit of attachment, undertaking on attachment, the writ of attachment and the return to the writ of attachment, and notice of levy on real estate under the attachment are no part of the judgment roll or of the transcript. Though they are included in the transcript on appeal, they are not properly a part thereof where they are not contained in a bill of exceptions, and must, on motion, be stricken out. King v. Seebeck (1911) 20 I. 223, 118 P. 292.

The order denying motion to strike respondent's cost bill can not be reviewed

ecause it is not part of the judgment roll, or is it one of the papers required to be urnished to the court upon appeal, and it as not been incorporated in a bill of exceptions. Bell v. Stadler, 31 I. 568, 174 P. 29.

Copies of a motion for and of objections o the continuance of a trial, together with opies of affidavits in support and in opposition, and of the minutes of the court howing the motion was granted, are not art of the judgment roll. Bumpas v. Moore, 31 I. 668, 175 P. 339.

Instructions given or refused at the trial re not part of the judgment roll. Unless lleged errors in giving and refusing instructions are presented by the reporter's ranscript, they can only be reviewed when aved by a bill of exceptions. Crowley v. Croesus Min. Co., 12 I. 530, 86 P. 536; Minn. Threshing Machine Co. v. Peterson, 31 I. 745, 176 P. 99.

Collateral attack: In a collateral attack on a judgment the only evidence that is admissible in support of such attack is the judgment roll, and if that shows on its face the court had no jurisdiction to try the cause, the judgment is void. O'Neill v. Potvin (1907) 13 I. 721, 93 P. 20.

The default of the defendant in not answering should be indorsed upon the complaint; but if the clerk neglects to make such indorsement, it is a mere irregularity that can not be taken advantage of in a collateral attack on the judgment; and especially is that true where the judgment recites the fact that the default of the defendant was duly entered. Harpold v. Doyle (1909) 16 I. 671, 102 P. 158.

§ 6902. Docketing and lien of judgment. Immediately after filing he judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him, and from the ime the judgment is docketed it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, wned by him at the time or which he may afterwards acquire, until the ien expires. The lien continues for five years unless the judgment be reviously satisfied, or unless the enforcement of the judgment be stayed n appeal by the execution of a sufficient undertaking as provided in his code, in which case the lien of the judgment ceases. ['13, c. 22, 1, p. 91.]

Hist. (See C. C. P. '81, § 425) R. S. § 457, reen. R. C. ib.; am. '13, c. 22, § 1, p. 1, reen. C. L. § 4457.

Comp. leg.—Cal. Similar: C. C. P. 1872, 671; am. Kerr's C. ib.

N. D. Analogous: C. C. P. § 7691, 7697.

Cross ref. Entry and docket of judgment where there has been change of enue: § 6669. Lien of judgment against onresident owner of public utility: § 6682. n transcript of judgment lien is two ears: § 6905. Docketing abstract of judgent from justice's court: § 7119. Judgent against executor or administrator reates no lien: § 7592. In case of death fter verdict, subsequent judgment creates o lien: § 7594.

Cited: Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116; Moore v. Boise Land and Orchard Co., 31 I. 390, 173 P. 117.

Record as notice: The record in the clerk's docket here provided for is actual notice to the parties to the judgment, and is constructive notice to them and also to persons in privity with them, when the privity is shown. Smith v. Kessler (1912) 22 I. 589, 127 P. 172.

Extent of lien: Judgment lien can not be made effectual to bind or to convey any greater or other estate than the judgment debtor had at the time of the entry of the judgment. Donaldson v. Thousand Springs P. Co. (1916) 29 I. 735, 162 P. 334.

§ 6903. [4458] **Contents of judgment docket.** The docket mentioned in the last section is a book which the clerk keeps in his office ith each page divided into columns and headed as follows:

Judgment debtors; Judgment creditors; Judgment—time of entry; Where entered in judgment book; Appeals—when taken; Judgment of ppellate court; Satisfaction of judgment—when entered. If judgment e for the recovery of money or damages, the amount must be stated in he docket under the head of judgment; if the judgment be for any ther relief, a memorandum of the general character of the action or of he relief granted must be stated. The names of the defendants must e entered in alphabetical order. [R. S. § 4458.]

Hist. (See C. C. P. '81, § 426) R. S. § 458, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Substantially same: . C. P. 1872, § 672; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7699.

Cited: Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116; Witt v. Beals, 31 I. 84, 169 P. 182.

§ 6904. [4459] **Inspection of docket.** The docket kept by the clerk open at all times during office hours for the inspection of the public,

without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection. [R. S. § 4459.]

Hist. (See C. C. P. '81, § 427) R. S. § 4459, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 673; Kerr's C. ib.

Cited: Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116.

§ 6905. [4460] Transcript of docket. A transcript of the original docket certified by the clerk may be filed with the recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied, or unless the enforcement of the judgment be stayed upon appeal, as hereinbefore provided. [R. S. § 4460.]

Hist. (See C. C. P. '81, § 428) R. S. § 4460, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: Decree in inheritance tax proceedings may be filed hereunder without fee: § 3388. Certified copy of judgment may be recorded without further proof: § 5414. Lien of judgment five years: § 6902.

Comp. leg.—Cal. Same through "satisfied," rest omitted: C. C. P. 1872, § 674; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7691.

Cited: Lewis v. Warren etc. Furn. Co (1917) 31 I. 4, 168 P. 1142.

Creation of lien: It is not necessary, in order to create a lien upon the real estate of the judgment debtor, that the certified transcript of the original docket be recorded; the filing of the transcript to be recorded is sufficient to create the lien. Moore v. Taylor (1876) 1 I. 630.

§ 6906. [4461] Entry of satisfaction. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor; or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed.

Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it. [R. S. § 4461.]

Hist. (See C. C. P. '81, § 429) R. S. § 4461, reen. R. C. ib., reen. C. L. ib.

Cross ref. Attorney's lien on judgment: § 6576.

Comp. leg.—Cal. Same except the words "or by his indorsement on the face, or on the margin of the record of the judgment," in the first paragraph, and the words "or make such indorsement" after "acknowledgment" in the second paragraph, are omitted: C. C. P. 1872, § 675; same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7601.

Vacation of satisfaction: Upon motion made by the judgment creditor to vacate and set aside a satisfaction on the grounds that the necessary and requisite showing had not been made and presented to the clerk as required by the provisions of the statute, and upon the hearing of such motion the judgment debtor makes a showing that he has in fact paid the judgment, although the showing so made is not such as would authorize the clerk to enter satisfaction of judgment, it is made the duty of the court to hear, examine and consider such showing, and the evidence in support thereof, and if he finds that in fact the judgment has not been paid, he should thereupon either deny the motion or vacate such satisfaction, and himself make an order directing the entry of satisfaction of the judgment. Tanner v. Wood (1907) 13 I. 486, 90 P. 733.

Lien of attorney: A judgment in a foreclosure suit awarding attorney's fees to the judgment creditor may be collected in full by the judgment creditor, and satisfaction thereof may be entered by him in conformity with the provisions of this section, unless the attorney has previously given notice to the judgment debtor and taken steps for the purpose of establishing the equity of his lien and having the same lay hold upon the original judgment procured by him for the security and payment of the fees earned by him in obtaining the original judgment. Dahlstrom v. Featherstone (1910) 18 I. 179, 110 P. 24[illegible]

§ 6907. Judgments of federal courts: Lien. Judgments in the district court of the United States, if rendered in this state, may be made liens upon the real estate owned by the defendant, and also upon all

real estate he may subsequently acquire, the same as if obtained in the district court of the state, by filing an attested copy of the judgments in the office of the county recorder of the county in which the real estate is situated; and no lien shall attach to the lands or other realty in any county of this state until the date of filing such transcript. ['19, c. 27, § 1, p. 104.]

Hist. '90-91, p. 119, § 1, reen. '99, p. 80, § 1, reen. R. C. § 4462, reen. C. L. § 4462; am. '19, c. 27, § 1, p. 104.

Comp. leg.—N. D. Analogous: C. C. P. § 7696, 7697.

§ 6908. [4463] **Same: Fees for filing transcripts.** The recorder shall, on the filing of such transcript in his office, immediately proceed to record and index the same in a separate book for that purpose in the same manner as a judgment rendered in the court of his own county, and he shall be allowed to charge and receive the same fees as provided by law for like service. ['90-'91, p. 119, § 2.]

Hist. '90-91, p. 119, § 2, reen. '99, p. 80, 2, reen. R. C. § 4463, reen. C. L. ib.

§ 6909. [4464] **Same: Satisfaction of judgment.** When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing, referring to the judgment, duly acknowledged and filed in the office of the recorder of the county, in every county where the judgment is a lien. If he fails to do so within 60 days after having been requested in writing to do so, he shall forfeit to the defendant the sum of $50. ['90-'91, p. 119, § 3.]

Hist. '90-91, p. 119, § 3, reen. '99, p. 80, 3, reen. R. C. § 4464, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7701.

CHAPTER 257.

EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

ARTICLE 1.

THE EXECUTION.

Cross ref. Enforcement of judgment against counties; claim to be presented to commissioners: § 3401. Sale of corporate franchises on execution: §§ 4761-6. Sale of homestead on execution: §§ 5445-59. Actions on judgment limited to six years: § 6608.

§ 6910. [4470] **Time within which execution may issue.** The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. [R. S. § 4470.]

Hist. (See C. C. P. '81, § 430) R. S. § 470, reen. R. C. ib., reen. C. L. ib.

Cross ref. Execution may be issued on abstract of judgment from justice's court: 7120. Execution may issue on orders for the payment of money: § 7198. Execution not to issue on judgment against executor or administrator: § 7592.

Comp. leg.—Cal. Same: C. C. P. 1872, § 681; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7713.

Cited: Bashor v. Beloit (1911) 20 I. 592, 119 P. 55; Lewis v. Warren etc. Furn. Co. (1917) 31 I. 4, 168 P. 1142.

§ 6911. [4471] **Form of writ.** The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligently refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money, or currency, as provided in section 6898, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it must re quire the sheriff to satisfy the judgment, with interest, out of the per sonal property of such debtor, and if sufficient personal property ca not be found, then out of his real property; or if the judgment be a lie upon real property, then out of the real property belonging to him on th day when the judgment was docketed, or at any time thereafter; or i the execution be issued to a county other than the one in which th judgment was recovered, on the day when the transcript of the docke was filed in the office of the recorder of such county, stating such da or any time thereafter.

2. If it be against real or personal property in the hands of the per sonal representatives, heirs, devisees, legatees, tenants, or trustees, i must require the sheriff to satisfy the judgment, with interest, out o such property.

3. If it be against the person of the judgment debtor, it must re quire the sheriff to arrest such debtor and commit him to the jail of th county until he pay the judgment, with interest, or be discharged ac cording to law.

4. If it be issued on a judgment made payable in a specified kind o money or currency, as provided in section 6898, it must also require th sheriff to satisfy the same in the kind of money or currency in which th judgment is made payable, and the sheriff must refuse payment in an other kind of money or currency; and in case of levy and sale of prop erty of the judgment debtor, he must refuse payment from any pur chaser at such sale in any other kind of money or currency than tha specified in the execution. The sheriff collecting money or currenc in the manner required by this chapter, must pay to the plaintiff o party entitled to recover the same, the same kind of money or currenc received by him, and in case of neglect or refusal so to do, he shall b liable on his official bond to the judgment creditor in three times th amount of the money so collected.

5. If it be for the delivery of the possession of real or personal pro erty, it must require the sheriff to deliver the possession of the same, d scribing it, to the party entitled thereto, and may at the same time r quire the sheriff to satisfy any costs, damages, rents or profits reco ered by the same judgment, out of the personal property of the perso against whom it was rendered, and the value of the property for whic the judgment was rendered, to be specified therein, if a delivery there can not be had; and if sufficient personal property can not be foun then out of the real property, as provided in the first subdivision of th section. [R. S. § 4471.]

Hist. (See C. C. P. '81, § 431) R. S. § 4471, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sheriff must indorse time of reception on process: § 3596. Liability of sheriff for neglect or refusal to levy: § 3600. Sheriff is justified by and must execute process regular on its face: § 3607. Delivery of execution by sheriff to successor on expiration of term of office: § 3617. Discharge of lien of execution on the records after lien has been lost or destroyed: § 6816. Execution from justice's court to contain similar direction: § 7123.

Comp. leg.—Cal. Same: C. C. P. 1872, § 682; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7718.

Execution in replevin: The losing pa in an action of claim and delivery does n have the option of returning or paying t the property as he may elect; the prope must be returned in specie if it can done and it is only in case it can not be returned that the value thereof can paid. Johnson v. Fraser (1888) 2 I. 4 18 P. 48.

Costs and interest: The judgment sho include all costs at the date of entry a thereafter bears interest at 7% from su date on the full amount of the entire ju ment. Bashor v. Beloit (1911) 20 I. 5 119 P. 55.

§ 6912. [4472] **When returnable: Record in execution book.** T execution may be made returnable at any time not less than 10 nor mo

than 60 days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies in a book to be called the "Execution book," which book must be indexed with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public without charge. It is evidence of the contents of the originals whenever they, or any part thereof, may be destroyed, mutilated or lost. [R. S. § 4472.]

Hist. (See C. C. P. '81, § 432) R. S. § 472, reen. R. C. ib., reen. C. L. ib.

Cross ref. Return is prima facie evidence of facts: § 3598. Penalty for failure to return: § 3599. Return of process by sheriff after expiration of term of office: § 3619.

Comp. leg.—Cal. Same except words "destroyed or mutilated" for "destroyed, mutilated or lost" at end: C. C. P. 1872, § 683; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7719.

§ 6913. [4473] **Enforcement of judgment by execution.** When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part; when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court. [R. S. § 4473.]

Hist. (See C. C. P. '81, § 433) R. S. 4473, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C C. P. 1872, § 684; same now as amended: Kerr's ib.

N. D. Analogous: C. C. P. § 7714.

Cited: Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88.

Directions to officer: A writ which fails to direct proper officers to execute the judgment is not void. Wilson v. Gray (1897) 5 I. 218, 47 P. 942.

Amendment of writ: The recitals of the writ may be amended upon proper showing. Ib.

§ 6914. [4474] **Execution after five years.** In all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings. [R. S. § 4474.]

Hist. (See C. C. P. '81, § 434) R. S. § 474, reen. R. C. ib., reen. C. L. ib.

Cross ref. Limitation on judgment: § 4808.

Comp. leg.—Cal. Same: C. C. P. 1872, § 685; additional provisions as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7713.

Method not exclusive:. In abolishing the writ of scire facias and enacting a substitute therefor by the provisions of this section, the substitute was not intended to be the exclusive method by which a judgment might be revived or kept alive. Bashor v. Beloit (1911) 20 I. 592, 119 P. 55.

§ 6915. [4475] **Execution after death.** Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In the case of the death of the judgment creditor, upon the application of his executor or administrator or successor in interest.

2. In case of the death of the judgment debtor, if the judgment b for the recovery of real or personal property, or the enforcement of lien thereon. [R. S. § 4475.]

Hist. (See C. C. P. '81, § 435) R. S. § 4475, reen. R. C. ib., reen. C. L. ib.

Cross ref. Execution not to issue after death: § 7593.

Comp. leg.—Cal. Same: C. C. P. 1872, § 686; Kerr's C. ib.

N. D. Analogous: Pro. C. § 8746.

S. D. Similar: Comp. Codes § 5803.

Rose v. Dunbar (1911) 20 I, 1, 4, 115 920, Ann. Cas. 1912D 1046.

Application: A plain money judgme does not fall within the purview of th section; an execution to enforce it can n issue after the death of the judgme debtor. Rose v. Dunbar (1911) 20 I. 115 P. 920, Ann. Cas. 1912D, 1046.

§ 6916. [4476] **To whom directed.** Where the execution is agains the property of the judgment debtor it may be issued to the sheriff o any county in the state. Where it requires the delivery of real or pe sonal property it must be issued to the sheriff of the county where th property, or some part thereof, is situated. Executions may be issue at the same time to different counties. [R. S. § 4476.]

Hist. (See C. C. P. '81, § 436) R. S. § 4476, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 687; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7716.

§ 6917. [4477] **Property liable to seizure.** All goods, chattels, mo eys and other property, both real and personal, or any interest therei of the judgment debtor, not exempt by law, and all property and righ of property, seized and held under attachment in the action, are liab to execution. Shares and interest in any corporation or company, an debts and credits, and all other property both real and personal, o any interest in either real or personal property, and all other proper not capable of manual delivery, may be attached on execution in lik manner as upon writs of attachment. Gold dust must be returned b the officer as so much money collected, at its current value, without e posing the same to sale. Until a levy, property is not affected by th execution. [R. S. § 4477.]

Hist. (See C. C. P. '81, § 437) R. S. § 4477, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: Garnishee defined: § 6788.

Manner of levying attachments: § 4307. Toll properties subject to execution: § 1042.

Comp. leg.—Cal. Same: C. C. P. 1872, § 688; Kerr's C. ib.

N. D. Similar: C. C. P. § 7720.

Cited: Wells v. Price (1899) 6 I. 4 56 P. 266; Eggleson v. Rubin (1909) 16 92, 100 P. 765; (Dis. op.) Bacon v. F M. & S. Co. (1910) 19 I. 136, 148, 112 1055; The Mode v. Myers (1917) 30 I. 1 164 P. 91; Meier & Frank v. Bruce (191 30 I. 732, 168 P. 5.

§ 6918. Claim of property by third person. If the property levi on be claimed by a third party as his property by a written claim ve fied by the oath of said claimant, setting out his title thereto, his right the possession thereof, and stating the grounds of such title, and serv upon the sheriff, the sheriff is not bound to keep the property, unle the plaintiff, or the person in whose favor the writ of execution ru on demand, indemnify the sheriff against such claim by an undertaki by at least two good and sufficient sureties. ['13, c. 71, p. 308.]

Hist. (See C. C. P. '81, § 438) R. S. § 4478, reen. R. C. ib.; am. '13, c. 71, p. 308, reen. C. L. § 4478.

Cross ref. Express reference to this section: Applies to claim by third person of property attached: § 6805. Actions against sheriffs, notice to indemnitors: § 7235.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 689; amended: Kerr's C. ib. Smith v. Graham (1913) 25 I. 174, 176, 136 P. 801.

N. D. Analogous: C. C. P. § 7728.

Sheriff's jury: The verdict of a sheri jury had under this section (before amendment) is merely advisory to the ficer and for his protection and is not adjudicata. Smith v. Graham, supra.

Effect of accepting indemnity bo Where property levied upon by consta is claimed by stranger the officer is bound to proceed further with execution writ; but when he has demanded and

epted indemnity he is bound to proceed nd rely on his bond in indemnity. Smith v. Graham (1913) 25 I. 174, 136 P. 801; (1917) 30 I. 132, 164 P. 354.

§ 6919. [4479] **Exemption in favor of married woman.** All real and ersonal estate belonging to any married woman at the time of her mar- iage, or to which she subsequently becomes entitled in her own right, nd all the rents, issues and profits thereof, and all compensation due or wing for her personal services, is exempt from execution against her usband. [R. S. § 4479.]

Hist. (See C. C. P. '81, § 439) R. S. § 479, reen. R. C. ib., reen. C. L. ib.

Cross ref. Wife's separate property de- ied: § 4656. Wife's control of separate operty: § 4657; of her earnings: § 4667.

Cited: Hall v. Johns (1909) 17 I. 224, 5 P. 71; Wilkerson v. Aven (1914) 26 I. 9, 144 P. 1105.

Profits of wife's separate property: Un- r the provisions of this section the in- ease of a married woman's separate property (in this case consisting of cattle) is exempt from execution against her husband. Thorn v. Anderson (1900) 7. I. 421, 63 P. 592; Bk. of Nez Perce v. Pindel (1912) 193 F. 917, 113 C. C. A. 545.

The issues and profits arising from the investment of the separate property of the wife is not liable upon execution against her husband. Evans v. Kroutinger (1903) 9 I. 153, 72 P. 882, 2 Ann. Cas. 691; Humbird L. Co. v. Doran (1913) 24 I. 507, 135 P. 66.

§ 6920. Exemptions in general. In addition to the homestead ex- npted by the Civil Code, the following property belonging to an actual sident of the state is exempt from execution, except as herein other- ise specially provided:

1. Chairs, tables, desks and books to the value of $200, belonging the judgment debtor.

2. Necessary household, table and kitchen furniture belonging to e judgment debtor, including one sewing machine in actual use in a mily or belonging to a woman, stoves, stovepipe and stove furniture, ds, bedding and bedsteads, not exceeding in value $300; wearing ap- rel, hanging pictures, oil paintings and drawings, drawn or painted any member of the family, and family portraits and their necessary ames; provisions actually provided for individual or family use suffi- nt for six months; two cows with their sucking calves and two hogs ith their sucking pigs.

3. The farming utensils or implements of husbandry of a farmer not ceeding in value the sum of $300; also four oxen or four horses, or ur mules, to be selected by the claimant, and their harness, one cart wagon, and food for such oxen, horses or mules for six months; also water right not to exceed 160 inches of water, used for the irrigation lands actually cultivated by him; also the crop or crops growing or own on 50 acres of land, leased, owned or possessed by the person cul- ating the same: *Provided,* That in no case shall the amount of crops so empted exceed the value of $500.

4. Tools or implements of mechanic or artisan necessary to carry on s trade, not exceeding in value the sum of $500; the notarial seal and rec- ds of a notary public; the instruments and chest of a surgeon, physician, rveyor and dentist, necessary to the exercise of their professions, with ir scientific and professional libraries; the law professional libraries d office furniture of attorneys, counselors and judges, and the libraries ministers of the gospel.

5. The cabin or dwelling of a miner, not exceeding in value the sum $500; also his sluices, pipes, hose, windlass, derrick, cars, pumps and ls not exceeding in value $200; also one saddle animal and one pack imal together with their saddles and equipments belonging to a miner ac- lly engaged in prospecting, not exceeding in value $250.

6. Two oxen, two horses, or two mules and their harness; and one t, wagon, dray or truck, by the use of which a cartman, drayman, truck-

man, huckster, peddler, hackman, teamster or other laborer habitually earns a living; and one horse with vehicles and harness or other equipments used by a physician, surgeon or minister of the gospel in making his professional visits, with food for such oxen, horses or mules for six months.

7. Seventy-five per cent of the earnings of a judgment debtor for his personal services rendered at any time within 30 days next preceding the levy of the execution, or levy of attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family residing in this state, supported wholly or in part by his labor: *Provided,* That if the garnishment be founded upon a debt for actual necessaries furnished to the defendant or his family or his dependents, no exemption shall be allowed in excess of 50 per cent of any wages or salary due the defendant at time of the service of execution or attachment: *Provided further,* That in no case shall the amount of such exemption of earnings exceed the sum of $100 at any one time.

8. The shares held by the members of a homestead association or building or loan association duly incorporated under the laws of the state of Idaho, not exceeding in value $1000, if the person holding the shares is not the owner of a homestead under the laws of this state.

9. All moneys, benefits, privileges or immunities accruing or in any manner growing out of any life insurance on the life of the debtor to an amount represented by an annual premium not exceeding $250.

10. All fire engines, hooks and ladders with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state.

11. All arms, uniforms and accoutrements required by law to be kept by any person, also one gun.

12. All courthouses, jails, public offices and buildings, schoolhouses, lots, grounds and personal property appertaining thereto, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the courthouse, jail and public offices belonging to any county of this state, or for the use of schools, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and ground thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state. No article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon. [C. L. § 4480.]

Hist. (See C. C. P. '81, § 440) R. S. § 4480; am. '95, p. 85, § 1, reen. '99, p. 251, § 1, reen. R. C. § 4480; am. '13, c. 60, p. 245; am. '15, c. 24, § 1, p. 76; compiled and reen. C. L. § 4480.

Cross ref. Fraternal insurance benefits exempt from attachment and execution: § 5167. Exemption of homestead: § 5440; same, to what judgments subject: § 5441; same, sale of homestead: §§ 5445-59. Preference of claims for wages over executions and attachments: § 7378.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 690; amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7730. See also C. C. P. §§ 7731, 7732, 7733, 7736, 7737, 7738, 7739, 7740, 7741, 7742.

Federal homestead: Under the provisions of § 2296 U. S. R. S. lands acquired under the provisions of the homestead law of the U. S. are not liable to the satisfaction of any debt contracted prior to the issuing final certificate for patent. Rudd v. Rossi (1916) 28 I. 376, 154 P. 977, rev. 248 U. S. 104, 63 L. ed. 41; Fidelity S. B. v. Miller (1916) 29 I. 777, 162 P. 244.

Cited: Gans v. Steele (1900) 7 I. 14, 61 P. 286; Kindall v. Lincoln Hdw. & Im. Co. (1902) 8 I. 664, 70 P. 1056; Cady v. Keller (1916) 28 I. 368, 370, 154 P. 629.

Claim made under wrong section: An exemption under this section will be allowed, even though mistakenly claimed under § 6919. Bk. of Nez Perce v. Pine (1912) 193 F. 917, 113 C. C. A. 545.

Who are residents: A person living with his family on an Indian reservation within the limits of the state, although a tr

passer thereon, is nevertheless a resident of the state and entitled to the benefit of the exemption laws as such. Coey v. Cleghorn (1904) 10 I. 166, 79 P. 72.

Mechanic's exemptions: A polyartist or jack of all trades may claim exemption of tools appropriate to more than one trade if he uses them in his business and the total value does not exceed the statutory limit. Re Robinson (1913) 206 F. 176.

An electric motor and lathe may properly be classed as implements and exempt under this section when used by a mechanic in his business. Ib.

Teamster's exemption: A party claiming a teamster's exemption must be an actual resident of the state, and must be, at the time of the claim, a teamster using his team habitually as a means of livelihood. O'Connor v. Langdon (1891) 3 I. 61, 26 P. 659.

One who has purchased horses and a wagon with the intention of engaging in the business of a teamster is entitled to claim them as exempt against an attachment issued while he is negotiating for the purchase of the remainder of his outfit and before he has actually started in business as a teamster. Cleveland v. Andrews (1896) 5 I. 65, 46 P. 1025.

Exemption of wages: The act of a debtor in procuring a third person to draw the debtor's wages from his employer and to hold them subject to the call of the debtor does not constitute such commingling of the wages with other funds to defeat the debtor's right of exemption. Elliott v. Hall (1892) 3 I. 421, 31 I. 796, 35 A. S. R. 285.

Estoppel to claim exemption: The fact that a debtor disclaims ownership of property at the time of the levy of an attachment thereon does not estop him to afterward claim the property as exempt, where he did not in any way advise, consent or agree to the levy and did not mislead the officer or prevent him from making the levy. Coey v. Cleghorn, supra.

Release of exempt property: After the sheriff has returned an execution he has no authority to release the property levied on, on the ground that it is exempt, but such a release can only be obtained by order of the court or judge. Roth v. Duvall (1867) 1 I. 149.

§ 6921. [4481] **Execution of writ.** The sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs. [R. S. § 4481.]

Hist. (See C. C. P. '81, § 441) R. S. § 481, reen. R. C. ib., reen. C. L. ib.

Cross ref. Penalty for neglect or refusal of sheriff to pay over money: § 3601. Levy on deposits of securities made by surety company: §5104. In case of attachment judgment to be satisfied out of attached property: § 6806. When defendant dies after execution issued the officer must account to the executor or administrator for any surplus: § 7593.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 691; now same as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7723.

Execution by constable: Where a constable seizes property under an attachment he may sell the attached property under an execution issued on the same and directed to the sheriff of the county. Pecotte v. Oliver (1886) 2 I. 251, 10 P. 302.

§ 6922. [4482] **Sale of property: Notice.** Before the sale of the property on execution notice thereof must be given as follows:

1. In case of perishable property, by posting a written notice of the time and place of sale in three public places of the precinct or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property, by posting a similar notice in three public places in the precinct or city where the sale is to take place for not less than five nor more than 10 days before the time set for the sale, or by publishing a copy thereof at least one week, and not more than two weeks, in a newspaper published in the county, if there be one.

3. In case of real property, by posting a similar notice particularly describing the property, for 20 days, in three public places in the precinct or city where the property is situated, and also where the property

is to be sold, and by publishing a copy thereof once a week for the same period before the time set for the sale, in a newspaper published in the county, if there be one. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. ['07, p. 30, § 1.]

Hist. (See C. C. P. '81, § 442) R. S. § 4482; am. '95, p. 40, § 1, reen. '99, p. 243, § 1; am. '01, p. 156, § 1; am. '07, p. 30, § 1, reen. R. C. § 4482, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 692; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7744-5.

Cited: (Dis. op.) First Nat. Bk. of Pocatello v. Bunting & Co. (1900) 7 I. 387, 63 P. 694.

Sufficiency of notice: Notice of sale of real estate levied upon by execution may be made either by posting notices or by publication, in the discretion of the sheriff or the attorney for the execution plaintiff. Ollis v. Kirkpatrick (1891) 3 I. 247, 28 P. 435.

§ **6923.** [4483] **Sale without notice: Penalty.** An officer selling without the notice prescribed by the last section forfeits $500 to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale) forfeits $500. [R. S. § 4483.]

Hist. (See C. C. P. '81, § 443) R. S. § 4483, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 693; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7745.

Cited: Hole v. Van Duzer (1905) 11 I. 79, 81 P. 109.

§ **6924.** [4484] **Conduct of sale.** All sales of property under execution must be made at auction, to the highest bidder, between the hours of 9 in the morning and 5 in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase, at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions. [R. S. § 4484.]

Hist. (See C. C. P. '81, § 444) R. S. § 4484, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 694; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7747.

Conduct of sale: An execution sale in a lump of a tract of land consisting of three separate lots, either of which was worth many times the amount of the bid, should be set aside. Ollis v. Kirkpatrick (1891) 3 I. 247, 28 P. 435.

The question as to whether or not several lots or tracts or parcels of land have been sold together under one bid instead of separately is a question properly to be presented to the court from which the execution issued and on motion to set aside the sale for the irregularity. It can not be raised for the first time on appeal either in the same or a collateral proceeding. Foore v. Simon Piano Co. (1910) 18 I. 167, 108 1038.

Order of sale: A defendant has the right to direct the order in which property levied upon shall be sold. An injunction order obtained in a proceeding to which the defendant was not a party, and which he had no notice, directing that property levied upon be sold in an order different from that directed by the defendant is void as to the defendant, and can not deprive him of his statutory right. Wood v. Jameson (1897) 5 I. 466, 50 P. 1008.

Setting aside sale: The proper remedy to set aside a judicial sale which has been wrongfully made, prior to the execution of the sheriff's deed, is by motion in the principal action. Notice of the motion should be served upon the adverse party and upon the purchaser. Ib.

§ 6925. [4485] **Refusal to pay purchase money: Resale.** If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. [R. S. 4485.]

Hist. (See C. C. P. '81, § 445) R. S. § 85, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 695; Kerr's C. ib.

§ 6926. [4486] **Same: Officer may reject bid.** When a purchaser refuses to pay the officer may, in his discretion, thereafter reject any subsequent bid of such person. [R. S. § 4486.]

Hist. (See C. C. P. '81, § 446) R. S. § 86, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 696; same as amended: Kerr's C. ib.

§ 6927. [4487] **Limitation of officer's liability.** The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay. [R. S. § 4487.]

Hist. (See C. C. P. '81, § 447) R. S. § 87, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 697; Kerr's C. ib.

§ 6928. [4488] **Delivery of property to purchaser.** When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. [R. S. § 4488.]

Hist. (See C. C. P. '81, § 448) R. S. § 88, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 698; Kerr's C. ib.

§ 6929. [4489] **Certificate of sale.** When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. [R. S. § 4489.]

Hist. (See C. C. P. '81, § 449) R. S. § 89, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 699; Kerr's C. ib.

§ 6930. [4490] **Same: Real property.** Upon a sale of real property the purchaser is substituted to, and acquires all the right, title, interest and claim of the judgment debtor thereto; and all his right, title, interest and claim thereto at any time during any subsisting lien thereon by attachment in the action, or by the docketing of the judgment. When the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption, it must be so stated. And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate

of such certificate must be filed for record by the officer in the office the recorder of the county. [R. S. § 4490.]

Hist. (See C. C. P. '81, § 450) R. S. § 4490, reen. R. C. ib. reen. C. L. ib.

Cross ref. Record of certificates of sale: § 3638.

Comp. leg.—Cal. Same except the words "and all his right, title, interest and claim thereto at any time during any subsisting lien thereon by attachment in the action, or by the docketing of the judgment" are omitted: C. C. P. 1872, § 700; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7751.

Cited: Lawyer v. Post, 109 F. 512, 47 C. A. 491.

Redemption: Federal court may up foreclosure of mechanic's lien decree s as an entirety and without redemptio notwithstanding state statute allowing r demption. Continental etc. Bk. v. Cor Bros. Const. Co. (1913) 208 F. 976, 126 C. A. 64.

§ **6931.** [4490a] **Execution of deed by successor in office.** When th sheriff who has sold any real estate shall die, resign, be removed fro office, or his term of office expire, before executing any good and suf cient deed for such real estate, such deed may be executed by the su cessor in office of such sheriff with the same effect to all intents an purposes as if made by the sheriff making the sale. ['95, p. 20, § 1.]

Hist. '95, p. 20, § 1, reen. '99, p. 235, § 1, reen. R. C. § 4490a, reen. C. L. ib.

N. D. Analogous: C. C. P. § 7764.

§ **6932. Redemption: By whom made.** Property sold subject to r demption, as provided in section 6930, or any part sold separately, ma be redeemed in the manner hereinafter provided, by the followin persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the who or any part of the property.

2. A creditor having a lien by judgment or mortgage on the pro erty sold, or some share or part thereof, subsequent to that on which th property was sold. The persons mentioned in the second subdivisio of this section are, in this chapter, termed redemptioners. [C. § 4491.]

Hist. (See C. C. P. '81, § 451) R. S. § 4491, reen. R. C. ib.; compiled and reen. C. L. § 4491.

Comp. leg.—Cal. Same: C. C. P. 1872, § 701, Kerr's C. ib.

N. D. Analogous: C. C. P. § 7753.

Cited: (Dis. op.) Kelley v. Clark (191 23 I. 17, 129 P. 921, Ann. Cas. 1914C 6 Hewitt v. Walters (1911) 21 I. 1, 119 705, Ann. Cas. 1913C 35.

§ **6933.** [4492] **Same: How made.** The judgment debtor or r demptioner may redeem the property from the purchaser within o year after the sale on paying the purchaser the amount of his purcha with 10 per cent thereon in addition, together with the amount of a assessment or taxes which the purchaser may have paid thereon aft the purchase, and interest on such amount; and, if the purchaser be al a creditor having a prior lien to that of the redemptioner, other th the judgment under which such purchase was made, the amount of su lien with interest. ['95, p. 34, § 1.]

Hist. (See C. C. P. '81, § 452) R. S. § 4492; am. '95, p 34, § 1, reen. '99, p. 241, § 1, reen. R. C. § 4492, reen. C. L. ib.

Comp. leg.—Cal. Same except "six months" for "one year," and "12" for "10": C. C. P. 1872, § 702; further amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7754.

Cited: Kelley v. Clark (1912) 23 I. 1, 129 P. 921, Ann. Cas. 1914C 665.

Construction of amendment: T amendment of this section which exte the period of redemption from six mon to one year does not apply to mortga executed prior to its passage, but as to s mortgages only six months is allowed redemption. Wilder v. Campbell (18 4 I. 695, 43 P. 677.

§ **6934.** [4493] **Same: Subsequent redemptions.** If property be redeemed by a redemptioner another redemptioner may, within 60 da after the last redemption and within one year after the sale, again deem it from the last redemptioner on paying the sum paid on su

ast redemption with 4 per cent thereon in addition, and the amount of ny assessment or taxes which the last redemptioner may have paid ereon, after the redemption by him with interest on such amount, nd in addition the amount of any liens held by said last redemptioner rior to his own, with interest; but the judgment under which the prop-rty was sold need not be so paid as a lien.

The property may be again, and as often as a redemptioner is so dis-osed, redeemed from any previous redemptioner, within 60 days after ie last redemption and within one year after the sale, on paying the im paid on the last previous redemption with 4 per cent thereon in ad-ition, and the amount of any assessments or taxes which the last pre-ous redemptioner paid after the redemption by him, with interest ereon, and the amount of any liens, other than the judgment under hich the property was sold, held by the last redemptioner previous to is own, with interest.

Written notice of redemption must be given to the sheriff and a dup-cate filed for record with the recorder of the county; and, if any taxes assessments are paid by the redemptioner, or if he has or acquires any en other than that upon which the redemption was made, notice there-must in like manner be given to the sheriff and filed with the re-order, and if such notice be not filed, the property may be redeemed ithout paying such tax, assessment or lien.

If no redemption be made within one year after the sale, the pur-aser or his assignee is entitled to a conveyance, or, if so redeemed, henever 60 days have elapsed and no other redemption has been ade, and notice thereon given, the time for redemption by a redemp-oner has expired, and the last redemptioner or his assignee is entitled a sheriff's deed at the expiration of one year after the sale; but in all ses the judgment debtor shall have the entire period of one year from e date of the sale to redeem the property.

If the judgment debtor redeem he must make the same payments as e required to effect a redemption by a redemptioner.

If a debtor redeem, the effect of the sale is terminated and he is re-ored to his estate.

Upon a redemption by the debtor, the person to whom the payment made must execute and deliver to him a certificate of redemption, ac-nowledged and proved before an officer authorized to take acknowl-gments of conveyances of real property.

Such certificate must be filed and recorded in the office of the re-rder of the county in which the property is situated, and the recorder ust note the record thereof in the margin of the record of the certifi-te of sale. ['95, p. 34, § 1.]

Hist. (See C. C. P. '81, § 453) R. S. § 3; am. '95, p. 34, § 1, reen. '99, p. 241, reen. R.C. § 4493, reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. 1872, § 703; further amended: Kerr's ib.

N. D. Analogous: C. C. P. § 7755.

Cited: Kelley v. Clark (1912) 23 I. 1, 129 P. 921, Ann. Cas. 1914C 665.

§ 6935. Redemption money: To whom paid and how payable. The yments mentioned in the last two sections may be made to the pur-aser or redemptioner, or for him, to the officer who made the sale, or his successor in office. When the judgment under which the sale has en made is payable in a specified kind of money or currency, pay-ents must be made in the same kind of money or currency, and a nder of the money is equivalent to payment. ['11, c. 88, p. 334.]

Hist. (See C. C. P. '81, § 454) R. S. § 4494, reen. R. C. ib.; am. '11, c. 88, p. 334, reen. C. L. § 4494.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 704; Kerr's C. ib. Kelley v. Clark (1912) 23 I. 1, 129 P. 921, Ann. Cas. 1914C 665.

N. D. Similar: C. C. P. § 7759. See C. C. P. § 7756.

Refusal to accept tender: If within the proper time the mortgagor or his assi make a bona fide tender of the amo necessary to redeem after foreclosure, purchaser, if he rejects, acts at his pe since the tender is not required to be k alive, being equivalent to payment, wh discharges the lien; still, if the rejectio reconsidered within a few hours, equ would suggest that the purchaser be lowed to accept the tender. Kelley v. Cl supra.

§ 6936. [4495] **Redemptioner must serve papers.** A redemption must produce to the officer or person from whom he seeks to redee and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims t right to redeem, certified by the clerk of the court, or recorder of t county where the judgment is docketed or filed, or if he redeem upon mortgage or other lien, a note of the record thereof, certified by t recorder.

2. A copy of any assignment necessary to establish his claim, ve fied by the affidavit of himself or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then a tually due on the lien. [R. S. § 4495.]

Hist. (See C. C. P. '81, § 455) R. S. § 4495, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "or filed" omitted: C. C. P. 1872, § 7 Kerr's C. ib.

N. D. Similar: C. C. P. § 7760.

§ 6937. [4496] **Court may restrain waste.** Until the expiration the time allowed for redemption, the court may restrain the commissi of waste on the property, by order granted with or without notice, the application of the purchaser or the judgment creditor. But it is n waste for the person in possession of the property at the time of sa or entitled to possession afterward, during the period allowed for demption, to continue to use it in the same manner in which it was pr viously used; or to use it in the ordinary course of husbandry; or to ma the necessary repairs of buildings thereon; or to use wood or timber the property therefor; or for the repair of fences; or for fuel in family, while he occupies the property. [R. S. § 4496.]

Hist. (See C. C. P. '81, § 456) R. S. § 4496, reen. R. C. ib., reen. C. L. ib.

Cross ref. Injunction to prevent injury to real property pending foreclosure: § 6967.

Comp. leg.—Cal. Same: C. C. P. 1872, § 706; Kerr's C. ib.

N. D. Identical: C. C. P. § 7761.

Title of purchaser: The purchaser real estate sold under execution does acquire title, and is not entitled to poss sion until the time for redemption has pired. Cantwell v. McPherson (1893) 721, 34 P. 1095.

§ 6938. [4497] **Right to rents and profits.** The purchaser, from t time of the sale until a redemption, and a redemptioner from the ti of his redemption until another redemption, is entitled to receive, fr the tenant in possession, the rents of the property sold, or the value the use and occupation thereof. But when any rents or profits ha been received by the judgment debtor or purchaser, or his or their signs, from the property thus sold preceding such redemption, t amount of such rents and profits shall be a credit upon the redempti money to be paid; and if the redemptioner or judgment debtor, bef the expiration of the time allowed for such redemption, demands writing of such purchaser, or creditor, or his assigns, a written a verified statement of the amounts of such rents and profits thus receiv the period for redemption is extended five days after such sworn sta ment is given by such purchaser or his assigns, to such redemptioner debtor. If such purchaser or his assigns shall, for a period of one mo

om and after such demand, fail or refuse to give such statement, such demptioner or debtor may, within 60 days after said demand, bring an tion in any court of competent jurisdiction, to compel an accounting id disclosure of such rents and profits, and until 15 days from and ter the final determination of such action the right of redemption is tended to such redemptioner or debtor. [R. S. § 4497.]

Hist. (See C. C. P. '81, § 457) R. S. § 97, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, '07; Kerr's C. ib.

N. D. Similar: C. C. P. § 7762.

§ 6939. [4498] **Failure of title: Revival of judgment.** If the purchaser of real property sold on execution, or his successor in interest, evicted therefrom in consequence of irregularities in the proceedings ncerning the sale, or of the reversal or discharge of the judgment, he ay recover the price paid, with interest, from the judgment creditor. the purchaser of property at sheriff's sale, or his successor in interest, il to recover possession in consequence of irregularity in the proceedgs concerning the sale, or because the property sold was not subject to ecution and sale, the court having jurisdiction thereof must, after noe and on motion of such party in interest, or his attorney, revive the iginal judgment in the name of the petitioner, for the amount paid by ch purchaser at the sale, with interest thereon from the time of payent at the same rate that the original judgment bore; and the judgent so revived has the same force and effect as would an original judgent of the date of the revival, and no more. [R. S. § 4498.]

list. (See C. C. P. '81, § 458) R. S. § 8, reen. R. C. ib., reen. C. L. ib.

omp. leg.—Cal. Same: C. C. P. 1872, 08; Kerr's C. ib.

. D. Analogous: C. C. P. § 7768.

ited: Cantwell v. McPherson (1892) 321, 29 P. 102; Lewiston Nat. Bk. v. ft (1898) 6 I. 104, 53 P. 271; Diamond v. Van Meter (1910) 18 I. 243, 108 P. 2, 21 Ann. Cas. 1273.

'etition for revivor: A petition to reve a judgment may be filed where there n absolute failure of title to land sold at riff's sale by reason of a cancellation the entry under which the land was sold, no patent therefor having been issued. Cantwell v. McPherson, supra.

Accrual of right: A proceeding to revive a judgment does not accrue so as to set the statute of limitations in motion until the period of redemption has expired and the sheriff's deed has been executed. Ib. Where the defect of title through which the purchaser fails to obtain possession consists in the cancellation of the public land entry under which the land was held when it was sold, the cause of action for the revival of judgment does not arise so as to set the statute of limitations in motion until the cancellation of the entry. Ib.

§ 6940. [4499] **Contribution between joint debtors.** When upon an ecution against several persons more than a due proportion of the lgment is satisfied out of the proceeds of the sale of the property of e of them, or one of them pays, without a sale, more than his proporn, he may compel contribution from the others; and when a judgment against several, and is upon an obligation of one of them, as security another, and the surety pays the amount, or any part thereof, either sale of his property or before sale, he may compel repayment from principal. In such case the person so paying or contributing is ened to the benefit of the judgment to enforce contribution or repaynt, if, within 10 days after his payment, he file with the clerk of the urt where the judgment was rendered, notice of his payment and im to contribution or repayment. Upon a filing of such notice the rk must make an entry thereof in the margin of the docket. [R. S. § 499.]

list. (See C. C. P. '81, § 459) R. S. § 9, reen. R. C. ib., reen. C. L. ib.

omp. leg.—Cal. Similar: C. C. P. 1872, 9; Kerr's C. ib.

. D. Analogous: Civ. C. 5768.

Remedy cumulative: The provisions of this statute are cumulative but not exclusive, to compel contribution. Dunn v. Stufflebeam (1910) 17 I. 559, 106 P. 1129.

Procedure: In proceedings between

joint judgment debtors where one seeks to compel the other to pay his proportionate share of the judgment and applies to the court for an order directing an execution to issue, it may enter such an order but it has no authority to enter a judgm against the judgment debtor for the p portionate part of the judgment he sho pay. Dunn v. Stufflebeam (1910) 17 559, 106 P. 1129.

ARTICLE 2.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

Cited: Boise Butcher Co. v. Anixdale (1914) 26 I. 483, 144 P. 337.

§ 6941. [4504] **Order for examination of defendant.** When an ex cution against property of the judgment debtor or of any of sever debtors in the same judgment, issued to the sheriff of the county whe he resides, or if he do not reside in this state, to the sheriff of the coun where the judgment roll is filed, is returned unsatisfied in whole or part, the judgment creditor, at any time after such return is made, entitled to an order from the judge of the court requiring such judgme debtor to appear and answer upon oath concerning his property, befo such judge, or a referee appointed by him, at a time and place specifi in the order; but no judgment debtor must be required to attend befo a judge or referee out of the county in which he resides. [R. S. § 4504

Hist. (See C. C. P. '81, § 460) R. S. § 4504, reen. R. C. ib., reen. C. L. ib.

Cross ref. This chapter applies to justices' courts: § 7126. Supplementary proceedings in attachment suits: § 6808.

Comp. leg.—Cal. Similar: C. C. P. 18 § 714; now substantially same: Kerr's C.

N. D. Analogous: C. C. P. § 7777.

Cited: Spaulding v. Coeur d'Alene etc. Co. (1899) 6 I. 638, 59 P. 426.

§ 6942. [4505] **Same: Proceedings to compel appearance.** Aft the issuing of an execution against property, and upon proof by affida of a party or otherwise, to the satisfaction of the court or of a jud thereof, that any judgment debtor has property which he unjustly fuses to apply toward the satisfaction of the judgment, such court judge may, by an order, require the judgment debtor to appear at specified time and place before such judge, or a referee appointed him, to answer upon oath concerning the same; and such proceedi may thereupon be had for the application of the property of the juc ment debtor toward the satisfaction of the judgment, as are provid upon the return of an execution. Instead of the order requiring the tendance of the judgment debtor, the judge may upon affidavit of judgment creditor, his agent or attorney, if it appear to him that th is danger of the debtor absconding, order the sheriff to arrest the deb and bring him before such judge. Upon being brought before the jud he may be ordered to enter into an undertaking, with sufficient sure that he will attend from time to time before the judge or referee, as m be directed during the pendency of proceedings and until the fi termination thereof, and will not in the meantime dispose of any port of his property not exempt from execution. In default of entering i such undertaking he may be committed to prison. [R. S. § 4505.]

Hist. (See C. C. P. '81, § 461) R. S. § 4505, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Substantially same: C. C. P. 1872; § 715; now similar: K C. ib.

N. D. Analogous: C. C. P. § 7777.

§ 6943. [4506] **Defendant's debtor may satisfy execution.** A the issuing of an execution against property and before its return, person indebted to the judgment debtor may pay to the sheriff amount of his debt, or so much thereof as may be necessary to sati the execution; and the sheriff's receipt is a sufficient discharge for amount so paid. [R. S. § 4506.]

Hist. (See C. C. P. '81, § 462) R. S. § 4506, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 716; Kerr's C. ib.

N. D. Similar: C. C. P. § 7778.

§ 6944. [4507] **Examination of defendant's debtors.** After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has money or property of such judgment debtor, or is indebted to him in an amount exceeding $50, the judge may, by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same. [R. S. § 4507.]

Hist. (See C. C. P. '81, § 463) R. S. § 507, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "money" omitted: C. C. P. 1872, § 717; Kerr's ib.

N. D. Similar: C. C. P. § 7779.

Cited: Spaulding v. Coeur d'Alene Ry. etc. Co. (1899) 6 I. 638, 59 P. 426.

§ 6945. [4508] **Witnesses required to appear.** Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this article in the same manner as upon the trial of an issue. [R. S. § 4508.]

Hist. (See C. C. P. '81, § 464) R. S. § 508, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 718; Kerr's C. ib.

N. D. Similar: C. C. P. § 7780.

Cited: Spaulding v. Coeur d'Alene Ry. etc. Co. (1899) 6 I. 638, 59 P. 426.

§ 6946. [4509] **Property applied to satisfy execution.** The judge or referee may order any money or property of a judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment. [R. S. § 4509.]

Hist. (See C. C. P. '81, § 465) R. S. § 509, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "money or" omitted: C. C. P. 1872, § 719; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7782.

Cited: Spaulding v. Coeur d'Alene Ry. etc. Co. (1899) 6 I. 638, 59 P. 426.

§ 6947. [4510] **Proceedings against defendant's debtor.** If it appears that a person or corporation, alleged to have money or property of the judgment debtor, or to be indebted to him, claims an interest in the money or property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just. [R. S. § 510.]

Hist. (See C. C. P. '81, § 466) R. S. § 510, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "money or" omitted: C. C. P. 1872, § 720: Kerr's C. ib.

N. D. Similar: C. C. P. § 7785.

Cited: Simpson v. Remington (1899) 6 I. 581, 59 P. 360.

Proceedings against garnishee: Where a garnishee claims an interest in the property adverse to the judgment debtor, the court may authorize the judgment creditor to institute an action for the recovery of such interest, but cannot enter on a hearing on the issue involved, proceed to determine the same and appoint a receiver to take charge of the property and subject it to the satisfaction of the judgment. Spaulding v. Coeur d'Alene Ry. etc. Co. (1899) 6 I. 638, 59 P. 426.

A judgment creditor may maintain a creditor's bill to reach property in the hands of a third person where such third person claims an interest in the property under a bill of sale from the judgment debtor, so that supplementary proceedings under this section would be ineffectual. Gordon v. Lemp (1901) 7 I. 677, 65 P. 444.

Complaint: Procedure: A complaint on a judgment brought against a person alleged to have money of the judgment debtor in her possession, under the authority of the order provided for in this section, which substantially shows that the judgment was rendered by a court of compe-

tent jurisdiction, its date, amount and the parties thereto, and then alleges facts showing that proper proceedings under the provisions of this article providing for proceedings supplementary to execution had been taken, that the order provided for in this section had been duly obtained, and further alleges that the defendant ha money belonging to the judgment creditc subject to execution in her possession, i sufficient when tested by a general demur rer. Boise Butcher Co. v. Anixdale (1914 26 I. 483, 144 P. 337.

§ 6948. [4511] Disobedience of orders a contempt. If any person party or witness disobey an order of the referee properly made in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt. [R. S. § 4511.]

Hist. (See C. C. P. '81, § 467) R. S. § 4511, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 721; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7788.

CHAPTER 258.

ACTIONS IN PARTICULAR CASES.

ARTICLE 1.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES AND OTHER LIENS.

Note: The title of this article was changed in Compiled Laws to include other lien on the authority of Farnsworth v. Pepper (1915) 27 I. 159, 148 P. 48.

Cross ref: Attorney general to foreclose school fund mortgages: § 2973. Fore closure of water contracts on Carey act lands: § 3018-28. Foreclosure of chattel mort gages, action authorized: § 6379; by notice and sale: §§ 6380-4; contest of foreclosure § 6385. Judgment of foreclosure to be recorded with deeds: § 3639.

§ 6949. [4520] Proceedings in foreclosure. There can be but one action for the recovery of any debt, or the enforcement of any right se cured by mortgage upon real estate or personal property, which actio must be in accordance with the provisions of this chapter. In such ac tion the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the applicatio of the proceeds of the sale to the payment of the costs of the court an the expenses of the sale, and the amount due to the plaintiff; and sale of real estate under judgments of foreclosure of mortgages and liens ar subject to redemption as in the case of sales under execution; and if i appear from the sheriff's return that the proceeds are insufficient, and balance still remains due, judgment can then be docketed for such bal ance against the defendant or defendants personally liable for the debt and it becomes a lien on the real estate of such judgment debtor, as i other cases on which execution may be issued.

No person holding a conveyance from or under the mortgagor of th property mortgaged, or having a lien thereon, which conveyance or lie does not appear of record in the proper office at the commencement o the action, need be made a party to such action; and the judgmen therein rendered, and the proceedings therein had, are as conclusiv against the party holding such unrecorded conveyance or lien as if h had been made a party to the action. [R. S. § 4520.]

Hist. (See C. C. P. '81, § 468) R. S. § 4520, reen. R. C. ib., reen. C. L. ib.

Cross ref: Mortgages in general: §§ 6355-69. Chattel mortgages: §§ 6363-87. Real estate mortgages: §§ 6370-2. Actions to enforce mortgages against the property of a decedent's estate: § 7588.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 726; different as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8099. See also: C. C. P. §§ 8100, 8102.

Cited: Feeny v. Chester (1900) 7 I. 324, 63 P. 192; Kelley v. Clark (1912) 23 I. 1, 27, 129 P. 921, Ann. Cas. 1914C 665; (1 brief of counsel) Com. Trust Co. v. Idah Brick Co. (1913) 25 I. 755, 139 P. 100 Kendrick State Bk. v. Barnum, 31 I. 56 173 P. 1144.

Jurisdiction of court: Where court ha acquired jurisdiction of mortgagor, thereby acquired jurisdiction of all partie holding unrecorded conveyances or con tracts from mortgagor, so as to conclud them in foreclosure proceedings. Hardin v. Harker (1909) 17 I. 341, 105 P. 78 134 A. S. R. 259.

Mortgagor presumed to represent interests of grantee of unrecorded conveyance n suit to foreclose; and the same presumption would arise where the grantee is made a party, that he would represent the interests of a person holding an unrecorded conveyance from such grantee. Ib.

Deed construed as mortgage: A deed absolute on its face and a contemporaneous contract for reconveyance upon payment of he amount due the grantee, constitutes a nortgage and must be foreclosed under his section. Brown v. Bryan (1896) 5 I. 145, 51 P. 995. A trust deed executed to secure a given debt payable at a specified ime, is a mortgage, and cannot be foreclosed by notice and sale under a power contained in the deed, but only by proceedngs under this section. Ib.

Remedy exclusive: Where a chattel nortgagee elects to enforce his rights by foreclosure, that action becomes exclusive and he can not subsequently bring an action of claim and delivery for the possession of the property. Cederholm v. Loofborrow (1886) 2 I. 191, 9 P. 641.

A mortgagee may not file a complaint on a note secured by the mortgage alone, issue summons thereon only against the sureties on the note, and proceed to judgnent against them. First Nat. Bk. v. Williams (1890) 2 I. 670, 23 P. 552.

Holder of a note secured by mortgage, nay not maintain action at law, without foreclosing, unless security has become worthless. Clark v. Paddock (1913) 24 I. 42, 132 P. 795, 46 L. R. A. (N. S.) 475.

Where a deed and a separate agreement or a reconveyance on specified conditions re such as to constitute together in legal effect a mortgage, the mortgagee's remedy n case of default of the mortgagor, is by foreclosure and sale; he can not maintain ejectment. Kelly v. Leachman (1892) I. 392, 29 P. 849.

This section does not preclude a party rom maintaining an action of claim and delivery for the recovery of the property nortgaged, where the same has been wrongfully taken by a third party. O'Neil . Whitcomb (1893) 3 I. 624, 32 P. 1133.

This section must be construed with R. S. 3391, providing for foreclosure of chattel nortgages by affidavit and notice of sale, nd these two modes of foreclosure are exclusive; a power of sale given to the mortagee by the mortgage is void, and does not uthorize the summary foreclosure of the nortgage by the mortgagee under such ower. Rein v. Callaway (1901) 7 I. 634, 5 P. 63.

Limitations: If the remedy upon a note barred by the statute of limitations, the medy upon a mortgage securing the note also barred. Law v. Spence (1897) 5 I. 44, 48 P. 282.

Parties: One who has purchased mortaged land and has been in possession of he same and paid taxes thereon for a umber of years, need not be made a party foreclosure proceedings where he fails place his deed on record prior to the ommencement of such proceedings. Mills . Smiley (1903) 9 I. 317, 76 P. 783.

Judgment: It is essential to the validity f a decree foreclosing a mortgage that it scertain the amount due the plaintiff to be realized from the sale of the mortgaged property. The decree must be so specific that the clerk can issue an order of sale thereon without reference to other entries or papers. Vermont Loan & Trust Co. v. McGregor (1897) 5 I. 510, 51 P. 104.

Deficiency judgment: The provision of this section for docketing a deficiency judgment against the person liable for the debt, has no application to the foreclosure of a chattel mortgage by notice and sale. Advance Thresher Co. v. Whiteside (1891) 3 I. 64, 26 P. 660.

There can be no money judgment in an action to foreclose a mortgage, either real or chattel, until the exhaustion of the mortgage security, after which a money judgment may be entered for any deficiency. Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267.

Where a seller of an interest in certain mining claims retains title to the buyer's interest to secure payment of the price, the vendor is entitled to foreclose the lien so retained on the purchaser's default, and to recover a deficiency judgment against the purchaser on the failure of his interest to sell for enough to satisfy the debt. Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482.

A deficiency judgment is allowable on foreclosure of a vendor's lien. (On petition for rehearing) Farnsworth v. Pepper (1915) 27 I. 159, 148 P. 48.

On distribution by a federal court of equity in Idaho of the assets of an insolvent corporation, the trustee of a mortgage in the state is entitled to share as a creditor in the unmortgaged assets in the hands of a receiver on the basis of the amount of his deficiency judgment only. Westinghouse E. & M. Co. v. Idaho Ry. L. & P. Co. (1915) 228 F. 972.

Action for deficiency: Where it appears from the return of the officer made in pursuance to this section that there remains a deficiency after applying the proceeds of sale upon the mortgage debt, the mortgagee may maintain an action to recover the deficiency. Advance Thresher Co. v. Whiteside (1891) 3 I. 64, 26 P. 660.

Reformation of mortgage: A mortgage may be reformed and foreclosed in the same action. Christensen v. Hollingsworth (1898) 6 I. 87, 53 P. 211.

Attorney's fees: The action to foreclose a mortgage given to secure several notes is a separate and distinct action and but one fee can be allowed in such action. If such fee is stipulated by the mortgage to be reasonable, the court has no authority to allow a larger sum. Lewis v. Sutton (1912) 21 I. 541, 122 P. 911.

To entitle a plaintiff in a foreclosure proceeding to recover attorney's fees, where the same have been stipulated for in the mortgage, the plaintiff must tender evidence upon two propositions: First, that the plaintiff has agreed to pay his counsel a fixed or a reasonable sum for his services; second, the reasonableness of the fee. Ib.

Redemption: There is a right of redemption from a foreclosure sale under this section; from an execution sale under § 6932, and from other sales under the

foreclosure of various liens; but the statute nowhere in express terms grants the right of redemption from a receiver's sale; and, where a sale made is not a sale on foreclosure but is a sale by the court's receiver, under the direct authority and supervision of the court, the direction may be that the sale be made without right of redemption and that a deed absolute be given; if such a decree is made and no appeal is prosecuted from this feature of it, the decree becomes final. Hewitt v. Walters (1911) 21 I. 1, 119 P. 705, Ann. Cas. 1913C 35.

§ 6950. [4521] **Disposition of surplus money.** If there be surplus money remaining after payment the amount due on the mortgage, lien or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court. [R. S. § 4521.]

Hist. (See C. C. P. '81, § 469) R. S. § 4521, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 727; Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 8088-9.

Cited: Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482.

§ 6951. [4522] **Partial sales.** If the debt for which the mortgage, lien or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property can not be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper. [R. S, § 4522.]

Hist. (See C. C. P. '81, § 470) R. S. § 4522, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 728; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8109.

§ 6952. [4523] **Mortgage not a conveyance.** A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure sale. [R. S. § 4523.]

Hist. R. S. § 4523, reen. R. C. ib., reen. C. L. ib.

Cross ref. Transfers deemed mortgages: § 6358.

Comp. leg.—Cal. Same: C. C. P. 1872, § 744; Kerr's C. ib.

Colo. Identical: C. C. P. § 261. See Westinghouse E. & M. Co. v. Idaho Ry. L. & P. Co. (1915) 228 F. 972; Moncrieff v. Hare (Colo.) 87 P. 1082, 7 L. R. A. (N. S.) 1001.

N. D. See Civ. C. § 5595.

Cited: Kelly v. Leachman (1892) 3 I. 392, 29 P. 849; Brown v. Bryan (1896) 5 I. 145, 51 P. 995, (1898) 6 I. 1, 51 P. 995; Hannah v. Vensel (1911) 19 I. 796, 116 P. 115.

Receiver: Construed with § 6817, subd. 2, a receiver may, where circumstances justify it, be appointed in a foreclosure suit and take possession of the property. Westinghouse etc. Co. v. Idaho Ry. etc. Co. (1915) 228 F. 972, 976.

§ 6953. Execution under foreclosure on property in more than one county. In all actions to foreclose a mortgage or other lien upon real property, where such real property is situated partly in one county and partly in another county, within the state of Idaho, the sheriff of the county in which such action is commenced and where the decree therein is rendered and entered, shall have the power and it is hereby made his duty to enforce execution issued upon such decree in the same manner as if the whole of such real property was situated in the county in which such action was commenced and where the decree therein was rendered and entered. ['09, p. 171, S. B. 103, § 1.]

Hist. '09, p. 171, S. B. 103, § 1, reen. C. L. § 4524.

§ 6954. Same: Duty of clerk on return. Upon the return of such execution by the sheriff, the clerk of the district court issuing the same shall file such execution as in other cases, and as county recorder shall

ecord said execution and return as in other cases of sales of real property. Immediately after such execution and return has been so recorded, as such county recorder he shall prepare a copy of such execution and return and certify the same, which shall be sent by United States mail, postage prepaid, to the county recorder of the other county or counties in which a portion of such real property is situated, and the county recorder of such county or counties shall record such execution and return with the certificate thereto, as in other cases upon the return of executions where real property has been sold. ['09, p. 171, S. B. 103, § 2.]

Hist. '09, p. 171, S. B. 103, § 2, reen. C. § 4525.

§ 6955. Same: Certificates of sale. The said sheriff making such sale shall make as many certificates of such sale as there are counties in which such real property is situated, adding a sufficient number to deliver one to each purchaser of such real property. The sheriff shall deliver one of such certificates to each purchaser of such real property, and shall file one with the county recorder of the county where such sale was made; and he shall also send one to each of the county recorders of the several other counties in which any portion of said real estate is situated, by United States mail, prepaying the postage thereon. Such certificates of sale shall be filed and recorded by the several county recorders as is now provided by law in sales of real property under execution. ['09, p. 171, S. B. 103, § 3.]

Hist. '09, p. 171, S. B. 103, § 3, reen. C. § 4526.

ARTICLE 2.

ACTIONS FOR NUISANCE, WASTE AND WILFUL TRESPASS ON REAL PROPERTY.

§ 6956. Actions for nuisance. Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. In the case of a moral nuisance, the action may be brought by any resident citizen of the county; in all other cases the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. ['15, c. 43, § 5, p. 126.]

Hist. (See C. C. P. '81, § 471) R. S. § 529, reen. R. C. ib.; am. '15, c. 43, § 5, p. 126, reen. C. L. § 4529.

Cross ref. Nuisance defined: § 6420. Moral nuisance defined: § 6422, et seq. Private person may sue for public nuisance specially injurious: § 6433. Abatement of moral nuisance: §§ 7042-51.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 731; Kerr's C. ib.

N. D. Similar: C. C. P. § 8166.

Special injury: This section does not change the general rule that a private party to maintain an action to abate a public nuisance must show special injury to himself. Redway v. Moore (1892) 3 I. 312, 29 P. 104.

§ 6957. [4530] **Actions for waste.** If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages. [R. S. § 4530.]

Hist. (See C. C. P. '81, § 472) R. S. § 530, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 732; Kerr's C. ib.

N. D. Similar: C. C. P. § 8167. Analogous: C. C. P. § 8145.

§ 6958. [4531] **Actions for trespass.** Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles, or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of or in any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor in a civil action, in any court having jurisdiction. [R. S. § 4531.]

Hist. (See C. C. P. '81, § 473) R. S. § 4531, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 733; Kerr's C. ib. Menasha W. W. Co. v. Spokane etc. Ry. Co. (1911) 19 I. 586, 115 P. 22.

Cited: (In brief of counsel) Dwyer v. Libert (1917) 30 I. 576, 167 P. 651.

Common law trespass: The fact that a party prays in his complaint for treble damages under this section, and before the trial waives his demand that the damages be trebled, does not preclude him from recovering a judgment for actual damages or entitle the defendant to a nonsuit. Gumaer v. White Pine etc. Co. (1905) 11 I. 591, 83 P. 771.

If a plaintiff alleges facts constituting a common law action for cutting and removing timber, etc., but amends, pleading the same facts and claiming treble damages under this section, the amendment does not constitute a new cause of action. The statute authorizing treble damages in no way affects the cause of action, but merely goes to the relief to be granted in case the plaintiff establishes his case. Ecklund v. B. R. Lewis Lbr. Co. (1907) 13 I. 581, 92 P. 532.

An action to recover treble damages under this section where it is not alleged that the damage was committed wilfully or intentionally, does not come within the purview of said section, but is good as an action at common law which may entitle the plaintiff to recover his actual damages. Menasha W. W. Co. v. Spokane etc. Ry. Co., supra.

Intention a necessary element: A defendant by his default admits the truth of an allegation in the complaint that the trespass was "wrongful, unlawful, willful and malicious." Ecklund v. B. R. Lewis Lbr. Co., supra.

This section is not applicable where it is not shown that the trespass was wilfully and intentionally committed. Menasha W. W. Co. v. Spokane etc. Ry., supra.

§ 6959. [4532] **Limitation of preceding section.** Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it. [R. S. § 4532.]

Hist. (See C. C. P. '81, § 474) R. S. § 4532, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872 § 734; Kerr's C ib.

§ 6960. [4533] **Damages for forcible entry.** If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed. [R. S. § 4533.]

Hist. (See C. C. P. '81, § 475) R. S. § 4533, reen. R. C. ib., reen. C. L. ib.

Cross ref. Entry for surveying purposes: § 2243. Damages for entry for surveying purposes: § 2245. Actions for forcible entry: §§ 7320-38.

Comp. leg.—Cal. Same: C. C. P. 1872 § 735; Kerr's C. ib.

Cited: (In brief of counsel) Dwyer v. Libert (1917) 30 I. 576, 167 P. 651.

ARTICLE 3.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

Cross ref. Actions to quiet title against transfer tax liens: § 3395. Record of judgment affecting title to land—to be recorded with deeds: § 3639. Order for survey of lands divided by county lines in case of disputed title: §§ 3667-8. Actions to determine adverse claims to lots under the townsite act: §§ 3774-78. Actions to recover property granted with right of reentry: § 5350. Actions to correct defective acknowledgments: § 5407; to prove instruments for record: § 5408.

§ 6961. [4538] **Actions to quiet title.** An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. [R. S. § 4538.]

Hist. (See C. C. P. '81, § 476) R. S. § 538, reen. R. C. ib., reen C. L. ib.

Cross ref. Heirs or devisees may themelves or jointly with the administrator or xecutor maintain an action to quiet title: 7558.

Comp. leg.—Cal. Same: C. C. P. 1872, 738; different as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8144.

Form of action: This section has not rescribed any particular form of action or adversing a mining claim under the atutes of the United States, and does not reclude an action in the nature of ejectent at law with the consequent right to jury trial in such a case. Burke v. Mconald (1887) 2 I. 339, 13 P. 351.

This section does not do away with the tion of ejectment, nor preclude a person inging such an action from alleging and roving the facts required therein. McMasrs v. Torsen (1897) 5 I. 536, 51 P. 100.

Where a suit is brought in the federal urt praying for the cancellation of deeds interests in a mining claim for a decree termining the adverse claims of defendits to such interests and establishing mplainant's title thereto. and in which receiver is prayed for to take control of e mine and workings on said claim, and injunction restraining defendants from king ore therefrom pending suit, the urt has jurisdiction to determine the tire controversy between the parties recting the mine and the ore therein, d it is the duty of the defendants to set all defenses they may have to comainants' claim thereto. Hanley v. Beatty 902) 117 F. 59, 54 C. C. A. 445.

An action under this section may be her equitable or legal, depending upon e facts. In either case it is removable to federal court where the citizenship and e amount involved are sufficient to confer risdiction. Stockton v. O. S. L. R. Co. 909) 170 F. 627.

An action to quiet title being equitable its nature it is a matter addressed to the cretion of the court as to whether he ll submit any question of facts to the y for their finding thereon. Fairview vestment Co. v. Lamberton (1913) 25 I. 136 P. 606.

Venue: An action to quiet title to real ate must be prosecuted and maintained the jurisdiction in which the res or subt matter is situated. Taylor v. Hulett 908) 15 I. 265, 97 P. 37, 19 L. R. A. S.) 535.

Right to maintain action: An action by party actually in possession of propy to quiet title to a leasehold estate is a t in equity and neither party is entitled a jury as a matter of right. Shields v. nson (1904) 10 I. 476, 79 P. 391.

Where the judgment is recovered against husband and the execution is levied on separate property of the wife, the wife may bring an action under this section to enjoin the sale and for the vacation of the writ of execution as to such property. Young v. First Nat. Bk. of Hailey (1895) 4 I. 323, 39 P. 557.

One who enters upon land and improves, cultivates and exercises complete control over the same for a period of 17 years without his title ever being questioned, may maintain an action to quiet title under this section, although the patent under which he claims vests in him no title to the land in controversy. Johnson v. Hurst (1904) 10 I. 308, 77 P. 784.

Anyone claiming some right or interest in land may maintain a suit to quiet his title under this section, although he has neither the possession nor the legal title to such land; thus the holder of the equitable title may maintain a suit against the holder of the legal title. Coleman v. Jaggers (1906) 12 I. 125, 85 P. 894.

An action may be maintained by a remainderman for the protection of a contingent remainder as against one who claims an estate or interest in the property adverse to such remainderman. Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

Holder of a tax title has sufficient interest to enforce his rights under this section. (Dis. op.) McKinnon v. McIlhargey (1913) 24 I. 720, 135 P. 826.

The provisions of this section are broad and any person whether in possession or not, whether holding legal or equitable title, might bring action. The Mode v. Myers (1917) 30 I. 159, 164 P. 91.

Interest of mortgagee is an interest adverse to holder of a legal title. Pettengill v. Blackman (1917) 30 I. 241, 164 P. 358.

This section applies to public lands claimed adversely by an individual subject only to paramount title of United States. Crandall v. Goss (1917) 30 I. 661, 167 P. 1025.

Pleading: A complaint which shows that plaintiff has an interest or a right to the possession of land, that the defendant, without right, claims an interest or estate in the land adverse to plaintiff, is sufficient without setting out what interest the defendant claims. Fry v. Summers (1895) 4 I. 424, 39 P. 1118.

In an action to quiet title where a defendant relies upon title in himself, a cross complaint is not necessary. Where the defendant seeks to enforce an equitable title against the plaintiff as the holder of the legal title, a cross complaint is proper. Bacon v. Rice (1908) 14 I. 107, 93 P. 511.

Form of decree: In a proper case the trial court will render and enter judgment enjoining the assertion of any right, title or interest of, in or to the property in dispute, adverse to the petitioners. Stewart M. Co. v. Ontario M. Co. (1913) 23 I. 724, 132 P. 787, aff. 237 U. S. 350, 59 L. ed. 989, 35 S. C. R. 610.

§ 6962. [4539] **Disclaimer or default: Costs.** If the defendant in h action disclaim in his answer any interest or estate in the property, suffer judgment to be taken against him without answer, the plain can not recover costs. [R. S. § 4539.]

Hist. (See C. C. P. '81, § 477) R. S. § 9, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872. § 739; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8151.

Allowance of costs: No costs should be adjudged against defendants in an action to quiet title where they fail to appea Young v. First Nat. Bk. of Hailey (189 4 I. 323, 39 P. 557.

§ 6963. [4540] **Termination of plaintiff's right.** In an action for th recovery of real property, where the plaintiff shows a right to recover a the time the action was commenced, but it appears that his right has te minated during the pendency of the action, the verdict and judgmer must be according to the fact, and the plaintiff may recover damage for withholding the property. [R. S. § 4540.]

Hist. (See C. C. P. '81, § 478) R. S. § 4540, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 740; Kerr's C. ib.

N. D. Similar: C. C. P. § 8154.

§ 6964. [4541] **Value of improvements as set-off.** When damage are claimed for withholding the property recovered, upon which pe manent improvements have been made by a defendant, or those unde whom he claims, holding under color of title adversely to the claim o the plaintiff, in good faith, the value of such improvements must be a lowed as a set-off against such damages. [R. S. § 4541.]

Hist. (See C. C. P. '81, § 479) R. S. § 4541, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 741; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8152.

§ 6965. [4542] **Order for survey and examination.** Any person hav ing a bona fide claim to the possession, title of, or interest in, any rea property or mining claim, including any ledges thereof, which is, o which he has good reason to believe is, in the possession of anothe either by surface or underground holdings or workings, and it is nec essary for the ascertainment, enforcement or protection of such rights o interests, that an examination or survey of such property be had, an the person so in the possession thereof fails or refuses for three day after demand on him made in writing, to permit such examination o survey to be made, the party desiring the same may apply to the cou or the judge thereof, whether he have an action concerning such pro erty pending in such court or not, for an order for such examinatio and survey.

Such application must be made upon written petition or statement u der oath, setting out a description of the property, interest of the par therein, that the premises are in the possession of a party, naming hi the reason why such survey or examination is asked, the demand ma for same, and refusal thereof.

The court or judge must appoint a time and place for hearing, which notice, with a copy of the petition, must be served upon the a verse party at least three days before the hearing and one addition day for each 25 miles between the place of service of notice and t hearing, and such hearing must be had and the testimony must be pr duced in the same manner as provided by section 6778 for hearings injunctions.

If upon such hearing the court or judge is satisfied that either pa is entitled to any relief or order for examination or survey of any pr erty in the possession of the other, which has, by the papers in the p ceedings, been put in controversy, an order must be granted for su examination, survey and other privileges as the court or judge m deem just, and the order must specify as nearly as possible what t person in whose favor such order is granted may do.

Thereupon, such person may have free access, with such agents a assistants as may be allowed, to all parts of such property, with right

move any loose rock, debris or other obstacle, when the same is necsary to the making of a full inspection or survey of such property, but such removal must be made without the consent of the adverse party the order of the court or judge permitting the same.

The court or judge may also, upon proper showing with the view of oducing such evidence as may be needed to determine the rights of e parties, allow work to be done on such property, but any work so rmitted must be allowed only after the same is particularly defined, id must not be allowed in such manner as to interfere with the workgs of the adverse party, and then only when the court is satisfied the lverse party is acting in bad faith and is infringing or attempting so do, upon the rights of the party asking to do such work, and when ere is no other reasonable or convenient mode for the production of e evidence necessary to settle the rights of the parties.

The party so asking to do work upon the premises of, or in the possion of another, must give good and sufficient security for the payent of all damages he may do the adverse party by reason of such ork, and the court or judge must at every stage of the proceedings ve due regard for the rights of all parties in interest. [R. S. § 4542.]

Hist. Act Feb. 10, 1887; R. S. § 4542, n. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 72, § 742; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 8159-60.

Purpose: This section is merely a legisive declaration of what has been recoged as the general equity powers of the urt and is intended to enable any per who claims possession, title to, or erest in, any real property or mining im, to make examination and inspecn of the property for the purpose of tecting and preserving such possession, e or interest in such property. Bacon Fed. M. & S. Co. (1910) 19 I. 136, 112 1055.

Grounds for order: Interest: A comint alleging that the plaintiff is a judgnt creditor of the defendant and has caused an execution to issue upon such judgment, and to be levied upon an interest of the defendant in a mining claim, does not entitle the plaintiff to an order permitting plaintiff to examine and inspect such property prior to the execution sale. (Sullivan, J. dissents) Bacon v. Fed. M. & S. Co., supra.

Same: Necessity: The plaintiff must also allege a state of facts showing a necessity for the inspection and examination of the property before he is entitled to the order. Bacon v. Fed. M. & S. Co., supra.

Mining claim defined: The term "mining claim" as used in this section does not include mining property the title to which is in the claimant. (Con. op. Sullivan, J. dissents) Salisbury v. Lane (1900) 7 I. 370, 63 P. 383.

§ 6966. [4543] **Same.** The order must describe the property, and a py thereof must be served on the owner or occupant; and thereupon ch party may enter upon the property, with necessary surveyors and sistants, and make such survey and measurement, but if any unnecsary injury be done to the property he is liable therefor. [R. S. 4543.]

Hist. (See C. C. P. '81, § 481) R. S. § 3. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 743; Kerr's C. ib.

§ 6967. [4544] **Injury to property pending foreclosure, etc.: Injnction.** The court may, by injunction, on good cause shown, restrain e party in possession from doing any act to the injury of real property ring the foreclosure of a mortgage thereon, or after a sale on execun before a conveyance. [R. S. § 4544.]

Hist. (See C. C. P. '81, § 483) R. S. § 4. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 745; Kerr's C. ib.

Cross ref. Court may restrain waste: 937.

§ 6968. [4545] **Same: Damages.** When real property has been d on execution, the purchaser thereof, or any person who may have ceeded to his interest, or any redemptioner, may, after his estate benes absolute, recover damages for injury to the property by the ten-

ant in possession after sale, and before possession is delivered unde the conveyance. [R. S. § 4545.]

Hist. (See C. C. P. '81, § 484) R. S. § 4545, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or any redemptioner" are omitted: C. C P. 1872, § 746: Kerr's C. ib.

N. D. Similar: C. C. P. § 8161.

§ 6969. [4546] **Alienation pending suit.** An action for the recover of real property against a person in possession can not be prejudiced b any alienation made by such person, either before or after the com mencement of the action. [R. S. § 4546.]

Hist. (See C. C. P. '81, § 485) R. S. § 4546, reen. R. C. ib. reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 747; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8162.

§ 6970. [4547] **Mining customs admissible in evidence.** In action respecting mining claims, proof must be admitted of the customs, us ages or regulations established and in force at the bar or diggings em bracing such claim, and such customs, usages or regulations, when no in conflict with the laws of this state, must govern the decision of th action. [R. S. § 4547.]

Hist. (See C. C. P. '81, § 486) R. S. § 4547, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 748; Kerr's C. ib.

N. D. Similar: C. C. P. § 8163.

Mining claim defined: The term "min ing claim" as used herein includes patent ed as well as unpatented mining ground (Dis. op.) Salisbury v. Lane (1900) 7 I 370, 63 P. 383.

ARTICLE 4.

POSSESSORY ACTIONS FOR PUBLIC LANDS.

§ 6971. Actions to protect possessory rights. Any person being citizen of the United States, or having in accordance with law declare his intention to become a citizen, occupying and settled upon any of th public lands of the United States in this state for the purpose of cult vating or grazing the same, may commence and maintain any action fo interference with, or injury to his possession of such land, against an person interfering with or injuring the same; but if such land contain mines of any of the precious metals, the possession or claim of the pe son occupying the same for the purposes aforesaid must not prevent th working of such mines by persons desiring to work the same, as fully a if no such claim for agricultural or grazing purposes had been mad thereon: *Provided,* That this chapter must not be so construed as to allo a person, subsequent to the location of land for agricultural or grazing pu poses, to go upon such lands for the purpose of mining without first payin the owner thereof the value of any growing crops he may destroy; th provision does not extend to any crops planted subsequent to their locati for mining purposes; and this chapter must not be construed to authori the maintenance of any claim upon lands which, at the commencement any such action, may have been selected by the United States and reserv for any purpose. [C. L. § 4552.]

Hist. (Comp. Laws '75, p. 751) R. S. § 4552, reen. R. C. ib., comp. and reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 8164.

Cited: Brose v. Boise City Ry. etc. Co. (1897) 5 I. 694, 51 P. 753; Hall v. Blackman (1902) 8 I. 272, 68 P. 19; Cheney v. Minidoka Co. (1914) 26 I. 471, 144 P. 343; Denny v. Arritola, 31 I. 428, 174 P. 135.

Necessity of occupancy: An action to quiet title to land which is a part of the public domain can not be maintained where neither the plaintiff nor his pred cessor in interest have ever occupied t land or filed a possessory claim thereto provided by this section. Branca v. Fer (1904) 10 I. 239, 77 P. 636.

Abandonment: Possession and comp ance with this and following sections bei shown, abandonment thereof must made to appear conclusively by party lying on it to defeat the right of claim to have his possession in the land quiet Goldensmith v. Snowstorm M. Co. (19 28 I. 408, 154 P. 968.

Temporary absence from a homestead selected under this section and following sections to obtain a livelihood or for other legitimate reason, is not of itself sufficient to establish abandonment. Ib.

One attacking right to unsurveyed land claimed under this section can not raise question of claimant's failure to apply to local land office of the United States for entry under the homestead laws after the same was surveyed by the government. Ib.

§ 6972. Claim: What to contain. Every claim, to enable the holder to maintain any action as aforesaid, must contain not more than 160 acres of land, to be in compact form, and so distinctly marked that the boundaries thereof may be easily traced: *Provided,* That when the United States government has set aside any tract of land subject to homestead entry of not more than 320 acres in such homestead, each claim under the provisions of this article may contain 320 acres. ['13, c. 102, § 1, p. 422.]

Hist. Comp. Laws '75, p. 752; R. S. § 4553, reen. R. C. ib.; am. '13, c. 102, § 1, p. 422, reen. C. L. § 4553.

Cited: Goldensmith v. Snowstorm M. Co. (1916) 28 I. 403, 154 P. 968.

§ 6973. Same: Description: Recording. Every such claim must be accurately described in a written notice, which must be recorded in the office of the recorder of the county wherein the claim is situated, in a book to be kept for that purpose, together with an affidavit of the claimant setting forth:

1. That such claim does not embrace more than 320 acres of land.
2. That he holds no other claim under the provisions of this chapter.
3. That to the best of his information and belief, no part of said land is claimed under any existing adverse title. ['13, c. 102, § 2, p. 423.]

Hist. Comp. Laws '75, p. 752, R. S. § 4554, reen. R. C. ib.; am. '13, c. 102, § 2, p. 423, reen. C. L. § 4554.

Cited: Goldensmith v. Snowstorm M. Co. (1916) 28 I. 403, 154 P. 968.

Homestead distinguished: There is a clear distinction between a "possessory right" which is initiated and made good by occupancy and settlement and filing a notice thereof as required by this section, and the right which accrues to a person through the making of a formal homestead or other entry of the land under the laws of the United States. When the public land is surveyed by the government and filed upon by a qualified entryman in the usual way, it ceases to be public land. Cheney v. Minidoka Co. (1914) 26 I. 471, 144 P. 343.

§ 6974. [4555] Same: Improvement, cultivation and residence. Within 90 days after the date of such record said claimant must improve the land so recorded, unless the same has been previously improved by him or some one through whom he claims, by putting such improvements thereon as partake of the realty to the value of $200, and must continue to occupy and cultivate or graze the same or some portion thereof, either in person or by his agent or employee, and no person is entitled to maintain any such action unless he has complied with all the provisions of this chapter. [R. S. § 4555.]

Hist. Comp. Laws '75, p. 752; R. S. § 4555, reen. R. C. ib., reen. C. L. ib.

Cited: Goldensmith v. Snowstorm M. Co. (1916) 28 I. 403, 154 P. 968.

§ 6975. [4556] Actions: Proof of improvements. In any action for the possession of, or for any injury done to, a lot or parcel of land, situated in any city, town or village on the public lands, the plaintiff must be required to prove either an actual inclosure of the whole lot claimed by him, or the erection of a dwelling house or other substantial building on some part thereof, by himself or some person through whom he claims, and proof of such building, with or without inclosure, is sufficient to hold such lot or parcel to the bounds thereof, as indicated by the plat of such city, town or village, if there be one, and if there be no such plat, then to hold the same, with its full width and extent from and including such building to the nearest adjacent street, where the intervening space has not been previously claimed by adverse possession. [R. S. § 4556.]

Hist. Comp. Laws '75, p. 752; R. S. § 4556, reen. R. C. ib., reen. C. L. ib.

Cited: Brose v. Boise City Ry. etc. Co. (1897) 5 I. 694, 51 P. 753; Hall v. Blackman (1902) 8 I. 272, 68 P. 19; Carter v. Ruddy (1897) 166 U. S. 493, 41 L. ed. 1090, 17 S. C. R. 640.

Nature of action: An action under the provisions of this section to recover possession of premises located in the public domain is not an action of ejectment nor do the rules governing common law actions of ejectment apply to cases of this character as the action is purely statutory. Maydole v. Watson (1900) 7 I. 66, 60 P. 86.

ARTICLE 5.

ACTIONS FOR THE PARTITION OF REAL ESTATE.

Cross ref. Partition in probate proceedings: §§ 7734-45. Record of judgments in partition—to be recorded with deeds: § 3639.

§ 6976. [4560] **When partition may be had.** When several cotenants hold and are in possession of real property as parceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition can not be made without great prejudice to the owners. [R. S. § 4560.]

Hist. (See C. C. P. '81, § 487) R. S. § 4560, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 752; Kerr's C. ib.

N. D. Identical: C. C. P. § 8024.

Cited: Richardson v. Ruddy (1908) 15 I. 488, 98 P. 842; Leggat v. Blomberg (1908) 15 I. 496, 98 P. 723.

§ 6977. [4561] **Interests of parties must be set forth.** The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any one of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties can not be named, that fact must be set forth in the complaint. [R. S. § 4561.]

Hist. (See C. C. P. '81, § 488) R. S. § 4561, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 753; Kerr's C. ib.

N. D. Identical: C. C. P. § 8025.

§ 6978. [4562] **Parties: Lienholders and purchasers.** No person having a conveyance of, or claiming a lien on, the property, or of some part of it, need be made a party to the action, unless such conveyance or lien appear of record. [R. S. § 4562.]

Hist. (See C. C. P. '81, § 489) R. S. § 4562, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 754; Kerr's C. ib.

N. D. Identical: C. C. P. § 8026.

§ 6979. [4563] **Lis pendens must be filed.** Immediately after filing the complaint in the district court the plaintiff must file with the recorder of the county, or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons. [R. S. § 4563.]

Hist. (See C. C. P. '81, § 490) R. S. § 4563, reen. R. C. ib., reen. C. L. ib.

Cross ref. Lis pendens in general: § 6674.

Comp. leg.—Cal. Same: C. C. P. 1872, § 755; similar as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8027.

§ 6980. [4564] **Summons: How directed.** The summons must be directed to all the joint tenants and tenants in common, and all persons

having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property. [R. S. § 4564.]

Hist. (See C. C. P. '81, § 491) R. S. § 4564, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 756; Kerr's C. ib.

N. D. Identical: C. C. P. § 8028.

§ 6981. [4565] **Same: Service by publication.** If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or can not be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action. [R. S. § 4565.]

Hist. (See C. C. P. '81, § 492) R. S. § 4565, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 757; Kerr's C. ib.

Cross ref. Publication of summons: §§ 3677-8.

N. D. Analogous: C. C. P. § 8029.

§ 6982. [4566] **Answer.** The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers fully and particularly, the origin, nature and extent of their respective interests in the property, and if such defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien. [R. S. § 4566.]

Hist. (See C. C. P. '81, § 493) R. S. § 4566, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 758; Kerr's C. ib.

N. D. Identical: C. C. P. § 8030.

§ 6983. [4567] **Rights of all parties may be determined.** The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered, except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves. [R. S. § 4567.]

Hist. (See C. C. P. '81, § 494) R. S. § 4567, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 759; Kerr's C. ib.

N. D. Identical: C. C. P. § 8031.

§ 6984. [4568] **Partial partition.** Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made as if such original cotenants were the parties and sole parties in interest and the only parties to the action, and hereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as be-

tween those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof as they may desire. [R. S. § 4568.]

Hist. (See C. C. P. '81, § 495) R. S. § 4568, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 760; Kerr's C. ib.

N. D. Identical: C. C. P. § 8032.

Partial partition: Where it appears in a suit for partition that it is impracticable or inconvenient to make a complete partition in the first instance among all the parties, the court may direct a partition among two or more of the parties, and from time to time thereafter may determine the rights of the other parties and render judgment accordingly. Richardson v. Ruddy (1904) 10 I. 151, 77 P. 972.

§ 6985. [4569] **Lienholders: Determination of rights.** If it appears to the court, by the certificate of the county recorder or clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security. [R. S. § 4569.]

Hist. (See C. C. P. '81, § 496) R. S. § 4569, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 761; Kerr's C. ib.

N. D. Similar: C. C. P. § 8033.

§ 6986. [4570] **Same: Notice to lienholders.** The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise, of the amount due or to become due, contingently or absolutely thereon. In case such person be absent or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require. [R. S. § 4570.]

Hist. (See C. C. P. '81, § 497) R. S. § 4570, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 762; Kerr's C. ib.

N. D. Identical: C. C. P. § 8034.

§ 6987. [4571] **Partition: Sale: Referees.** If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition can not be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained. [R. S. § 4571.]

Hist. (See C. C. P. '81, § 498) R. S. § 4571, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 763; different as amended: Kerr's C. ib.

N. D. Identical: C. C. P. § 8035.

Effect of interlocutory decree: The interlocutory decree entered in an action for the partition of real property determines the right to partition and fixes the respective rights of the parties. Richardson v. Ruddy (1908) 15 I. 488, 98 P. 842.

§ **6988.** [4572] **Duties of referees.** In making the partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this article, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. [R. S. § 4572.]

Hist. (See C. C. P. '81, § 499) R. S. § 4572, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 764; additional provisions by amendment: Kerr's C. ib.

N. D. Similar: C. C. P. § 8036.

Cited: Richardson v. Ruddy (1908) 15 I. 488, 98 P. 842.

§ **6989.** [4573] **Report of referees.** The referees must make a report of their proceedings, specifying the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share. [R. S. § 4573.]

Hist. (See C. C. P. '81, § 500) R. S. § 4573, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 765; Kerr's C. ib.

N. D. Identical: C. C. P. § 8037.

Report: The report of the referees appointed to partition real property presents merely the question whether the partition was made in accordance with the decree of the court. Richardson v. Ruddy (1908) 15 I. 488, 98 P. 842.

§ **6990.** [4574] **Same: Confirmation: Judgment.** The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons or either of them. And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent as if it had been entered before his death. [R. S. § 4574.]

Hist. (See C. C. P. '81, § 501) R. S. § 4574, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 766; Kerr's C. ib.

N. D. Identical: C. C. P. § 8038.

Hearing: The hearing of the report of referees appointed to partition real property should be for the purpose of ascertaining whether the directions of the court were carried out, and evidence should be received on this question only, except when the fairness of the referees is involved. Richardson v. Ruddy (1908) 15 I. 488, 98 P. 842.

§ **6991.** [4575] **Effect of judgment on tenants for years.** The judgment does not affect tenants for years less than 10 to the whole of the property which is the subject of the partition. [R. S. § 4575.]

Hist. (See C. C. P. '81, § 502) R. S. § 4575, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8039.

Comp. leg.—Cal. Same: C. C. P. 1872, § 767; Kerr's C. ib.

§ 6992. [4576] Allowance of expenses. The expenses of the referees, including those of a surveyor and his assistants when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action equitably. [R. S. § 4576.]

Hist. (See C. C. P. '81, § 503) R. S. § 4576, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8040.

Comp. leg.—Cal. Same: C. C. P. 1872, § 768; Kerr's C. ib.

§ 6993. [4577] Lien on undivided interest. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien. [R. S. § 4577.]

Hist. (See C. C. P. '81, § 504) R. S. § 4577, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8041

Comp. leg.—Cal. Same: C. C. P. 1872, § 769; Kerr's C. ib.

§ 6994. [4578] Estate for life or years may be set off. When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold. [R. S. § 4578.]

Hist. (See C. C. P. '81, § 505) R. S. § 4578, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8042.

Comp. leg.—Cal. Same: C. C. P. 1872, § 770; Kerr's C. ib.

§ 6995. [4579] Application of proceeds of sale of incumbered property. The proceeds of the sale of incumbered property must be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein. [R. S. § 4579.]

Hist. (See C. C. P. '81, § 506) R. S. § 4579, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8043.

Comp. leg.—Cal. Same: C. C. P. 1872; § 771; Kerr's C. ib.

§ 6996. [4580] Resort to other securities compelled. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just reduction to be made from the amount of the lien on the property on account thereof. [R. S. § 4580.]

Hist. (See C. C. P. '81, § 507) R. S. § 4580, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8044.

Comp. leg.—Cal. Same: C. C. P. 1872, § 772; Kerr's C. ib.

§ 6997. [4581] **Distribution of proceeds.** The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court or deposited therein, or as directed by the court. [R. S. § 4581.]

Hist. (See C. C. P. '81, § 508) R. S. § 4581, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 773; Kerr's C. ib.

N. D. Identical: C. C. P. § 8045.

§ 6998. [4582] **Action may be continued.** When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action. [R. S. § 4582.]

Hist. (See C. C. P. '81, § 509) R. S. § 582, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 774; Kerr's C. ib.

N. D. Identical: C. C. P. § 8046.

§ 6999. [4583] **Conduct of sale.** All sales of real property made by referees under this article must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be subject to a prior estate, charge or lien, that must be stated in the notice. [R. S. § 4583.]

Hist. (See C. C. P. '81, § 510) R. S. § 583, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sales on execution: §§ 6922-6.

Comp. leg.—Cal. Same: C. C. P. 1872, 775; Kerr's C. ib.

N. D. Similar: C. C. P. § 8047.

Cited: (Dis. op.) First Nat. Bk. of Pocatello v. Bunting & Co. (1900) 7 I. 387, 63 P. 694.

§ 7000. [4584] **Terms of sale.** The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants or parties out of the state. [R. S. § 4584.]

Hist. (See C. C. P. '81, § 511) R. S. § 584, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 776; Kerr's C. ib.

N. D. Similar: C. C. P. § 8048.

§ 7001. [4585] **Security for purchase money.** The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money of such parts of the property as are directed by the court to be sold on credit for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant in the name of the guardian of such infant; and for other shares in the name of the clerk of the court and his successors in office. [R. S. § 4585.]

Hist. (See C. C. P. '81, § 512) R. S. § 585, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" for "court"; C. C. P. 1872, § 777; Kerr's C. ib.

N. D. Identical: C. C. P. § 8049.

§ 7002. [4586] **Compensation of tenants for life or years.** The person entitled to a tenancy for life or years, whose estate has been sold,

is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing filed with the clerk of the court. Upon the filing of such consent the clerk must enter the same in the minutes of the court. [R. S. § 4586.]

Hist. (See C. C. P. '81, § 513) R. S. § 4586, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8050.

Comp. leg.—Cal. Same: C. C. P. 1872, § 778; Kerr's C. ib.

§ 7003. [4587] **Same: How fixed.** If such consent be not given, filed and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require. [R. S. § 4587.]

Hist. (See C. C. P. '81, § 514) R. S. § 4587, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8051.

Comp. leg.—Cal. Same: C. C. P. 1872, § 779; Kerr's C. ib.

§ 7004. [4588] **Protection of unknown parties.** If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared. [R. S. § 4588.]

Hist. (See C. C. P. '81, § 515) R. S. § 4588, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8052.

Comp. leg.—Cal. Same: C. C. P. 1872, § 780; Kerr's C. ib.

§ 7005. [4589] **Compensation for contingent interest.** In all cases of sales when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties. [R. S. § 4589.]

Hist. (See C. C. P. '81, § 516) R. S. § 4589, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8053.

Comp. leg.—Cal. Same: C. C. P. 1872, § 781; Kerr's C. ib.

§ 7006. [4590] **Notice of terms of sale.** In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately. [R. S. § 4590.]

Hist. (See C. C. P. '81, § 517) R. S. § 4590, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 8054.

Comp. leg.—Cal. Same: C. C. P. 1872, § 782; Kerr's C. ib.

§ 7007. [4591] **Referees and guardians must not purchase.** Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void. [R. S. § 4591.]

Hist. (See C. C. P. '81, § 518) R. S. § 4591, reen. R. C. ib., reen, C. L. ib.

N. D. Identical: C. C. P. § 8055.

Comp. leg.—Cal. Same: C. C. P. 1872, § 783; Kerr's C. ib.

§ 7008. [4592] **Report of sale.** After completing a sale of the prop-:ty, or any part thereof ordered to be sold, the referees must report ıe same to the court with a description of the different parcels of lands)ld to each purchaser; the name of the purchaser; the price paid or :cured; the terms and conditions of the sale, and the securities, if any, .ken. The report must be filed in the office of the clerk. [R. S. § 4592.]

Hist. (See C. C. P. '81, § 519) R. S. § 92, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words of the county where the property is situated" are added: C. C. P. 1872, § 784; Kerr's C. ib.

N. D. Similar: C. C. P. § 8056.

§ 7009. [4593] **Confirmation and order for conveyance.** If the sale ? confirmed by the court, an order must be entered directing the ref-·ees to execute conveyances and take securities pursuant to such sale, hich they are hereby authorized to do. Such order may also give di-·ctions to them respecting the disposition of the proceeds of the sale. R. S. § 4593.]

Hist. (See C. C. P. '81, § 520) R. S. § 93, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 785; Kerr's C. ib.

N. D. Identical: C. C. P. § 8057.

§ 7010. [4594] **Lienholders as purchasers.** When a party entitled a share of the property, or an incumbrancer entitled to have his lien aid out of the sale, becomes a purchaser, the referees may take his ceipt for so much of the proceeds of the sale as belongs to him. [R. S. 4594.]

Hist. (See C. C. P. '81, § 521) R. S. § 94, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 6; Kerr's C. ib.

N. D. Identical: C. C. P. § 8058.

§ 7011. [4595] **Record and effect of conveyance.** The conveyances ust be recorded in the county where the premises are situated, and all be a bar against all persons interested in the property in any way, ho shall have been named as parties in the action, and against all such arties and persons as were unknown, if the summons were served by ıblication, and against all persons claiming under them, or either of em, and against all persons having unrecorded deeds or liens at the mmencement of the action. [R. S. § 4595.]

Hist. (See C. C. P. '81, § 522) R. S. § 95, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except last clause ginning "and against all persons" is omitted: C. C. P. 1872, § 787; now same as amended: Kerr's C. ib.

N. D. Identical: C. C. P. § 8059.

§ 7012. [4596] **Investment of proceeds.** When there are proceeds sale belonging to an unknown owner, or to a person without the state, ho has no legal representative within it, the same must be invested securities at interest for the benefit of the persons entitled thereto. R. S. § 4596.]

Hist. (See C. C. P. '81, § 523) R. S. § 96, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words onds of this state or of the United States" for "securities at interest"; C. C. P. 1872, § 788; Kerr's C. ib.

N. D. Similar: C. C. P. § 8060.

§ 7013. [4597] **Same: When made in recorder's name.** When the curity of the proceeds of sale is taken, or when an investment of any ch proceeds is made, it must be done, except as herein otherwise pro-ıed, in the name of the recorder of the county where the papers are ed, and his successors in office, who must hold the same for the use d benefit of the parties interested, subject to the order of the court. R. S. § 4597.]

Hist. (See C. C. P. '81, § 524) R. S. § 4597, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal Same except "Clerk" for "recorder": C. C. P. 1872, § 789; Ker C. ib.

N. D. Similar: C. C. P. § 8061.

§ 7014. [4598] **Same: When made in parties' names.** When secu ity is taken by the referees on a sale, and the parties interested in su security, by an instrument in writing, under their hands, delivered the referee, agree upon the shares and proportions to which they a respectively entitled, or when shares and proportions have been pr viously adjudged by the court, such securities must be taken in t names of and payable to the parties respectively entitled thereto, a must be delivered to such parties upon their receipt therefor. Su agreement and receipt must be returned and filed with the clerk. [R. § 4598.]

Hist (See C. C. P. '81, § 525) R. S. § 4598, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 790; Kerr's C. ib.

N. D. Identical: C. C. P. § 8062.

§ 7015. [4599] **Same: Duty of recorder.** The recorder in who name a security is taken, or by whom an investment is made, and h successors in office, must receive the interest and principal as it b comes due, and apply and invest the same as the court may direct; a must deposit with the county treasurer all securities taken, and ke an account in a book provided and kept for that purpose in the recor er's office, free for inspection by all persons, of investments in mone received by him thereon and the disposition thereof. [R. S. § 4599.]

Hist. (See C. C. P. '81, § 526) R. S. § 4599, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "clerk" for "recorder": C. C. P. 1872, § 791; Ker C. ib.

N. D. Similar: C. C. P. § 8063.

§ 7016. [4600] **Unequal partition: Compensation.** When it appea that partition can not be made equal between the parties, according their respective rights, without prejudice to the rights and interests some of them, and a partition be ordered, the court may adjudge co pensation to be made by one party to another on account of the inequ ity; but such compensation shall not be required to be made to oth by owners unknown, nor by an infant, unless it appears that such fant has personal property sufficient for that purpose, and that his terest will be promoted thereby. And in all cases the court has pow to make compensatory adjustment between the respective parties cording to the ordinary principles of equity. [R. S. § 4600.]

Hist. (See C. C. P. '81, § 527) R. S. § 4600, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 792; Kerr's C. ib.

N. D. Identical: C. C. P. § 8064.

§ 7017. [4601] **Sale of infant's share.** When the share of an inf is sold, the proceeds of the sale may be paid by the referee making sale to his general guardian, or the special guardian appointed for h in the action, upon giving the security required by law or directed order of the court. [R. S. § 4601.]

Hist. (See C. C. P. '81, § 528) R. S. § 4601, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 793: Kerr's C. ib.

N. D. Identical: C. C. P. § 8065.

§ 7018. [4602] **Same: Share of insane person.** The guardian may be entitled to the custody and management of the estate of an sane person or other person adjudged incapable of conducting his affairs, whose interest in real property has been sold, may receive behalf of such person, his share of the proceeds of such real prop

om the referees on executing, with sufficient sureties, an undertaking pproved by a judge of the court, that he will faithfully discharge the ust reposed in him, and will render a true and just account to the per- n entitled or to his legal representative. [R. S. § 4602.]

Hist. (See C. C. P. '81, § 529) R. S. § 02, reen. R. C. ib., reen. C. L. ib. N. D. Identical: C. C. P. § 8066.

Comp. leg.—Cal. Same: C. C. P. 1872, 94; Kerr's C. ib.

§ 7019. [4603] **Partition without action.** The general guardian of infant, and the guardian entitled to the custody and management the estate of an insane person, or other person adjudged incapable conducting his own affairs, who is interested in the real estate held joint tenancy, or in common, or in any other manner so as to author- e his being made a party to an action for the partition thereof, may nsent to a partition without action, and agree upon the share to be t off to such infant or other person entitled, and may execute a release his behalf to the owners of the shares of the parts to which they may respectively entitled, upon an order of the court. [R. S. § 4603.]

Hist. (See C. C. P. '81, § 530) R. S. § 03, reen. R. C. ib., reen. C. L. ib. N. D. Identical: C. C. P. § 8067.

Comp. leg.—Cal. Same: C. C. P. 1872, 95; Kerr's C. ib.

§ 7020. [4604] **Costs of partition a lien.** The costs of partition, in- ding reasonable counsel fees, expended by the plaintiff or either of e defendants for the common benefit, fees of referees, and other dis- rsements, must be paid by the parties respectively entitled to share the lands divided, in proportion to their respective interests therein, d may be included and specified in the judgment. In that case they all be a lien on the several shares, and the judgment may be enforced execution against such shares and against other property held by e respective parties. When, however, litigation arises between some the parties only, the court may require the expense of such litigation be paid by the parties thereto, or any of them. [R. S. § 4604.]

Hist. (See C. C. P. '81, § 531) R. S. § 04, reen. R. C. ib., reen. C. L. ib. N. D. Identical: C. C. P. § 8068.

Comp. leg.—Cal. Same: C. C. P. 1872, 96; Kerr's C. ib.

§ 7021. [4605] **Appointment of single referee.** The court, with the nsent of the parties, may appoint a single referee, instead of three ferees, in the proceedings under the provisions of this chapter, and e single referee, when thus appointed, has all the powers and may rform all the duties required of the three referees. [R. S. § 4605.]

Hist. (See C. C. P. '81, § 532) R. S. § 05, reen. R. C. ib., reen. C. L. ib. N. D. Identical: C. C. P. § 8069.

Comp. leg.—Cal. Same: C. C. P. 1872, 97; Kerrs' C. ib.

§ 7022. [4606] **Cost of abstract of title.** If it appears to the court at it was necessary to have made an abstract of the title to the prop- y to be partitioned, and such abstract shall have been procured by e plaintiff, or if the plaintiff shall have failed to have the same made fore the commencement of the action, and any one of the defendants all have had such abstract afterwards made, the cost of the abstract, th interest thereon from the time the same is subject to inspection of e respective parties to the action, must be allowed and taxed. [R. S. 1606.]

Hist. (See C. C. P. '81, § 533) R. S. § 06, reen. R. C. ib., reen. C. L. ib. N. D. Similar: C. C. P. § 8070.

Comp. leg.—Cal. Same in part: C. C. P. 2, § 799; Kerr's C. ib.

ARTICLE 6.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

§ 7023. [4611] Writ of scire facias abolished. The writ of sci facias is abolished. [R. S. § 4611.]

Hist. (See C. C. P. '81, § 534) R. S. § 4611, reen. R. C. ib., reen. C. L. ib.

Cross ref. Substitute for writ of scire facias, § 6914. Bashor v. Beloit (1911) 20 I. 592, 119 P. 55.

Comp. leg.—Cal. Same with additions: C. C. P. 1872, § 802; same now as amende Kerr's C. ib.

N. D. See C. C. P. § 7969.

Cited: Stevens v. Hall (1902) 8 I. 5 69 P. 282; Bashor v. Beloit (1911) 20 592, 119 P. 55.

§ 7024. [4612] Actions for usurpation of office. An action may b brought in the name of the people of the state against any person wh usurps, intrudes into, holds or exercises any office or franchise, real pretended, within this state, without authority of law. Such actio shall be brought by the prosecuting attorney of the proper count when the office or franchise relates to a county, precinct or city, an when such office or franchise relates to the state, by the attorney ge eral; and it shall be the duty of the proper officer, upon proper shov ing, to bring such action whenever he has reason to believe that an such office or franchise has been usurped, intruded into, held or exe cised without authority of law. Any person rightfully entitled to a office or franchise may bring an action in his own name against th person who has usurped, intruded into, or who holds or exercises th same. [R. S. § 4612.]

Hist. R. S. § 4612, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 803; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7971.

Cited: S. v. Inhabitants of Pocatello (1891) 3 I. 174, 28 P. 411.

Nature of proceeding: A proceeding in quo warranto is not a civil action but a quasi criminal proceeding. Therefore there can be no intervention in such proceeding. P. v. Green (1869) 1 I. 235.

The action of quo warranto to try title to an office is an action at law, and a territorial statute authorizing such action to be determined at chambers without the intervention of a jury was held to be in violation of the federal constitution. P. v. Havird (1889) 2 I. 531, 25 P. 294.

One remedy for reaching the ineligibility of a person to hold office is by an information in the nature of quo warranto; the other is by a contest under the express provisions of the statute. Toncray v. Budge (1908) 14 I. 621, 95 P. 638.

The writ of quo warranto was a common law remedy, and is now a statutory remedy in this state, being covered by and included in this section and following sections. The district courts of this state have original jurisdiction in proceedings by information in the nature of quo warranto, and the jurisdiction to be exercised falls within the category of cases both at law and in equity. Ib.

The remedy herein provided for an information in the nature of quo warranto, is for the protection of the public in its governmental and sovereign capacity, and for the benefit of the community or state at large rather than for the gratificatio satisfaction or protection of any partic lar individual, except it be one who is hi self entitled to the office. Ib.

Statutory proceedings for removal fr office are in the nature of quo warran and quasi criminal. S. v. Gooding (191 22 I. 128, 124 P. 791.

By whom prosecuted: It is contrary the spirit and purpose of the ancient w of quo warranto, and its modern form information in the nature of quo warran to allow the action to be prosecuted p miscuously by any and every elector. T action must be prosecuted in the name the people of the state against the usu er or intruder, and must be brought or on the relation of the district attor of the proper county or of the attor general of the state, except in the sin instance where a person claims hims to be originally entitled to the office, which case he may prosecute the act in his own name. Toncray v. Budge, sup

If an action in the nature of quo w ranto is not prosecuted by or on the re tion of the attorney general or the pro county attorney, it is necessary for plaintiff to show some good cause w the same is not so prosecuted, and obt the permission and consent of the co to act as the relator himself and pro cute the action. Ib.

What may be reviewed: Irregulari in the action of the board of county c missioners in establishing a justice cinct can not be reviewed in an ac of quo warranto to try title to the o of justice in such precinct. Johnsto Savidge (1905) 11 I. 204, 81 P. 616.

§ 7025. [4613] Statement of private right: Arrest of defenda Whenever such action is brought in the name of the people of the st

e prosecuting attorney at the request of the person entitled to the ice or franchise, in addition to the cause of action in behalf of the ople of the state, may set forth the name of the person so entitled, th a statement of his right thereto, and in such case, upon proof by idavit that the defendant has received fees or emoluments belong- g to the office, and by means of usurpation thereof, an order may be anted by the judge or court wherein the case is pending, for the ar- st of such defendant, and holding him to bail, and thereupon he may arrested and held to bail in the same manner and with the same ect, and subject to the same rights and liabilities as in other civil tions where the defendant is subject to arrest. [R. S. § 4613.]

Hist. (See C. C. P. '81, § 536) R. S. § 13, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. P. 1872, § 804; also, as amended: Kerr's ib.

N. D. Analogous: C. C. P. § 7973.

Cited: Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

§ 7026. [4614] **Form of judgment.** In every such case judgment ay be rendered upon the right of the defendant, and also upon the ght of the party so alleged to be entitled, or only upon the right of e defendant, as the form of the action and justice may require. [R. S. 4614.]

Hist. (See C. C. P. '81, § 537) R. S. § 14, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "action" "case," and the words "as justice may uire" for "as the form of the action and justice may require": C. C. P. 1872, § 805; Kerr's C. ib.

N. D. Similar: C. C. P. § 7974.

Cited: Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

§ 7027. [4615] **Judgment for person entitled to office.** If the judg- ent be rendered upon the right of the person so alleged to be en- led, and the same be in favor of such person, he shall be entitled, ter taking the oath of office and executing such official bond as may required by law, to take upon himself the execution of the office. . S. § 4615.]

Hist. (See C. C. P. '81, § 538) R. S. § 15, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 06; Kerr's C. ib.

N. D. Similar: C. C. P. § 7975.

Cited: Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

§ 7028. [4616] **Same: Damages against usurper.** If judgment be ndered upon the right of the person so alleged to be entitled, in favor such person, he may recover by action the damages which he may ve sustained by reason of the usurpation of the office by the defend- t. [R. S. § 4616.]

Hist. (See C. C. P. '81, § 539) R. S. § 16, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 07; Kerr's C. ib.

N. D. Similar: C. C. P. § 7977.

Cited: Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

§ 7029. [4617] **Actions against several claimants.** When several rsons claim to be entitled to the same office or franchise, one action ay be brought against all such persons in order to try their respective ghts to such office or franchise. [R. S. § 4617.]

Hist. (See C. C. P. '81, § 540) R. S. § 17, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 08; Kerr's C. ib.

Cited: Toncray v. Budge (1908) 14 I. 1, 95 P. 26.

Necessity of intrusion: This section does authorize the trial of the right to an office before there has been an actual intrusion into the office. (Per Whitson, J.) Lindsay v. People (1872) 1 I. 438. But in the same case, Hollister, J., concurring specially, held that a claim to the office is all that is necessary to authorize the action; there need be no usurpation thereof by the defendant.

§ 7030. [4618] **Judgment of ouster and fine.** When a defendant ainst whom such action has been brought is adjudged guilty of usurp-

ing or intruding into or unlawfully holding any office, franchise privilege, judgment must be rendered that such defendant be e cluded from the office, franchise or privilege, and that he pay the co of the action. The court may also, in its discretion, in actions to whi the people of the state are a party, impose upon the defendant a fi not exceeding $5000, which fine, when collected, must be paid into t treasury of the state. [R. S. § 4618.]

Hist. (See C. C. P. '81, § 541) R. S. § 4618, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "in actions to which the people of the state are a party" are omitted: C. C. P. 1872, § 809; Kerr's C. ib.

N. D. Similar: C. C. P. § 7979.

Cited: Toncray v. Budge (1908) 14 621, 95 P. 26.

§ 7031. [4619] **Undertaking required of informer.** When the a tion is brought upon the information or application of a private par the prosecuting attorney may require such party to enter into an u dertaking, with sureties to be approved by the said officer, condition that such party or the sureties will pay any judgment for costs or da ages recovered against the plaintiff, and all the costs and expenses i curred in the prosecution of the action. [R. S. § 4619.]

Hist. (See C. C. P. '81, § 542) R. S. § 4619, reen. R. C. ib., reen. C. L. ib.

Cross ref. Statutory form of undertaking: § 7236. Justification of sureties: § 7237. State, county or city need not give bond: § 7238.

Comp. leg.—Cal. No such provision in C. C. P. 1872; now same except "attorn general" for "prosecuting attorney": Ker C. § 810.

N. D. Analogous: C. C. P. § 7972.

Cited: Toncray v. Budge (1908) 14 621, 95 P. 26.

ARTICLE 7.

PROVISIONS RELATING TO THE ADJUDICATION OF WATER RIGHTS.

'19, c. 8, § 38, p. 65 (§ 351 herein) abolished the office of state engineer, and § of the same act (§ 350 herein) vested his powers and duties in the department reclamation. The section notes "Compiled upon authority '19, c. 8," etc., indic that the substitutions of offices and officials authorized by that act have been m accordingly; the text of the preexisting law not being changed except in so far necessary in making substitutions.

The remainder of the act from which this article is taken is found in § 5568, et s

§ 7032. Examination of stream by department of reclamati Whenever suit shall be filed in the district court for the purpose of a judicating the priority of rights to the use of water from any stream the state, and before such adjudication is made the judge of such co shall request the department of reclamation to make an examinat of such stream, and the canals and ditches diverting water therefr and of all the land being irrigated by such canals and ditches and otl works, and the lands susceptible of reclamation therefrom, in the m ner provided in section 5604, and such department shall prepare a m showing such stream, canal and ditches, and the lands thereunder, provided in said section, and a statement which shall give the cor tion of such works, their capacity and the amount of land irriga from each of such canals, ditches or other works, and other essen features in relation to the reclamation of the lands tributary to s stream; such map and statement shall be accepted as evidence in determination of such rights by such court, and a copy of such m and statement shall be placed on file in the office of the departmen

Whenever the department of reclamation shall make such exami tion at the request of the court or the judge thereof, it shall make in duplicate, an itemized statement showing the cost of making s examination and survey, specifying the amount of each item for la supplies and other expenses, and the name of the person or company titled to payment therefor, and shall verify the same by oath, and

e oath of any person or persons having actual knowledge of the cts contained in such statement, and shall forward such statement to e state auditor. Said auditor shall present the same to the state board examiners, and if allowed by them, in whole or in part, the auditor all draw warrants on the general fund in favor of the parties en- led thereto, and the treasurer shall pay the same out of said fund. ıe sum so allowed by the state board of examiners shall be forthwith rtified by the state auditor to the judge and clerk of the court in ıich said suit shall be pending, and the same shall constitute a part the costs and disbursements in said cause. The court, at the time of try of final judgment in said cause, shall adjudge and determine the oportionate amount of such cost of examination and survey to be id by each of the parties to said suit, and the respective sums so ap- rtioned are hereby declared to be a lien upon the lands and water ghts of the said parties, and the said respective sums shall be entered the auditors of the proper counties upon the assessment roll of the unty in which the property is situated, opposite the names of the rties respectively required to pay the same, and said sums shall collected in the same manner and at the same time as other taxes are llected and shall be placed in a separate fund, to be remitted to the ıte treasurer at the same time that other taxes are remitted and to by said treasurer placed in the general fund.

In case the department of reclamation has already made such exam- ıtion as provided in section 5604, it shall be requested by the court the judge to furnish a certified copy of the records of the examina- n, which shall be brought up to date by further examination of the ound by such department, if need be, and such certified copies of ch records shall be filed and received as evidence in such case as in s section provided.

fist. '03, p. 223, § 37; am. '05, p. 357. , reen. R. C. § 4620, reen. C. L. ib.; npiled upon authority '19, c. 8, § 37, 65.

'omp. leg. N. D. See C. C. P. § 8236.

'ited: Idaho Trust etc. Bk. v. Riden- ıgh (1916) 29 I. 647, 161 P. 868.

'onstitutionality: This section, in mak- a peculiar provision for costs in pro- dings to adjudicate the water rights a stream, does not violate Const. III, subd. 3, and V, 2, 26, prohibiting the ctment of special laws, and requiring laws relating to courts to be general t uniform. Boise Irr. etc. Co. v. Stew- (1904) 10 I. 38, 77 P. 25, 321.

Expense to be apportioned: Where the court, under this section, orders a survey by the state engineer of the ditches and canals diverting water from a stream, and of the irrigable lands thereunder, and of those to which water has been applied, and the making of maps thereof, the cost of such survey is properly chargeable to the several litigants in the case in proportion to the quantity of water allotted to each. In such case, it it proper for the court to make the apportionment and order judgment against each occording to the amount properly apportioned to such litigant, and it is unnecessary for anyone to file a cost bill covering such item of expense. Farmers' etc. Ditch Co. v. Nampa-Meridian Irr. Dist. (1908) 14 I. 450, 94 P. 761.

§ 7033. Decreed rights appurtenant to land. In alloting the wa- s of any stream by the district court according to the rights and orities of those using such waters, such allotment shall be made to use to which such water is beneficially applied, and when such wa- is used for irrigation, the right confirmed by such decree or allot- nt shall be appurtenant to and shall become a part of the land ich is irrigated by such water, and such right will pass with the con- ance of such land, and such decree shall describe the land to which h water shall become so appurtenant. The amount of water so oted shall never be in excess of the amount actually used for bene- al purposes for which such right is claimed: *Provided,* That in the e of works capable of diverting more water than is applied to a neficial purpose at the time the rights of the person or persons

owning or using such works are adjudicated by the court, the rig only to the water beneficially applied at the time of making such allo ment shall be confirmed by the court, and the court shall ascertain th amount of water which can be diverted through such works in exce of such quantity beneficially applied, and shall set a time when suc amount shall be applied to the beneficial purpose for which it is i tended, which time shall not exceed six years from the date of the d cree issued by such court under such adjudication, and any person usi any of such water which was not beneficially applied at the time such adjudication shall, before the expiration of the time set for suc beneficial application, make proof of such beneficial use in the mann provided in section 5577, and such right, when confirmed in the ma ner provided in this chapter and chapter 218 shall relate to the priori established by such court, and if such application of any of such wat shall be made subsequent to such date, then the priority of the right the use thereof shall be determined in the manner provided in sectio 5579. ['13, c. 35, p. 133.]

Hist. '03, p. 223, § 38, reen. R. C. § 4621; am. '13, c. 35, p. 133, reen. C. L. § 4621.

Comp. leg.—N. D. See C. C. P. §§ 8269, 8316.

Description of land: The land to which a decreed right is appurtenant or on which it is used need not always be described in the decree, particularly in the case of rental rights. Farmers' etc. Ditch Co. v. Nampa-Meridian Irr. Dist. (1908) 14 450, 94 P. 761.

Application of proviso: The proviso this section is only applicable where t litigant is in position to profit by the do trine of relation. One claiming by appr priation merely, without compliance wi the statutes of this state, is not so e titled. Reno v. Richards, 32 I. —, 1 P. 81.

§ 7034. Certified copies of allotments. It shall be the duty of t clerk of the district court in each of the counties of this state to prepa at the expense of the county, and transmit without delay to the depa ment of reclamation by express or registered mail, a certified copy the allotments of the various streams, made by the district court a now on file in the offices of the district court in the various counties the state: *Provided,* That said clerk may, in place of such transcri transmit such original records of such decrees as are recorded in boo kept for that purpose. Immediately upon receipt of said transcripts said original records, it shall be the duty of the department to reco them in a book kept for that purpose, and to classify and arrange sa decrees by placing all the rights to water of one stream and its trib taries together, and the department shall send to each water comm sioner a certified copy of the allotments made by the district court of the streams within his district. And when an allotment of the wat of a stream shall be made by the district court, the clerk of such distr court shall immediately prepare, at the expense of the county, a transmit to the department of reclamation, a certified copy of the cree alloting such waters.

Hist. '03, p. 223, § 39, reen. R. C. § 4622, reen. C. L. ib.; compiled upon authority '19, c. 8, § 37, p. 65.

§ 7035. [4623] **Printed copies of decrees to be prepared.** Upon ceipt by such water commissioner of such certified copies of such crees of allotment, such commissioner shall arrange all the decrees lating to each separate stream, and number them in the order of th priorities, and shall cause them to be printed in a neat pamphlet fo and shall supply each user of water on such stream with a printed co of such decree. And such water commissioner shall, on or before first day of January of each year thereafter, cause to be printed a of all decrees or licenses which may be issued from time to time to

sers of water from any stream within his district, such list to state the ame of the person to which such decree or license has been granted, ıe date of the priority of the right, the amount of water granted, the escription of the land to which it is supplied, and the number of such ecrees or licenses, which numbers shall be in the order of the priori- es of the rights under decrees or licenses, and each user of water on ıch stream shall be provided with a copy of such list of rights, and ıe expense of printing such decrees and such lists of rights shall be ɔrne by the users of water on such streams, and shall be charged to ıch users as a part of the expenses of distributing water to such users, ıd shall be paid in the manner provided for the payment of the ex- ɔnses and compensation of the water masters. ['03, p. 223, § 40.]

Hist. '03, p. 223, § 40, reen. R. C. § 23, reen. C. L. ib.

§ 7036. Summary supplemental adjudication of water rights. 'here the priority rights upon any stream, canal or reservoir in this ate shall have been determined by decree of any court of competent risdiction, and thereafter it shall appear that any person or corpora- ɔn having the right to the use of any part of said water was not in- uded in said decree as a party thereto, and said right was not deter- ined thereby, or that any person who subsequent thereto has acquired ıy right to the use of such waters, any such person or corporation may ıve such right adjudicated in the following manner:

He may bring an action in the district court of the county wherein ch decree was entered against the watermaster having charge of the stribution of the water of said stream, canal or reservoir in which id party claims an interest, or if there be no watermaster thereof, en against the department of reclamation; that the said party shall his complaint, set out his own right as he is now required to do in ses involving the right of priority of use of water, and he shall fur- er set forth his acceptance as binding upon him of the said decree d the findings of fact and conclusions of law upon which it is based. ıereupon summons shall issue out of said court in said cause and be rved upon said defendant. That the plaintiff in said action shall cause be published once a week for not less than three weeks a notice of e pendency and purpose of said action in such newspaper or newspa- rs as the judge of said district court may order, which notice shall ntain the title of the court and the cause, the name of the stream, nal or reservoir in the waters of which said plaintiff claims an inter- , the date of priority claimed by him and the date and short title (be- g usually the name of the first plaintiff and the first defendant) of e decree theretofore entered, fixing the permanent rights in said eam, canal or reservoir. That after the expiration of the time fixed said order, said cause may be brought on for hearing in open court, d any party interested may appear and defend against said right. e court by its decree in said action shall determine the rights of said ıintiff in accordance with the proof submitted but subject to the ms of the original decree hereinbefore referred to: *Provided,* That the ht thus established shall not be deemed adjudicated, but prima facie rely, and may be attacked by suit brought in a court of competent jur- iction at any time by any person deeming himself aggrieved thereby. e court shall charge all costs arising under said action to the party nging the same, unless the defendant personally shall be guilty of mis- nagement or bad faith in the action or defense. Whereupon water ıll be distributed to him in accordance therewith and in the same manner though he had had his said right included in said decree. The plaintiff,

any party to said original decree, or any person interested, may appea from the decree entered in the action hereby authorized to be brough and the statutes governing new trial and appeal and the procedure i connection therewith shall govern so far as applicable: *Provided, how ever,* If the plaintiff appeals or moves for a new trial, notice thereof an of the date fixed for the settlement of any reporter's transcript, bill o exceptions, or any other matter required to be settled, shall be served b the publication of such notice or notices for three weeks in such news paper as the judge of said district may by order direct. That the pro posed draft of such reporter's transcript, or other matter required to b settled, or bill of exceptions, shall be filed with the clerk of said court an such filing shall be sufficient service thereof. The transcript and brief upon appeal shall be served as in other civil cases.

Hist. '11, c. 224, p. 708; am. '15, c. 34, § 18, p. 112, reen. C. L. § 4623a; compiled upon authority, 19, c. 8, § 37, p. 65.

Cited: Wylie v. Kent (1915) 28 I. 1 152 P. 194.

ARTICLE 8.

DIVORCES FOR INSANITY.

Cross ref. Actions for divorce in general: §§ 4620-53.

§ 7037. Insanity a ground for divorce. A divorce may be grante when either husband or wife has become permanently insane: *Provide* That no divorce shall be granted under the provisions of this chapter un less such insane person shall have been duly and regularly confined in a insane asylum of this state, or of a sister state or territority, for at leas six years next preceding the commencement of the action for divorc nor unless it shall appear to the court that such insanity is permaner and incurable: *Provided, further,* That no action shall be maintaine under the provisions of this chapter unless the plaintiff shall be an a tual resident of this state, and shall have resided therein for one yea next preceding the commencement of such action. [C. L. § 4624.]

Hist. '95, p. 11, § 1, reen. '99, p. 232, § 1; am. '03, p. 332, § 1; am. R. C. § 4624; compiled and reen. C. L. ib.

Cross ref. Express reference to this se tion: Causes for divorce: § 4627.

§ 7038. [4625] **Appointment of guardian: Service of process.** Th district courts of the several judicial districts of this state shall hav jurisdiction of actions for divorce under the provisions of this chapte and such action shall be brought in the county of this state in whic the plaintiff resides. And the court in which such action is about to b commenced shall, upon the filing by the plaintiff of a petition, duly ver fied, showing that a cause of action exists under this chapter, appoi some person to act as guardian of such insane person in such actio and the summons and complaint in such action shall be served upon th defendant by delivering a copy of such summons and complaint such guardian, and by delivering a copy thereof to the county attorn of the county in which such action is brought. ['95, p. 11, § 2.]

Hist. '95, p. 11, § 2, reen. '99, p. 232, § 2, reen. R. C. § 4625, reen. C. L. ib.

§ 7039. [4626] **Prosecuting attorney to defend action.** It shall the duty of the county attorney upon whom the summons and co plaint in such action shall be served to appear for such defendant such action and defend the same, and no divorce shall be granted unc the provisions of this chapter except in the presence of the county torney. ['95, p. 11, § 3.]

Hist. '95, p. 11, § 3, reen. '99, p. 232, § 3, reen. R. C. § 4626, reen. C. L. ib.

§ 7040. [4627] **Alimony, distribution of property, custody of children.** In any action brought under the provisions of this chapter the aid courts and the judges thereof shall possess all the powers relative o the payment of alimony, the distribution of property and the care nd custody of children of the parties, that such courts now have, or ıay hereafter have, in other actions for divorce. ['95, p. 11, § 4.]

Hist. '95, p. 11, § 4, reen. '99, p. 232, 4, reen. R. C. § 4627, reen. C. L. ib.

§ 7041. [4628] **Costs and expenses to be paid by plaintiff.** All the osts of the court in such action, as well as the actual expenses of the ounty attorney therein, together with the expenses and fees of the uardian therein, shall be paid by the plaintiff; such expenses of the ounty attorney and expenses and fees of the guardian shall be fixed nd allowed by the court, and the court or the judge thereof may make ıch order as to the payment of such fees and expenses as to said court r judge may seem proper. ['95, p. 11, § 5.]

Hist. '95, p. 11, § 5, reen. '99, p. 232, 5, reen. R. C. § 4628, reen. C. L. ib.

ARTICLE 9.

ACTIONS FOR INJUNCTION AND ABATEMENT OF MORAL NUISANCES.

Comp. leg.—The Iowa statute of '13, reenacted in '15, Iowa C., c. 9, §§ 4944h(1-11), nbodies provisions nearly identical with the Idaho law. References to the Illinois w are given below.

§ 7042. Cumulative remedy. In addition to any other remedy pro-ded by law, any act, occupation, structure or thing which is a moral uisance, may be abated, and the person doing such act or engaged in ıch occupation, and the owner and agent of the owner of any such ructure or thing may be enjoined, as in this article provided. ['15, 43, § 6, p. 127.]

Hist. '15, c. 43, § 6, p. 127, enacting 4628a, reen. C. L. ib.

Cross ref. Moral nuisances defined: § 22 et seq.

Constitutionality: A similar act relating to intoxicating liquors held constitutional. S. v. Kasiska (1915) 27 I. 548, 150 P. 17.

§ 7043. Who may maintain action. The county attorney or any :sident citizen of the county may maintain an action of an equitable ature, as relator, in the name of the state of Idaho, to abate a moral uisance, perpetually to enjoin all persons from maintaining the same, ıd to enjoin the use of any structure or thing adjudged to be a moral uisance. ['15, c. 43, § 6, p. 127.]

Hist. '15, c. 43, § 6, p. 127, enacting 4628b, reen. C. L. ib.

Cross ref. Private person may main-in action: §§ 6433, 6956.

Comp. leg.—Ill. Similar: '15, S. B. 362, first part § 2, p. 371.

§ 7044. Temporary injunction. Upon the filing of a verified com-aint therefor, in any court of competent jurisdiction, the court or a dge at chambers, if satisfied that the moral nuisance complained of :ists, may allow a temporary writ of injunction, without bond, en-ining the defendant from maintaining any such nuisance within the risdiction of the court issuing such writ; but no such injunction shall ;ue unless it be made to appear to the satisfaction of the court that e owner or agent of the owner of such building or place knew, or had :en personally served with notice, that such building or place was be-g so used and had failed to abate such nuisance, or that upon diligent quiry such owner or agent of the owner could not be found within e state for the service of such preliminary notice. ['15, c. 43, § 6, 127.]

Hist. '15, c. 43, § 6, p. 127, enacting 4628c, reen. C. L. ib.

Comp. leg.—Ill. Similar: '15, S. B. 362, second part of § 2, p. 371.

§ 7045. Restrictions upon dismissal. If the complaint is filed upo the relation of a citizen, the proceeding shall not be dismissed for wa of prosecution, nor upon motion of such relator, unless there is file with such motion a sworn statement made by such relator and his a torney, setting forth the reasons therefor, and unless such dismissal approved by the county attorney in writing or in open court. If th court is of the opinion that such proceeding ought not to be dismisse it may overrule such motion and may enter an order directing th county attorney to prosecute such cause to final determination. Th cause shall be heard immediately upon issue being joined, and if th hearing is continued beyond the next term, the court, or a judge chambers, may permit any resident citizen of the county consentin thereto to be substituted for the original relator. If any such com plaint is filed upon the relation of a citizen, and the court finds tha there was no reasonable grounds or cause for filing the same, th costs may be taxed against such relator. ['15, c. 43, § 6, p. 127.]

Hist. '15, c. 43, § 6, p. 127, enacting § 4628d, reen. C. L. ib.

Comp. leg.—Ill. Identical: '15, S. 362, part of § 3, p. 371.

§ 7046. Evidence of reputation admissible. At all hearings upo the merits, evidence of the general reputation of the building or pla constituting the alleged nuisance, of the inmates thereof, and of tho resorting thereto, is admissible for the purpose of proving the exis ence of such nuisance. ['15, c. 43, § 6, p. 128.]

Hist. '15, c. 43, § 6, p. 128, enacting § 4628e, reen. C. L. ib.

Comp. leg.—Ill. Analogous: '15, S. 362, § 4, p. 371.

§ 7047. Perpetual injunction and order of abatement: Execution order. If the existence of the nuisance is established, the court sha enter a decree perpetually restraining all persons from maintaining permitting such nuisance, and from using the building or place which the same is maintained for any purpose, for a period of one ye thereafter, unless such decree is sooner vacated, as hereinafter pr vided. While said decree remains in effect, such building or pla shall be in the custody of the court.

An order of abatement shall also issue as a part of such decr which order shall direct the sheriff of the county to remove from su building or place all fixtures and movable property used in conducti or aiding or abetting such nuisance, to sell the same in the mann provided by law for the sale of chattels under execution, to close su building or place against its use for any purpose, and to keep it clos for a period of one year, unless sooner released as hereinafter p vided. The sheriff's fees for removing and selling the movable pr erty shall be taxed as a part of the costs, and shall be the same those for levying upon and selling like property under execution. I closing the building and keeping it closed the court shall allow a r sonable fee to be taxed as a part of the costs. ['15, c. 43, § 6, p. 12

Hist. '15, c. 43, § 6, p. 128, enacting § 4628f, reen. C. L. ib.

Comp. leg.—Ill. Similar: '15, S. B. § 5, p. 371.

§ 7048. Disposition of proceeds of sale. The proceeds of the s of the movable property shall be applied in payment of the costs the proceeding and of the abatement, and the balance, if any, shall paid to the defendant or person owning said property immediately pr to such sale. ['15, c. 43, § 6, p. 128.]

Hist. '15, c. 43, § 6, p. 128, enacting § 4628g, reen. C. L. ib.

Comp. leg.—Ill. Similar: '15, S. B. § 6, p. 371.

§ 7049. Violation of injunction and order of abatement: Pena In case of the violation of any injunction or order of abatement iss

nder the provisions of this article, the court, or a judge at chambers, ıay summarily try and punish the offender for his contempt of court. '15, c. 43, § 6, p. 128.]

Hist. '15, c. 43, § 6, p. 128, enacting 4628h, reen. C. L. ib.

Comp. leg.—Ill. Similar: '15, S. B. 362, § 7, p. 371.

§ 7050. **Release of building from injunction.** If the owner of such uilding or place has not been guilty of any contempt of court in the roceeding, and pays all costs of the proceeding and of the abatement ıd files a bond, with sureties to be approved by the court, in the penal ım of the full value of the property, to be ascertained by the court, or y a judge at chambers, conditioned that such owner will immediately ɔate such nuisance and prevent the same from being established or aintained therein within a period of one year thereafter, the court ıall vacate such decree and order of abatement, so far as the same ay relate to such building or place, and shall also vacate the order recting the sale of the movable property. The release herein provided ɔr shall not release such property from any judgment, lien, penalty or ability to which it may be otherwise subject by law. ['15, c. 43, 6, p. 129.]

Hist. '15, c. 43, § 6, p. 129, enacting 4628i, reen. C. L. ib.

Comp. leg.—Ill. Similar: '15, S. B. 362, § 8, p. 371.

§ 7051. **Costs a lien.** Whenever the costs shall be assessed under ıe provisions of this article against the owner of any property declared be a moral nuisance, such costs shall constitute a lien upon such pro- erty to the extent of the interest of such owner, and writ of execution ıall issue thereon. ['15, c. 43, § 6, p. 129.]

Hist. '15, c. 43, § 6, p. 129, enacting 4628j, reen. C. L. ib.

Comp. leg.—Ill. Similar: '15, S. B. 362, § 9, p. 371.

CHAPTER 259.

PROCEEDINGS IN CIVIL ACTIONS IN PROBATE COURTS.

§ 7052. [4629] **Civil proceedings in probate courts.** In all civil its, and within its civil jurisdiction, all proceedings in the probate ɔurt, the process, provisional remedies and supplementary proceed- gs, and the rules of practice, pleading and procedure, shall be the me as is provided by law for justices' courts. ['05, p. 28, § 1.]

Hist. '05, p. 28, § 1, reen. R. C. § 4629, n. C. L. ib.

Cross ref: Civil jurisdiction of probate urt: § 6466.

Cited: Kimball v. Raymond (1903) 9 I. 176, 72 P. 957; Dewey v. Schreiber Imp. Co. (1906) 12 I. 280, 85 P. 921; Zimmerman v. Bradford-Kennedy Co. (1908) 14 I. 681, 95 P. 825; Hanson v. Morrison (1917) 30 I. 422, 165 P. 521.

CHAPTER 260.

PROCEEDINGS IN JUSTICES' COURTS.

Cross ref. Civil jurisdiction of justices' courts: § 6471.

ARTICLE 1.

PLACE OF TRIAL.

§ 7053. [4639] **Place of trial.** Actions in justices' courts must be mmenced, and subject to the right to change the place of trial as in is chapter provided, must be tried:

1. If there is no justice's court for the precinct or city in which the fendant resides: in any city or precinct of the county in which he sides.

2. When two or more persons are jointly, or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different precincts or different cities of the same county, or in different counties: in the precinct or city in which any of the persons liable may reside.

3. In cases of injury to the person or property: in the precinct or city where the injury was committed, or where the defendant resides.

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same: in the precinct or city in which the property may be found, or in which the property was taken or in which the defendant resides.

5. When the defendant is a nonresident of the county: in any precinct or city wherein he may be found.

6. When the defendant is a nonresident of the state: in any precinct or city in the state.

7. When a person has contracted to perform an obligation at a particular place and resides in another county, precinct or city: in the precinct or city in which such obligation is to be performed or in which he resides.

8. When the parties voluntarily appear and plead without summons: in any precinct or city in the state.

9. In all other cases: in the precinct or city in which the defendant resides. [R. S. § 4639.]

Hist. (See C. C. P. '81, § 543) R. S. § 4639, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 832; substantially the same: Kerr's C. ib.

Cited: S. v. Noyes (1908) 15 I. 241, 96 P. 435.

Injuries to property: A justice's court of the precinct wherein an injury to property committed by a foreign corporation occurs, has jurisdiction to try the action for such injury, although the legal residence of the corporation within the state is in another county. Webster v. O. S. L. Ry. Co. (1898) 6 I. 312, 55 P. 661.

Place of performance: This section authorizes an action to be instituted in the precinct where the obligation is to be performed, whether or not the obligation in writing. Purdum v. Neil (1904) 10 263, 77 P. 631.

§ 7054. [4640] **Change of venue.** The court may, at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party.

2. When either party makes and files an affidavit that he believes that he can not have a fair and impartial trial before such justice by reason of the interest, prejudice or bias of the justice.

3. When, from any cause, the justice is disqualified from acting. [R. S. § 4640.]

Hist. (See C. C. P. '81, § 544) R. S. § 4640, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 833; Kerr's C. ib.

N. D. Similar: Jus. C. § 9036.

§ 7055. [4641] **Limitation on right to change.** The place of trial can not be changed in justice's court on motion of the same party more than once, upon any or all of the grounds specified in the first and second subdivisions of the preceding section. [R. S. § 4641.]

Hist. (See C. C. P. '81, § 545) R. S. § 4641, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 834; Kerr's C. ib.

N. D. Similar: Jus. C. § 9037.

§ 7056. [4642] **Where transferred.** When the court orders the place of trial to be changed, the action must be transferred for trial

a court the parties agree upon; and if they do not agree, then to ıe probate court or to another justice's court in the same county. R. S. § 4642.]

Hist. (See C. C. P. '81, § 546) R. S. § 42, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Substantially same: C. P. 1872, § 835; Kerr's C. ib.

N. D. Similar: Jus. C. § 9037.

Cited: (In brief of counsel) S. v. Cowen (1916) 29 I. 783, 784.

§ 7057. [4643] **Proceedings after transfer.** After an order has ɔen made transferring the action for trial to another court, the fol- wing proceedings must be had:

1. The justice ordering the transfer must immediately transmit to ıe clerk of the probate court, or to the justice to whom it is trans- ɔrred, on payment of his costs by the party applying, all the papers the action, together with a certified transcript from his docket of ıe proceedings therein.

2. Upon the receipt by him of such papers, the clerk or justice ust issue a notice stating when and where the trial will take place, hich must be served upon the parties at least one day before the me fixed for trial. [R. S. § 4643.]

Hist. (See C. C. P. '81, § 547) R. S. § 43, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, 836; Kerr's C. ib.

N. D. Similar: Jus. C. § 9038.

Refusal to pay costs: Where a defendant refuses to pay the costs of a transcript on being granted a change of venue, it is the duty of the justice to proceed and try the case. Presly v. Dean (1904) 10 I. 375, 79 P. 71.

§ 7058. [4644] **Effect of transfer.** From the time the order chang- g the place of trial is made the court to which the action is thereby ansferred has the same jurisdiction over it as though it had been ɔmmenced in such court. [R. S. § 4644.]

Hist. (See C. C. P. '81, § 548) R. S. § 44, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 837; Kerr's C. ib.

N. D. Similar: Jus. C. § 9038.

§ 7059. [4645] **Transfer to district court.** The parties to an action a probate or justice's court can not give evidence upon any ques- ɔn which involves the title or possession of real property, nor can any sue presenting such question be tried by such court; and if it appear om the answer of the defendant verified by his oath or that of his ɣent or attorney, that the determination of the action will necessarily volve the question of title or possession to real property, the probate ɔurt or justice must suspend all further proceedings in the action, and ɛrtify the pleadings, and, if any of the pleadings are oral, a transcript the same, from his docket to the clerk of the district court of the ɔunty; and from the time of the filing of such pleadings or transcript ith the clerk, the district court has, over the action, the same jurisdic- ɔn as if it had been commenced therein: *Provided*, That this section all not be construed to extend to, or include, actions of forcible entry, rcible detainer or unlawful detainer. [R. S. § 4645.]

Hist. (See C. C. P. '81, § 549) R. S. § 45, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. 1872, § 838; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9055.

Cited: Hammer v. Garrett (1909) 15 657, 99 P. 124.

Construed: Where it appears by an- er that title or possession of real prop- ty is in issue, under this section (for- rly C. C. P. 1874, § 347) a justice of the ace has no jurisdiction to try the case. If he does so and appeal is taken to the district court, the appeal should be dismissed. Langford v. Monteith (1880) 102 U. S. 145, 26 L. ed. 53, aff. 1 I. 612.

Attachment on real estate: Real estate may be attached under writ issued out of a justice's or probate court. It does not follow that by issuing writ of attachment, in execution of which sheriff levies upon real estate, court will necessarily hear evidence involving title to real property. Hanson v. Morrison (1917) 30 I. 422, 165 P. 521.

ARTICLE 2.

MANNER OF COMMENCING ACTIONS.

§ 7060. [4650] Actions: How commenced. An action in a jus tice's court is commenced by filing a complaint. [R. S. § 4650.]

Hist. (See C. C. P. '81, § 550) R. S. § 4650, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 839; as amended: Kerr's C. ib.

N. D. See Jus. C. § 9019.

§ 7061. [4651] Summons: When issued. The court must indors on the complaint the date upon which it was filed, and at any tim within one year thereafter the plaintiff may have summons issued [R. S. § 4651.]

Hist. (See C. C. P. '81, § 551) R. S. 4651, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 187 § 840: Kerr's C. ib.

§ 7062. [4652] Waiver of summons. At any time after the com plaint is filed the defendant may, in writing, or by appearing an pleading, waive the issuing of summons. [R. S. § 4652.]

Hist. (See C. C. P. '81, § 552) R. S. § 4652, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 187 § 841: Kerr's C. ib.

§ 7063. [4653] Appearance and attorney. Parties in a justice' court may appear and act in person or by attorney; and any perso except the officer by whom the summons or jury process was serve may act as attorney. [R. S. § 4653.]

Hist. (See C. C. P. '81, § 553) R. S. § 4653, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. 1872, § 842: Kerr's C. ib.

§ 7064. [4654] Same: By infant or incompetent person. When a infant, insane or incompetent person is a party he must appear eithe by his general guardian if he have one or by a guardian ad litem a pointed by the justice. When a guardian ad litem is appointed by th justice he must be appointed as follows:

1. If the infant, insane or incompetent person be plaintiff, the a pointment must be made before the summons is issued, upon the appl cation of the infant, if he be of the age of 14 years; if under that ag or if insane or incompetent, upon the application of a relative friend.

2. If the infant, insane or incompetent person be defendant, th appointment must be made at the time the summons is returned, or b fore the answer, upon the application of the infant, if he be of the a of 14 years, and apply at or before the summons is returned; if he under the age of 14, or be insane or incompetent, or neglect so apply, then upon the application of a relative or friend, or any oth party to the action, or by the justice on his own motion. [R. S. § 4654

Hist. (See C. C. P. '81, § 554) R. S. § 4654, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. 1872, § 843; as amended: Kerr's C. ib.

Cross. ref. Appointment of guardians ad litem in district court: 6639-40.

§ 7065. Contents of summons. The summons must be directed the defendant, signed by the justice and must contain:

1. The title of the court, the name of the county, the name of th precinct or city in which the action is commenced, and the names the parties thereto.

2. If the summons is for personal service, it may be in substa tially the following form:

In the justice's court for.....precinct of..... county, Idaho.

.....
Plaintiff.
vs. } *Summons.*
.....
Defendant.

The state of Idaho sends greeting to the above-named defendant:

You are hereby summoned to appear in the above-entitled court to be held at....., in said precinct, in the above-entitled cause, at.....o'clock, ...m., upon the.....day of....., 19....., and answer plaintiff's complaint on file in said court, or plaintiff will take judgment against you as prayed in said complaint.

Witness my hand this.....day of....., 19.....

.....
Justice of the Peace.

3. When the summons is for publication, a statement of the nature the action in general terms.

4. If the plaintiff has appeared by attorney, the name and place residence of the attorney must be indorsed on the summons. ['11, 194, § 1, p. 651.]

Hist. (See C. C. P. '81, § 555) R. S. § 55, reen. R. C. ib.; am. '11, c. 194, § 1, 651, reen. C. L. § 4655.

Cross ref. Summons must contain no inks: § 7142.

Comp. leg.—Cal. Analogous: C. C. P. 72, § 844; amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9021, 9022.

Cited: Chase v. Hagood (1893) 3 I. 682, 34 P. 811; Purdum v. Neil (1904) 10 I. 263, 77 P. 631.

§ **7066. Same: Time for appearance.** The time specified in the mmons for the appearance of the defendant must be as follows:

1. If an order of arrest is indorsed upon the summons, forthwith.

2. In all other cases, not less than three nor more than 20 days om its date, except as provided in section 7069. [C. L. § 4656.]

Hist. (See C. C. P. '81, § 556) R. S. § 56, reen. R. C. ib.; exception added to t sentence on authority of '11, c. 194, . p. 651 (§ 4659), compiled and reen. L. § 4656.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 845; amended: Kerr's C. ib.

N. D. See Jus. C. § 9023.

§ **7067.** [4657] **Alias summons.** If the summons is returned without ing served upon any or all of the defendants, the justice, upon the mand of the plaintiff, may issue an alias summons, in the same form the original, except that he may fix the time for the appearance of e defendant at a period not to exceed 90 days from its date. [R. S. 4657.]

Hist. (See C. C. P. '81, § 557) R. S. § 57, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 846: Kerr's C. ib.

§ **7068.** [4658] **Same: Successive alias summons.** The justice may thin a year from the date of the filing of the complaint, issue as many as summons as may be demanded by the plaintiff. [R. S. § 4658.]

Hist. (See C. C. P. '81, § 558) R. S. § 58, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 847: Kerr's C. ib.

§ **7069. Place of service.** The summons can not be served out of e county in which the action is brought, except as otherwise proled and except where the action is brought upon a joint contract or ligation of two or more persons who reside in different counties, and

the summons has been served upon the defendant, resident of th county, in which case the summons may be served upon the other d fendants out of the county; and except, also, when an action is brougl against the party who has contracted in writing to perform an oblig tion at a particular place and resides in a different county, in whic case summons may be served in the county where he resides. Whe the defendant resides in the county, the summons can not be serve within two days of the time fixed for the appearance of the defen ant; when he resides out of the county and the summons is served o of the county, the summons can not be served within 20 days of suc time. ['11, c. 194, § 2, p. 651.]

Hist. (See C. C. P. '81, § 559) R. S. § 4659, reen. R. C. ib.; am. '11, c. 194, § 2, p. 651, reen. C. L. § 4659.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 848; amended: Kerr's C. ib.

N. D. Analogous: Jus. §§ 9024-5.

Cited: S. v. Noyes (1908) 15. I. 241, 96 P. 435.

Actions on contract: While an action may be instituted in the precinct whe the obligation is to be performed, regar less of whether or not the obligation is writing, under 7053, subd. 7, yet summo can not be served out of the county which the action is commenced unless t contract sued on is in writing and to performed in the county in which the a tion was begun. Purdum v. Neil (190 10 I. 263, 77 P. 631.

§ 7070. Manner of service. The summons in the cases mentione in the preceding section may be served by a sheriff or constable any of the counties of this state: *Provided,* That when a summons issu by a justice of the peace is to be served out of the county in which it w issued, the summons shall have attached to it a certificate, under seal the clerk of the district court of such county, to the effect that the pers issuing the same was an acting justice of the peace at the date of t summons; or the summons may be served by any male resident over t age of 18 years, not a party to the suit, within the county where the a tion is brought, and must be served and returned as provided in actio commenced in the district court; or any service may be made perso ally outside the state, or by publication, and the sections of this code pr viding for such personal service and publication of summons issued c of the district court are applicable to the probate and justices' cour the necessary changes and substitutions being made therein. [C. § 4660.]

Hist. (See C. C. P. '81, § 560) R. S. § 4660, reen. R. C. ib.; am. '11, c. 194, § 3, p. 652; compiled and reen. C. L. § 4660.

Cross ref. Publication of summons: § 6677-8.

Comp. leg.—Cal. Partly similar: C. C. P. 1872, § 849; amended: Kerr's C. ib.

N. D. See Jus. C. § 9026.

Cited: S. v. Noyes (1908) 15 I. 2 96 P. 435.

§ 7071. [4661] **Hour for appearance.** The parties are entitled one hour in which to appear after the time fixed in the summons, b are not bound to remain longer than that time unless both parties ha appeared, and the justice, being present, is engaged in the trial of a other cause. [R. S. § 4661.]

Hist. (See C. C. P. '81, § 561) R. S. § 4661, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 850; amended: Kerr's C. ib.

N. D. Similar: Jus. C. § 9029.

ARTICLE 3.

PLEADINGS.

§ 7072. [4666] **Form of pleadings.** Pleadings in justice's court

1. Are not required to be in any particular form, but must be su as to enable a person of common understanding to know what is tended.

2. May, except the complaint, be oral or in writing.
3. Need not be verified, unless otherwise provided in this code.
4. If in writing, must be filed with the justice.
5. If oral, an entry of their substance must be made in the docket. R. S. § 4666.]

Hist. (See C. C. P. '81, § 562) R. S. § 666, reen. R. C. ib., reen. C. L. ib.

Cross ref. Pleadings must be verified: 7336.

Comp. leg.—Cal. Same except "must" r "need" and "title" for "code," subd. 3. C. P. 1872, § 851: Kerr's C. ib.

N. D. Similar: Jus. C. § 9039.

Cited: Dewey v. Schreiber Imp. Co. (1906) 12 I. 280, 85 P. 921.

Pleadings: Pleadings in justices' courts may be very informal. Rabb v. North Am. Acc. Ins. Co. (1916) 28 I. 321, 154 P. 493.

§ 7073. [4667] **Enumeration of pleadings.** The pleadings are:
1. The complaint by the plaintiff.
2. The demurrer to the complaint.
3. The answer by the defendant.
4. The demurrer to the answer. [R. S. § 4667.]

Hist. (See C. C. P. '81, § 563) R. S. § 667, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 852: Kerr's C. ib.

N. D. Similar: Jus. C. § 9040.

§ 7074. [4668] **Complaint.** The complaint in these courts is a conse statement, in writing, of the facts constituting the plaintiff's cause f action; or a copy of the account, note, bill, bond or instrument upon hich the action is based. [R. S. § 4668.]

Hist. (See C. C. P. '81, § 564) R. S. § 668, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "justices' courts" for "these courts": C. C. 1872, § 853: Kerr's C. ib.

N. D. Similar: Jus. C. § 9044.

Cited: Purdum v. Neil (1904) 10 I. 263, 77 P. 631.

Complaint informal: A complaint in a justice's court may be an informal statement of the cause of action. Rabb v. North Am. Acc. Ins. Co. (1916) 28 I. 321, 154 P. 493.

§ 7075. [4669] **Demurrer to complaint.** The defendant may, at ny time before answering, demur to the complaint. [R. S. § 4669.]

Hist. (See C. C. P. '81, § 565) R. S. § 69, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 854: Kerr's C. ib.

N. D. Similar: Jus. C. § 9045.

§ 7076. [4670] **Answer and counterclaim.** The answer may con.in a denial of any or all of the material facts stated in the complaint hich the defendant believes to be untrue; also a statement in a plain id direct manner of any other facts constituting a defense or counrclaim, upon which an action might be brought by a defendant gainst the plaintiff in that court. [R. S. § 4670.]

Hist. (See C. C. P. '81, § 566) R. S. 4670, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "a justice's court" for "that court": C. C. P. 1872, § 855: Kerr's C. ib.

§ 7077. [4671] **Failure to plead counterclaim.** If the defendant nit to set up a counterclaim in the cases mentioned in the last section, either he nor his assignee can afterward maintain an action against ie plaintiff therefor. [R. S. § 4671.]

Hist. (See C. C. P. '81, § 567) R. S. § 71, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 856: Kerr's C. ib.

§ 7078. [4672] **Demurrer to answer.** When the answer contains ew matter in avoidance, or constituting a defense or a counterclaim, ie plaintiff may, at any time before the trial, demur to the same for sufficiency, stating therein the grounds for such demurrer. [R. S. 4672.]

Hist. (See C. C. P. '81, § 568) R. S. § 4672, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 857: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9048.

§ 7079. [4673] **Proceedings on demurrer.** The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint.

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith.

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow.

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed. [R. S. § 4673.]

Hist. (See C. C. P. '81, § 569) R. S. § 4673, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 858: Kerr's C. ib.

N. D. Similar: Jus. C. § 9046.

§ 7080. [4674] **Amendment of pleadings: Relief from default.** Either party may, at any time before the conclusion of the trial amend any pleading, but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also in its discretion, when an adjournment will, by the amendment, be rendered necessary, require as a condition to the allowance of such amendment made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding $20.

The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect; but the application for such relief must be made within 10 days after the entry of the judgment, and upon an affidavit showing good cause therefor. [R. S. § 4674.]

Hist. (See C. C. P. '81, § 570) R. S. § 4674, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 859: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9050.

Relief from default: A motion for relief from a default judgment made after the expiration of 10 days subsequent to the entry is a nullity. Smith v. Peterson (1911) 31 I. 34, 169 P. 290.

Failure to give notice of motion for relief from default is not a ground for striking such a motion from the files. Ib.

§ 7081. [4675] **Pleading to amended pleading.** When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow. [R. S. § 4675

Hist. (See C. C. P. '81, § 571) R. S. § 4675, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 860: Kerr's C. ib.

N. D. Similar: Jus. C. § 9051.

ARTICLE 4.

PROVISIONAL REMEDIES.

Civil Arrest.

§ 7082. [4680] **Order of arrest.** An order to arrest the defendant may be indorsed on a summons issued out of a justice's court, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, when the defendant is about to depart from the state with intent to defraud his creditors.
2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity.
3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought.
4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female can be arrested in any action. [R. S. § 4680.]

Hist. (See C. C. P. '81, § 572) R. S. § 680, reen. R. C. ib., reen. C. L. ib.

Cross ref. Arrest proceedings in district court: §§ 6729-55. Discharge of persons imprisoned on civil process: §§ 308-19. Arrest in forcible entry and unlawful detainer: § 7330.

Comp. leg.—Cal. Same except words "express or implied" inserted after "contract," subd. 1: C. C. P. 1872, § 861: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7489.

§ **7083.** [4681] **Same: Where executed.** In cases under the first subdivision of the last section, or when the defendant is about to depart from the state, the order of arrest may be executed, and the defendant arrested, in any part of the state. [R. S. § 4681.]

Hist. (See C. C. P. '81, § 573) R. S. § 681, reen. R. C. ib., reen. C. L. ib.

N. D. See C. C. P. § 7491.

§ **7084.** [4682] **Same: Affidavit and undertaking.** Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and file a written undertaking in the sum of $300, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. [R. S. § 4682.]

Hist. (See C. C. P. '81, § 574) R. S. § 682, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 872, § 862; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7492.

§ **7085.** [4683] **Proceedings after arrest.** The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or it appears to him by the affidavit of the defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the precinct or city, if there is another, and if not, then before the justice of an adjoining precinct or city, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him. [R. S. 4683.]

Hist. (See C. C. P. '81, § 575) R. S. § 683, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "township" for "precinct": C. C. P. 1872, § 863: Kerr's C. ib.

N. D. See C. C. P. § 7493.

§ **7086.** [4684] **Notice to plaintiff of arrest.** The officer making the arrest must immediately give notice thereof to the plaintiff or his attorney or agent, and indorse on the summons, and subscribe, a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff. [R. S. § 4684.]

Hist. (See C. C. P. '81, § 576) R. S. § 684, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 864: Kerr's C. ib.

§ 7087. [4685] **Custody of defendant.** The officer making the arrest must keep the defendant in custody until he is discharged by order of the court. [R. S. § 4685.]

Hist. (See C. C. P. '81, § 577) R. S. § 4685, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "justice" for "court": C. C. P. 1872, § 865: Kerr's C. ib.

Attachment.

§ 7088. [4686] **Attachment: Affidavit.** A writ to attach the property of the defendant must be issued by the justice at the time of, or after, issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit for attachment out of the district court. [R. S. § 4686.]

Hist. (See C. C. P. '81, § 578) R. S. § 4686, reen. R. C. ib., reen. C. L. ib.

Cross ref. Affidavit for attachment in district court: § 6780.

Comp. leg.—Cal. Same except the words "specified in section 538 of this code" for "for attachment out of the district court": C. C. P. 1872, § 866: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9058.

Cited: Kimball v. Raymond (1903) 9 I. 176, 72 P. 957; Hanson v. Morrison (1917) 30 I. 422, 165 P. 521.

§ 7089. [4687] **Same: Undertaking.** Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than $50 nor more than $300, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. [R. S. § 4687.]

Hist. (See C. C. P. '81, § 579) R. S. § 4687, reen. R. C. ib., reen. C. L. ib.

Cross ref. Statutory form of undertaking: § 7236. Justification of sureties: § 7237. State, county or city need not give bond: § 7238.

Comp. leg.—Cal. Same: C. C. P. 1872, § 867; Kerr's C. ib.

N. D. Identical: Jus. C. § 9059.

Cited: Hanson v. Morrison (1917) 30 I. 422, 165 P. 521.

§ 7090. [4688] **Same: Writ.** The writ may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties in an amount sufficient to satisfy such demand besides costs, in which case to take such undertaking. [R. S. § 4688.]

Hist. (See C. C. P. '81, § 580) R. S. § 4688, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: Garnishee defined: § 6788.

Comp. leg.—Cal. Same: C. C. P. 1872, § 868; additional clause, as amended: Kerr's C. ib.

N. D. Similar: Jus. C. § 9060.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

Attachment of real estate: Land may be levied upon by a writ of attachment issued out of justice's court. Hanson v. Morrison (1917) 30 I. 422, 165 P. 521.

Priority over attachment in district court: A purchaser of land at sale in execution of judgment rendered in probate court purchases it clear of claim of attachment issuing out of district court, which claim is subsequent to writ of attachment of probate court. Ib.

§ 7091. [4689] **Same: Application of district court practice.** The sections of this code providing for attachments out of the district court except as in this chapter expressly provided, are applicable to attachments issued out of justice's courts, the necessary changes and substitutions being made therein. [R. S. § 4689.]

Hist. (See C. C. P. '81, § 581) R. S. § 4689, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: Garnishee defined: § 6788. Attach

nent proceedings in district court: §§ 779-6816. Sections 6788 to 6800 relating o garnishment applicable to all courts of ompetent jurisdiction: § 6800.

Comp. leg.—Cal. Somewhat similar: C. . P. 1872, § 869: Kerr's C. ib.

Cited: Eagleson v. Rubin (1909) 16 I. 2, 100 P. 765; Hanson v. Morrison (1917) 9 I. 422, 165 P. 521.

Application of § 6781: The requirements of § 6781 providing for the posting and publication of notice and the prorating of proceeds of sale of attached property, do not apply to attachments out of justice's court. Kimball v. Raymond (1903) 9 I. 176, 72 P. 957.

Claim and Delivery.

§ **7092.** [4690] **Claim and delivery.** In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons or at any time thereafter before answer, claim the delivery of such property to him, and the sections of this code providing he practice in proceedings for claim and delivery of personal property in the district court are applicable to like proceedings in justice's courts, the necessary changes and substitutions being made herein. [R. S. § 4690.]

Hist. (See C. C. P. '81, § 582) R. S. § 690, reen. R. C. ib., reen. C. L. ib.

Cross ref. District court proceedings n claim and delivery: §§6756-67.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 870: Kerr's C. ib.

N. D. Similar: Jus. C. § 9062.

ARTICLE 5.

JUDGMENT BY DEFAULT.

§ **7093. Trial on default.** When, in an action arising upon contract for the recovery of money or damages only, the defendant fails o appear and answer or demur at the time specified in the summons, or within one hour thereafter, the court must, upon the application of the plaintiff, enter the default of the defendant, and immediately thereafter enter judgment against the defendant for the mount specified in the summons, including costs, and in other actions where the defendant has so failed to answer or demur the court must likewise enter the default of the defendant, and the plaintiff may then offer proof of his claim, and the court must then render udgment in his favor for such sum, not exceeding the amount stated n the summons, as appears by such evidence to be just. ['11, c. 194, 4, p. 652.]

Hist. (See C. C. P. '81, § 583) R. S. § 695, reen. R. C. ib.; am. '11, c. 194, § 4, . 652, reen. C. L. § 4695.

Comp. leg.—Cal. Analogous: C. C. P. 872, § 871; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9094.

Appeal: An appeal from a default judgment under this section, although the notice specifies that it is taken upon questions of both law and fact, will be deemed to be taken upon questions of law alone. Smith v. Peterson (1917) 31 I. 34, 169 P. 290.

§ **7094.** [4696] **Same: Default after demurrer.** In the following cases the same proceedings must be had, and judgment must be entered in like manner as if the defendant had failed to appear nd answer or demur:

1. If the complaint has been amended, and the defendant fails o answer it as amended, within the time allowed by the court.
2. If the demurrer to the complaint is overruled and the defendnt fails to answer at once.
3. If the demurrer to the answer is sustained and the defendant ails to amend the answer within the time allowed by the court. [R. . § 4696.]

Hist. (See C. C. P. '81, § 584) R. S. § 696, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, 872: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9095.

ARTICLE 6.

TIME OF TRIAL AND POSTPONEMENTS.

§ 7095. [4701] **Time of trial.** Unless postponed as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the summons for the appearance of defendant, and the trial must be continued, without adjournment for more than 24 hours at any one time, until all the issues therein are disposed of. [R. S. § 4701.]

Hist. (See C. C. P. '81, § 585) R. S. § 4701, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 873; similar: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9028.

Utah: Identical: C. L. § 3709. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Cited: Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Effect of unauthorized postponement: Where a defendant failed to appear in a probate court at the hour fixed for appearance in the summons, and the court entered the defendant's default after the expiration of one hour after the time fixed for appearance and failed to make an order postponing the case, and three days thereafter heard the proofs submitted by plaintiff and entered judgment, the action of the court, though irregular, will not oust it of jurisdiction, nor will it render such judgment void for want of jurisdiction under this section. Zimmerman v. Bradford-Kennedy Co. (1908) 14 I. 681, 95 P. 825.

§ 7096. [4702] **Postponement: By court.** The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action.

2. For not exceeding two days, if by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary.

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded. [R. S. § 4702.]

Hist. (See C. C. P. '81, § 586) R. S. § 4702, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 874: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9032.

Utah: Identical: C. L. § 3710. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Cited: Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

§ 7097. [4703] **Same: By consent.** The court may, by consent of the parties given in writing or in open court, postpone the trial to a time agreed upon by the parties. [R. S. § 4703.]

Hist. (See C. C. P. '81, § 587) R. C. § 4703, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 875: Kerr's C. ib.

N. D. Identical: Jus. C. § 9032.

Utah: Identical: C. L. § 3711. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Cited: Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

§ 7098. [4704] **Same: Upon application.** The trial may be postponed upon the application of either party for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he can not, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged.

3. If the application is on the part of the defendant under arrest,

before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by the court, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the court must order the defendant to be discharged from custody.

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the court, and that the testimony so taken may be read on the trial with the same effect, and subject to the same objections as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper, the trial must not be postponed. [R. S. § 4704.]

Hist. (See C. C. P. '81, § 588) R. S. § 4704, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 876: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9034.

Utah: Identical: C. L. § 3712. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Effect of improper postponement: The granting of a postponement of a trial by the probate court, upon an affidavit which fails to state a statutory ground, does not divest the court of jurisdiction of the cause; the granting of a continuance is largely in the sound discretion of the court, and if error is made it may be corrected but the court does not lose jurisdiction of the case. Holt v. Gridley (1900) 7 I. 416, 63 P. 188.

It is error for a justice to grant a continuance different from or in any other manner than that provided by this article; but such error, as in granting a continuance beyond the time limited, must be corrected by appeal or direct attack upon the judgment; it is not jurisdictional, and does not divest the justice of jurisdiction to proceed further in the case, where jurisdiction has been obtained. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

§ 7099. [4705] Same: Undertaking. No adjournment must, unless by consent, be granted for a period longer than 10 days, upon the application of either party, except upon condition that such party file an undertaking in an amount fixed by the court, with two sureties, to be approved by the court, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking. [R. S. § 4705.]

Hist. (See C. C. P. '81, § 589) R. S. § 4705, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "justice" for "court": C. C. P. 1872, § 877: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9035.

ARTICLE 7.

TRIALS IN JUSTICES' COURTS.

§ 7100. [4711] Issues defined. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact. [R. S. § 4711.]

Hist. (See C. C. P. '81, § 590) R. S. § 4711, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 878: Kerr's C. ib.

N. D. Similar: Jus. C. § 9041.

Cited: Smith v. Clyne (1908) 15 I. 254, 97 P. 40.

§ 7101. [4712] **Issues of law.** An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof. [R. S. § 4712.]

Hist. (See C. C. P. '81, § 591) R. S. § 4712, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 879: Kerr's C. ib.

N. D. Similar: Jus. C. § 9042.

Cited: Smith v. Clyne (1908) 15 I. 254, 97 P. 40.

§ 7102. [4713] **Issues of fact.** An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matter in the answer, except an issue of law is joined thereon. [R. S. § 4713.]

Hist. (See C. C. P. '81, § 592) R. S. § 4713, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 880: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9073.

§ 7103. [4714] **Trial of issues of law.** An issue of law must be tried by the court. [R. S. § 4714.]

Hist. (See C. C. P. '81, § 593) R. S. § 4714, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 881; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9074.

§ 7104. [4715] **Same: Issues of fact.** An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court. [R. S. § 4715.]

Hist. (See C. C. P. '81, § 594) R. S. § 4715, reen. R. C. ib., reen. C. L. ib.

Cross ref. Impaneling jury: § 6550. Constitution of jury: § 6516. Summoning jury: §§ 6540-1.

Comp. leg.—Cal. Same: C. C. P. 1872, § 822; Kerr's C. ib.

§ 7105. [4716] **Waiver of jury.** A jury may be waived:

1. By the consent of the parties, entered in the docket.

2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact.

3. By the failure of either party to appear at the time fixed for the trial of an issue of fact. [R. S. § 4716.]

Hist. (See C. C. P. '81, § 595) R. S. § 4716, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 883: Kerr's C. ib.

N. D. Similar: Jus. C. § 9076.

§ 7106. [4717] **Trial on failure to appear.** If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party. [R. S. § 4717.]

Hist. (See C. C. P. '81, § 596) R. S. § 4717, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 884: Kerr's C. ib.

§ 7107. [4718] **Challenge to jurors.** The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth as grounds of such challenge in the district court. Challenges for cause must be tried by the court. [R. S. § 4718.]

Hist. (See C. C. P. '81, § 597) R. S. § 4718, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Challenges in district court: § 6844.

Comp. leg.—Cal. Same except the words "in section 602" for "of such challenge in the district court," and "justice" for "court", last word: C. C. P. 1872, § 885: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9038.

§ 7108. [4719] **Exhibition of written instrument required.** When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the

trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order, or if such order is not obeyed, the account or instrument can not be given in evidence. [R. S. § 4719.]

Hist. (See C. C. P. '81, § 598) R. S. § 4719, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 886: Kerr's C. ib.

§ 7109. [4720] **Signatures deemed admitted.** If the plaintiff annex to his complaint or file with the court at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath. [R. S. § 4720.]

Hist. (See C. C. P. '81, § 599) R. S. § 4720, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "justice" for "court": C. C. P. 1872, § 887: Kerr's C. ib.

ARTICLE 8.

JUDGMENTS OTHER THAN BY DEFAULT.

§ 7110. [4725] **Judgment by confession.** Judgments upon confession may be entered in any justice's court specified in the confession, in any amount of which the court has jurisdiction. [R. S. § 4725.]

Hist. (See C. C. P. '81, § 600) R. S. § 4725, reen. R. C. ib., reen. C. L. ib.

Cross ref. Confession of judgment: § 7304.

Comp. leg.—Cal. Same except the words "in any amount of which the court has jurisdiction" are omitted: C. C. P. 1872, § 889: Kerr's C. ib.

N. D. Similar: Jus. C. § 9093.

§ 7111. [4726] **Judgment of dismissal.** Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted.

2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter.

3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court.

4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or precinct, or city, but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived. [R. S. § 4726.]

Hist. (See C. C. P. '81, § 601) R. S. § 4726, reen. R. C. ib. reen. C. L. ib.

Comp. leg.—Cal. Same except "township" for "precinct," subd. 4: C. C. P. 1872, § 890; amended: Kerr's C. ib.

N. D. Similar: Jus. C. § 9096.

Improper venue: Determination: When the question of jurisdiction dependent on the question of venue is presented as a mixed question of law and fact by conflicting affidavits, filed on a preliminary motion to dismiss, the court should overrule the preliminary motion and determine the question on the evidence in the case as presented on the trial. Purdum v. Neil (1904) 10 I. 263, 77 P. 631.

§ 7112. [4727] **Judgment upon verdict.** When a trial by jury has been had, judgment must be entered by the court at once, in conformity with the verdict. [R. S. § 4727.]

Hist. (See C. C. P. '81, § 602) R. S. § 4727, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "justice" for "court": C. C. P. 1872, § 891: Kerr's C. ib.

N. D. Similar: Jus. C. § 9099.

§ 7113. [4728] **Judgment on trial by court.** When the trial is by the court, judgment must be entered at the close of the trial. [R. S. § 4728.]

Hist. (See C. C. P. '81, § 603) R. S. § 4728, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 892: Kerr's C. ib. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Mont. Identical: C. C. P. § 1623. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

N. D. Identical: Jus. C. § 9100.

Utah: Identical: C. L. § 3726. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Directory: This section is directory, not mandatory. Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

Unauthorized entry of judgment: The attempt of the probate judge to enter up a formal judgment nunc pro tunc after an appeal has been taken to the district court is without jurisdiction and can not change the records in the district court. Grey v. Cederholm (1884) 2 I. 34, 3 P. 12.

§ 7114. [4729] **Entry of judgment.** The judgment must be entered substantially in the form required by this code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment. [R. S. § 4729.]

Hist. (See C. C. P. '81, § 604) R. S. § 4729, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Form of judgment in general: § 6898.

Comp. leg.—Cal. Same except first sentence omitted and "so" inserted before "stated": C. C. P. 1872, § 893; similar: Kerr's C. ib.

§ 7115. [4730] **Judgment in excess of jurisdiction: Remittitur.** When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue. [R. S. § 4730.]

Hist. (See C. C. P. '81, § 605) R. S. § 4730, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "justice" for "court": C. C. P. 1872, § 894: Kerr's C. ib.

N. D. Similar: Jus. C. § 9101.

§ 7116. [4731] **Offer of judgment.** If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum in excess of the offer, he can not recover costs, but costs must be adjudged against him, and if he recover, be deducted from his recovery. The offer and failure to accept can not be given in evidence, nor affect the recovery otherwise than as to costs. [R. S. § 4731.]

Hist. (See C. C. P. '81, § 606) R. S. § 4731, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "equal to" for "in excess of": C. C. P. 1872, § 895; same as amended: Kerr's C. ib.

N. D. Similar: Jus. C. § 9105.

§ 7117. [4732] **Costs included in judgment.** The court must tax and include in the judgment the costs allowed by law to the prevailing party. [R. S. § 4732.]

Hist. (See C. C. P. '81, § 607) R. S. § 4732, reen. R. C. ib., reen. C. L. ib.

Cross ref. Prevailing party entitled to costs: § 7146. Upon offer of judgment: § 7192.

Comp. leg.—Cal. Same: C. C. P. 1872, § 896: Kerr's C. ib.

N. D. Similar: Jus. C. § 9106.

Taxation of costs: The probate court has no authority to retax costs after entering judgment, but should tax the costs allowed by law before entering judgment, in accordance with this section. Bowen v. Weatherman (1892) 3 I. 469, 31 P. 814.

§ 7118. [4733] **Abstract of judgment.** The probate court or justice of the peace, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in the following form (filling blanks according to the facts):

State of Idaho, County of....., ... plaintiff, vs. ....., defendant, ... In probate court of .... county, (or, In justice court, before....., justice of the peace of.....precinct, (or city)....., 19...., (insert date of abstract), Judgment entered for plaintiff (or defendant) for.....dollars, on the.....day of....., 19.....

I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of....., justice of the peace, as appears by his docket, now in my possession, as his successor in office, signed by the clerk of the probate court and attested by its seal, or signed by the justice (as the case may be). [R. S. § 4733.]

Hist. (See C. C. P. '81, § 608) R. S. § 4733, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but no reference to probate court: C. C. P. 1872, § 897; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9109.

Cited: Smith v. Richards (1889) 2 I. 498, 21 P. 419.

§ 7119. [4734] **Same: Filing and docketing.** The abstract may be filed and docketed in the office of the clerk of the district court of the county in which the judgment was rendered, and must be docketed in the judgment docket of the district court. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket. [R. S. § 4734.]

Hist. (See C. C. P. '81, § 609) R. S. § 4734, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 898; as amended, abstract is filed in office of county clerk and docketed in the judgment docket of the superior court: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9109.

§ 7120. [4735] **Same: Execution from district court.** From the time of docketing in the office of the clerk of the district court, execution may be issued thereon by the said clerk to the sheriff of any county in the state, in the same manner and with like effect as if issued on judgments of the district courts. [R. S. § 4735.]

Hist. (See C. C. P. '81, § 610) R. S. § 4735, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "other than the county in which the judgment was rendered" inserted after "state": C. C. P. 1872, § 899; as amended, "superior courts" for "district courts": Kerr's C. ib.

§ 7121. Judgment not a lien unless transcribed. A judgment rendered in a probate or justice's court creates no lien upon any lands of the defendant unless such an abstract is filed and docketed in the office of the clerk of the district court of the county in which the lands are situated. When so filed and docketed such judgment is a lien upon the lands of the judgment debtor situated in that county, not exempt from execution, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for five years from the date of the judgment, unless the judgment be previously satisfied. ['15, c. 25, p. 78.]

Hist. (See C. C. P. '81, § 611) R. S. § 4730, reen. R. C. § 4736; am. '15, c. 25, p. 78, reen. C. L. § 4736.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 900; as amended: Kerr's C. ib.

Merger of liens: Where land is attached prior to judgment in probate or justice's court, the lien thereby created is merged with lien of judgment. Lien resulting from such merger has priority as of date of attachment in same manner as judgments and attachments procured in district court. Hanson v. Morrison (1917) 30 I. 422, 165 P. 521.

ARTICLE 9.

EXECUTIONS.

§ 7122. [4741] **Time within which execution may issue.** Execution for the enforcement of a judgment may be issued by the clerk of the probate court under the seal of the court, or by the justice who entered the judgment, or his successor in office on the application of the party entitled thereto, at any time within five years from the entry of judgment. [R. S. § 4741.]

Hist. (See C. C. P. '81, § 612) R. S. § 4741, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same as to justices' courts: C. C. P. 1872, § 901: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9195.

§ 7123. [4742] **Form and contents of writ.** The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the clerk or justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties and the name of the court or justice before whom, and of the county where, and the time when, it was rendered; the amount of the judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required in executions issued from the district court. [R. S. § 4742.]

Hist. (See C. C. P. '81, § 613) R. S. § 4742, reen. R. C. ib., reen. C. L. ib.

Cross ref. Execution from district court: § 6911. Execution must contain no blanks: § 7142.

Comp. leg.—Cal. Similar but refers only to justices' courts: C. C. P. 1872, § 902: Kerr's C. ib.

N. D. Similar: Jus. C. § 9117.

Direction of execution: The probate court is authorized to issue an execution addressed to a constable in a case involving less than $300 in which both the justice and probate courts have jurisdiction. Coombs v. Collins (1899) 6 I. 536, 57 P. 310.

§ 7124. [4743] **Renewal of execution.** An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return by the word "renewal" written thereon, with the date thereof, and subscribed by the clerk or justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued. [R. S. § 4743.]

Hist. (See C. C. P. '81, § 614) R. S. § 4743, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "renewed" for "renewal," and words "clerk or" omitted: C. C. P. 1872, § 903: Kerr's C. ib.

N. D. Similar: Jus. C. § 9124.

§ 7125. [4744] **Execution of writ.** The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required to proceed upon executions directed to him, and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff. [R. S. § 4744.]

Hist. (See C. C. P. '81, § 615) R. S. § 4744, reen. R. C. ib., reen. C. L. ib.

Cross ref: Express reference to this section: Garnishee defined: § 6788. Proceedings by officer under execution: §§ 6917-40.

Comp. leg.—Cal. Same except the words "by the provisions of title 9, part 2, of this code" are inserted after "required": C. C. P. 1872, § 904: Kerr's C. ib.

N. D. See Jus. C. § 9123.

Cited: Eagleson v. Rubin (1909) 16 I. 92, 100 P. 765.

§ 7126. [4745] **Supplementary proceedings.** The provisions of this code as to proceedings supplementary to execution in the district court are applicable to probate and justices' courts, the necessary changes and substitutions being made therein. [R. S. § 4745.]

Hist. (See C. C. P. '81, § 616) R. S. § 4745, reen. R. C. ib., reen. C. L. ib.

Cross ref. Supplementary proceedings: §§ 6941-8.

Comp. leg.—Cal. Same in effect as to justices' courts: C. C. P. 1872, § 905; Kerr's C. ib.

ARTICLE 10.

CONTEMPTS IN JUSTICES' COURTS.

§ 7127. [4750] **What constitutes contempt.** A probate judge or justice may punish as for contempt persons guilty of the following acts, and no other:

1. Disorderly, contemptuous or insolent behavior toward the judge or justice while holding the court, tending to interrupt the due course of a trial or other judicial proceedings.

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the judge or justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him.

4. Disobedience to a subpoena duly served, or refusing to be sworn or to answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him. [R. S. § 4750.]

Hist. (See C. C. P. '81, § 617) R. S. § 4750, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but applies only to justices: C. C. P. 1872, § 906; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Similar: Jus. C. § 9126.

Applied: A justice of the peace may commit a person for contempt in refusing to obey an order of the court and direct that he be imprisoned until he comply with the order. Re Niday (1908) 15 I. 559, 98 P. 845.

Jurisdiction: Where an alleged contempt is not committed in the immediate view and presence of the court or judge, no jurisdiction is acquired until an affidavit has been presented to such court or judge as required by § 5157. Harkness v. Hyde, 31 I. 784, 176 P. 885.

§ 7128. [4751] **Proceedings on contempt.** When a contempt is committed in the immediate view and presence of the judge or justice it may be punished summarily; to that end an order must be made reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. [R. S. § 4751.]

Hist. (See C. C. P. '81, § 618) R. S. § 4751, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "judge or" are omitted: C C. P. 1872, § 907; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

Cited: Re Niday (1908) 15 I. 559, 567, 98 P. 845.

§ 7129. [4752] **Same: Constructive contempts.** When the contempt is not committed in the immediate view and presence of the judge or justice, a warrant of arrest may be issued by such judge or justice, on which the person so guilty may be arrested and brought before the judge or justice immediately, when an opportunity to be heard in his defense or excuse must be given. The judge or justice may thereupon discharge him, or may convict him of the offense. [R. S. § 4752.]

Hist. (See C. C. P. '81, § 619) R. S. § 4752, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "judge or" omitted throughout: C. C. P. 1872, § 908; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: Jus. C. § 9127.

Cited: Harkness v. Hyde, 31 I. 784, 176 P. 885.

§ 7130. [4753] **Punishment for contempt.** The judge or justice may punish for contempts by fine or imprisonment, or both, such fine not to exceed in any case $100, and such imprisonment one day. [R. S. § 4753.]

Hist. (See C. C. P. '81, § 620) R. S. § 4753, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "judge or" omitted: C. C. P. 1872, § 909; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Similar: Jus. C. § 9128.

§ 7131. [4754] **Judgment of conviction.** The conviction specifying particularly the offense and the judgment thereon must be entered in the docket. [R. S. § 4754.]

Hist. (See C. C. P. '81, § 621) R. S. § 4754, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "by the justice in his docket" for "in the docket": C. C. P. 1872, § 910; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Similar: Jus. C. § 9129.

ARTICLE 11.

DOCKETS OF PROBATE COURTS AND JUSTICES OF THE PEACE.

§ 7132. [4759] **Entries in docket.** Every probate court and justice must keep a book denominated a "docket," in which must be entered:

1. The title of every action or proceeding.
2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof.
3. The date of the summons and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact.
4. The time when the parties or either of them appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading.
5. Every adjournment, stating on whose application and to what time.
6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.
7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request.
8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.
9. The judgment of the court specifying the costs included and the time when rendered.
10. The issuing of the excution, when issued, and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the court, when and by whom.
11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed. [R. S. § 4759.]

Hist. (See C. C. P. '81, § 622) R. S. § 4759, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar except it applies only to justices and also contains an additional subdivision: C. C. P. 1872, § 911; now the number of subdivisions is the same: Kerr's C. ib.

N. D. Similar: Jus. C. § 9011.

Continuance: Failure to make entries: The fact that a probate judge fails to note a continuance in his docket does not deprive him of jurisdiction. Green v. Christie (1895) 4 I. 438, 40 P. 54.

Same: Demurrers and motions: This section does not require that the action of the probate court upon a demurrer or motion shall be entered upon the docket; and no reference being made in the docket to what action the probate court took upon the demurrer and motion, this court will presume, in the absence of a showing to the contrary, that the probate court acted upon the demurrer and motion and overruled the same. Smith v. Clyne (1909) 16 I. 466, 101 P. 819.

§ 7133. [4760] **Entries as evidence of facts.** The several particulars of the last section specified must be entered under the title of the action to which they relate, and, unless otherwise in this code provided, at the time when they occur. Such entries in a probate or justice's docket, or

a transcript thereof, certified by the clerk or justice, or his successor in office, are primary evidence of the facts so stated. [R. S. § 4760.]

Hist. (See C. C. P. '81, § 623) R. S. § 4760, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but refers only to justice's docket: C. C. P. 1872, § 912; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9012.

§ 7134. [4761] **Index to docket.** The clerk of the probate court and every justice of the peace must keep an alphabetical index of his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name. [R. S. § 4761.]

Hist. (See C. C. P. '81, § 624) R. S. § 4761, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar except applying only to justices: C. C. P. 1872, § 913; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9013.

§ 7135. [4762] **Delivery of docket and papers to successor.** Every probate judge and every justice of the peace, upon the expiration of his term of office, must deposit with his successor, his official docket, statutes and session laws, and all other books, papers and documents pertaining to his office, as well his own as those of his predecessor, or any order which may be in his custody, to be kept as public records. ['99, p. 401, § 1.]

Hist. (See C. C. P. '81, § 625) R. S. § 4762; am. '99, p. 401, § 1, reen. R. C. § 4762, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 914; Kerr's C. ib.

N. D. Similar: Jus. C. § 9014.

§ 7136. [4763] **Same: In case of vacancy.** If the office of justice becomes vacant by his death or removal from the precinct or city or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the precinct, to be by him delivered to the successor of such justice. If there is no other justice in the precinct, then the docket and papers of such justice must be deposited in the office of the county recorder of the county, to be by him delivered to the successor in office of the justice. [R. S. § 4763.]

Hist. (See C. C. P. '81, § 626) R. S. § 4763, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same except "township" for "precinct" throughout and "county clerk" for "county recorder": C. C. P. 1872, § 915; Kerr's C. ib.

N. D. Similar: Jus. C. § 9015.

§ 7137. [4764] **Same: Jurisdiction of successor.** Any probate judge having the docket of his predecessor, and any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice. [R. S. § 4764.]

Hist. (See C. C. P. '81, §627) R. S. § 4764, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the first words "Any probate judge having the docket of his predecessor, and" are omitted: C. C. P. 1872, § 916; Kerr's C. ib.

N. D. Similar: Jus. C. § 9016.

§ 7138. [4765] **Definition of successor.** The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires the same or another person elected to take office in the same precinct or city, from that time is the successor. [R. S. § 4765.]

Hist. (See C. C. P. '81, § 628) R. S. § 4765, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "township" for "precinct": C. C. P. 1872, § 917; Kerr's C. ib.

§ 7139. [4766] **Probate judge to determine succession.** When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, the probate judge must, by a certificate, subscribed by him and filed in the office of the county recorder, designate which justice is the successor of a justice going out of office, or whose office has become vacant. [R. S. § 4766.]

Hist. (See C. C. P. '81, § 629) R. S. § 4766, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" for "probate" and "clerk" for "recorder": C. C. P. 1872, § 918; as amended: "a judge of the superior court" for "probate judge": Kerr's C. ib.

§ 7140. [4767] **Neglect to deliver docket to successor.** Every probate judge, and every justice of the peace, whose duty it is to deliver over the dockets, books, records and papers as prescribed in section 7135, shall forfeit and pay, for the use of the county, $25 for every three months' neglect, after due demand in writing by his successor in office, to perform such duty, which sum may be recovered at a suit of any person. The sum so recovered shall be paid into the current expense fund of the county. ['99, p. 401, § 2.]

Hist. '99, p. 401, § 2, reen. R. C. § 4767, reen. C. L. ib.

ARTICLE 12.

GENERAL PROVISIONS.

§ 7141. [4771] **Issuance of subpoenas and final process.** Subpoenas out of any probate or justice's court, and final process on any judgment recovered therein, may be issued to any part of the county. [R. S. § 4771.]

Hist. (See C. C. P. '81, § 630) R. S. § 4771, reen. R. C. ib., reen. C. L. ib.

Cross ref. Appointment of special constable: §§ 3692-3.

Comp. leg.—Cal. Similar but refers only to justices' courts: C. C. P. 1872, § 919; Kerr's C. ib.

§ 7142. [4772] **Papers to contain no blanks.** The summons, execution, and every other paper made or issued by a probate court or justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void. [R. S. § 4772.]

Hist. (See C. C. P. '81, § 631) R. S. § 4772, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except limited to justices' courts: C. C. P. 1872, § 920; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9010.

§ 7143. [4773] **Collection and payment of money.** Probate judges and justices of the peace must receive from the sheriffs or constables of their county all moneys collected on any process or order issued from their courts respectively, and all moneys paid to them in their official capacity, and must pay the same over to the parties entitled or authorized to receive them, without delay. [R. S. § 4773.]

Hist. (See C. C. P. '81, § 632) R. S. § 4773, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except limited to justices: C. C. P. 1872, § 921; wording changed as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9125.

§ 7144. [4774] **Disability of justice: Substitution.** In case of the sickness or other disability or necessary absence of a justice, on a return of a summons or at the time appointed for a trial, another justice of the same precinct or city may, at his request, attend in his behalf, and thereupon is vested with the power for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of proceedings before the attending justice subscribed by him, must be

made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction. [R. S. § 4774.]

Hist. (See C. C. P. '81, § 633) R. S. § 4774, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "township" for "precinct": C. C. P. 1872, § 922; Kerr's C. ib.

§ 7145. [4775] **Requirement of security for costs.** Probate and justices' courts may in all cases require a deposit of money or an undertaking, as security for costs of court, before issuing a summons. [R. S. § 4775.]

Hist. (See C. C. P. '81, § 634) R. S. § 4775, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the word "justices" for "probate and justices' courts": C. C. P. 1872, § 923; Kerr's C. ib.

N. D. See Jus. C. § 9020.

§ 7146. [4776] **Prevailing party entitled to costs.** The prevailing party in probate and justices' courts is entitled to costs of the action and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein. [R. S. § 4776.]

Hist. (See C. C. P. '81, § 635) R. S. § 4776, reen. R. C. ib., reen. C. L. ib.

Cross ref. Costs to be included in judgment: § 7117.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 924; now same except "probate and" omitted, as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9106.

Costs on appeal: Where a party succeeds in obtaining a judgment in the justice's court and the adverse party appeals to the district court and succeeds in reducing the judgment, the prevailing party in the justice's court is nevertheless entitled to recover his costs. (Sullivan, C. J. dissents) Lovel v. Joyce (1903) 9 I. 386, 74 P. 1073.

§ 7147. [4777] **Provisions applicable to justice courts.** The probate courts in the exercise of their civil jurisdiction, and justices' courts, being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers and course of proceedings in these courts, or which have been made applicable by special provisions in this code, are applicable to these courts and the proceedings therein. [R. S. § 4777.]

Hist. R. S. § 4777, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar as to justices' courts: C. C. P. 1872, § 925; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: Jus. C. § 9002.

§ 7148. [4778] **Deposit in lieu of undertaking.** In all civil cases arising in probate and justices' courts, where an undertaking is required by this code, a deposit with the court of a sum of money equal to the amount of the required undertaking, may be received and held by the court in place of said undertaking. [R. S. § 4778.]

Hist. (See C. C. P. '81, § 637) R. S. § 4778, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; similar: Kerr's C. § 926.

N. D. See C. C. P. § 7823.

Cited: Est. of McVay (1907) 14 I. 56, 93 P. 28.

Certified check: A justice of the peace may refuse to accept a certified check in lieu of the money deposit. But where he does accept such a check the deposit thereof with him is a substantial compliance with this section. Smith v. Field (1911) 19 I. 558, 114 P. 668, Ann. Cas. 1912C 354.

Check as money: A check received as money by a probate judge under this section, in lieu of an undertaking on appeal, treated as money, entered upon his docket and receipted for as money, no question being raised as to the value of the check, and it further appearing that the check will be cashed on presentation, meets the requirement of the law and the appeal will not be dismissed. England v. Nelson, 31 I. 686, 175 P. 814.

CHAPTER 261.

APPEALS IN CIVIL ACTIONS.

Cross ref. Other appeals to the district court: From board of medical examiners: § 2110; from decision of probate judge cancelling abstracter's certificate: § 2266; from board of county commissioners: §§ 3509-12; from municipal assessments: §§ 4011, 4138; from irrigation district assessments: § 4363; from drainage district assessments: § 4515; from department of reclamation: §§ 5570, 5576, 5582-3, 5588-92; from orders fixing water rates: § 5644.

ARTICLE 1.

APPEALS IN GENERAL.

§ 7149. [4800] Judgments and orders appealable. A judgment or order, in a civil action, except when expressly made final, may be reviewed as prescribed in this code, and not otherwise. [R. S. § 4800.]

Hist. (See C. C. P. '81, § 639) R. S. § 4800, reen. R. C. ib., reen. C. L. ib.

Cross ref. Appellate jurisdiction of supreme court in general: Const. V, 9; §§ 6445-6.

Comp. leg.—Cal. Same except the words "by this code" inserted after "final," and "title" for "code": C C. P. 1872, § 936; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7818.

Cited: Spongberg v. First Nat. Bk. (1909) 15 I. 671, 99 P. 712; Cady v. Keller (1916) 28 I. 368, 370, 154 P. 629; Weiser Irr. Dist. v. Middle Valley etc. Co. (1916) 28 I. 548, 553, 155 P. 484; Re Drainage Dist. No. 1 (1917) 30 I. 351, 164 P. 1018; Evans S. Bk. v. Skeen (1917) 30 I. 703, 167 P. 1165.

§ 7150. [4801] Vacation of ex parte orders. An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it; or may be vacated or modified on notice in the manner in which other motions are made. [R. S. § 4801.]

Hist. (See C. C. P. '81, § 640) R. S. § 4801, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 937; Kerr's C. ib.

Application of section: This is a general statute providing for vacating or modifying only such orders as are not specifically provided for elsewhere, and has no application to motions for the dissolution of injunctions which are provided for in § 4295. Thayer v. Bellamy (1903) 9 I. 1, 71 P. 544.

§ 7151. [4802] Who may appeal: Designation of parties. Any party aggrieved may appeal in the cases prescribed in this code. The party appealing is known as the appellant, and the adverse party as the respondent. [R. S. § 4802.]

Hist. (See C. C. P. '81, § 641) R. S. § 4802, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "title" for "code": C. C. P. 1872, § 938; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7818.

Who may appeal: The state is the aggrieved party to an order denying a motion for judgment for the penalty prescribed in case of usurious contracts by R. S. § 1266, and may appeal from such order. S. v. Eves (1898) 6 I. 144, 53 P. 543.

A party who recovers a judgment for only part of his claim is aggrieved by such judgment and entitled to appeal therefrom. Phillips v. Salmon River M. Co. (1903) 9 I. 149, 72 P. 886.

It is not necessary for a person to be named as plaintiff or defendant or intervenor in the title to an action, or in the title of a judgment entered therein, in order to become a party thereto so as to be entitled to appeal under this section. Washington Co. Abstract Co. v. Stewart (1904) 9 I. 376, 74 P. 955.

Where a party recovers a judgment and collects the same and prosecuted an appeal in the hope of gaining a larger judgment but thereby incurs the hazard of recovering a less judgment, his appeal will be dismissed; but if the appeal is from such an order or judgment that he can in no event recover a less favorable judgment than that which he has collected, the appeal will be sustained. Betchel v. Evans (1904) 10 I. 147, 77 P. 212.

In an action by a county to recover a road poll tax an appeal from a judgment in favor of the defendant may be taken by the county and in the name of the county as the party in interest; it need not be taken in the name of the attorney general. Kootenai Co. v. Hope Lbr. Co. (1907) 13 I. 262, 89 P. 1054.

ARTICLE 2.

APPEALS TO SUPREME COURT FROM DISTRICT COURTS.

§ 7152. Time for taking appeals. An appeal may be taken to the supreme court from a district court:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered; from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; from any special order made after final judgment; and from an interlocutory judgment in action for partition of real property; within 60 days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk. ['15, c. 80, § 1, p. 193.]

Hist. (See C. C. P. '81, § 642) R. S. § 4807; am. '95, p. 142, § 1, reen. '99, p. 273, § 1, reen. R. C. § 4807; am. '11, c. 111, p. 367; am. '15, c. 80, § 1, p. 193, reen. C. L. § 4807.

Cross ref. Constitutional provisions regulating appeals: Const. V, 9. Time for appeal to supreme court from decision of district court on appeal from county commissioners: § 7152. Appeal from judgment assessing damages against drainage districts to be taken within 30 days from judgment: § 4515. Appellate jurisdiction confined to final decisions: § 6445. From chambers orders: § 6498. Appeals in garnishment proceedings: § 6800. Appeal in election contests: § 7298. Appeal from judgment in submitted controversy: § 7307. Appeals from judgment dissolving corporations: § 7403. Appeal in condemnation proceedings: § 7422. Appeal in arbitration proceedings: § 7436.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 939; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7820.

Cited: S. v. Reed (1893) 3 I. 554, 32 P. 202; Boyd v. Steele (1899) 6 I. 625, 59 P. 21; Titiman v. Alamance M. Co. (1903) 9 I. 240, 74 P. 529; Neustadter Bros. v. Doust (1907) 13 I. 617, 92 P. 978; Later v. Haywood (1908) 14 I. 45, 93 P. 374; Walker v. Elmore Co. (1909) 16 I. 696, 102 P. 389; Leggett v. Evans (1909) 16 I. 760, 102 P. 486; Buster v. Fletcher (1912) 22 I. 172, 125 P. 226; Behrensmeyer v. Gwinn (1913) 25 I. 186, 136 P. 623; (In brief of counsel) Zilka v. Graham (1914) 26 I. 163; Thompson v. Harris (1917) 30 I. 109, 163 P. 611; St. Michael's Monastery v. Steele (1907) 30 I. 609, 107 P. 349; Worthman v. Shane, 31 I. 433, 173 P. 750; Miller-Cahoon Co. v. Lawrence, 31 I. 704, 176 P. 774.

Appeals from judgments: The following judgments are appealable: A default judgment entered by the clerk, Hardiman v. South Chariot M. Co. (1878) 1 I. 704; a judgment of nonsuit, Lalande v. McDonald (1887) 2 I. 307, 13 P. 347; Spongberg v. First Nat. Bk. (1909) 15 I. 671, 99 P. 712; an order changing attorneys, Curtis v. Richards (1895) 4 I. 434, 40 P. 57; a judgment removing a public officer from office, Miller v. Smith (1900) 7 I. 204, 61 P. 824; Ponting v. Isaman (1900) 7 I. 283, 62 P. 680; a judgment ordering an election on the question of the removal of a county seat, Wilson v. Bartlett (1900) 7 I. 269, 62 P. 415; a judgment affirming the action of the county commissioners declining to require certain officers to turn fees into the county treasury, Rhea v. Comrs. Wash. Co. (1906) 12 I. 455, 88 P. 89; an order vacating a satisfaction of judgment and adjudging plaintiff's attorney entitled to execution to enforce his interest in the judgment, Dahlstrom v. Featherstone (1910) 18 I. 179, 110 P. 243; a judgment in a habeas corpus proceeding determining the custody of a child, Jain v. Priest (1917) 30 I. 273, 164 P. 364.

The fact that a judgment contains an unfilled blank for the insertion of costs which were never taxed, does not make said judgment any the less a final judgment from which an appeal may be taken. Cantwell v. McPherson (1892) 3 I. 321, 29 P. 102.

Appeals from orders: The following orders are appealable: An order denying a new trial. Scholtz v. Keeler (1887) 2 I. 333, 13 P. 481; an order confirming a receiver's sale which constitutes a final disposition of the assets of an insolvent estate, First Nat. Bk. v. Bunting & Co. (1900) 7 I. 387, 63 P. 694; an order made after appeal in a divorce case directing the further payment of suit money, Roby v. Roby (1903) 9 I. 371, 74 P. 957, 3 Ann. Cas. 50; an order after judgment refusing to release attached property claimed to be exempt, Coey v. Cleghorn (1904) 10 I. 162, 77 P. 331; an order granting or refusing the appointment of a receiver, Chemung M. Co. v. Hanley (1905) 11 I. 302, 81 P. 619; an order dissolving a temporary injunction, Dougal v. Eby (1906) 11 I. 789, 85 P. 102; an order, after judgment, decreeing a certain person to be the assignee of the judgment and declaring his claim to be a lien thereon, Dahlstrom v. The Portland M. Co. (1906) 12 I. 87, 85 P. 916; an order refusing to set aside a judgment of dismissal, Oliver v. Kootenai Co. (1907) 13 I. 281, 90 P. 107; an order made by a judge allowing or disallowing claims against an estate, and directing a receiver to pay out of the funds in his hands such claims as the judge has allowed. Canadian Bk. of Commerce v. Wood (1907) 13 I. 794, 93 P. 257.

The following orders are not judgments and are not appealable: A judgment rendered on an appeal from an order of the county commissioners declaring the result of an election. Rupert v. Comrs. Alturas Co. (1882) 2 I. 19, 2 P. 718; an order directing the entry of a judgment of dismissal, Durant v. Comegys (1891) 3 I. 67, 35 A. S. R. 267, 26 P. 755, Bissing v. Bissing (1911) 19 I. 777, 115 P. 827; an order for judgment, Hodgins v. Harris (1895) 4 I. 517, 43 P. 72; Santti v. Hartman (1916) 29 I. 490, 161 P. 249; a record entry awarding judgment on the pleadings, Thiessen v. Riggs (1896) 5 I. 21, 46 P. 829; a judgment fixing the amount of clerk's fees but failing to find the entire amount due, Potter v. Talkington (1897) 5 I. 317, 49 P. 14; an order appointing receiver of mortgaged property, order denying motion to vacate receivership, or order authorizing sale of property, Evans S. Bk. v. Skeen (1917) 30 I. 703, 167 P. 1165; an order of reference requiring accounts to be stated in accordance with principles therein fixed, S. v. Bruce (1909) 17 I. 1, 19, 102 P. 831, 134 A. S. R. 245; an order granting or denying an injunction, LaVeine v. Stack-Gibbs L. Co. (1909) 17 I. 51, 104 P. 666, 134 A. S. R. 253; an order after final judgment taxing costs, Keane v. Pittsburg Lead M. Co. (1909) 17 I. 179, 105 P. 60; an order made after judgment vacating such judgment, Shumake v. Shumake, (1910) 17 I. 649, 107 P. 42; an order or judgment in a condemnation proceeding allowing commissioners to be appointed and authorizing the taking of land, McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542; order granting injunction pendente lite, Ferrell v. Coeur d'Alene etc. Co. (1916) 29 I. 118, 157 P. 946; Alameda M. Co. v. Success M. Co. (1916) 29 I. 618, 161 P. 862; order disallowing certain items in cost-bill, after hearing organizing drainage district, the drainage district law making no provision for allowance of costs upon an order organizing a district, nor for an appeal, Rhodenbaugh v. Stingel, 31 I. 594, 174 P. 604.

The following orders are nonappealable: An order for alimony pendente lite, Wyatt v. Wyatt (1886) 2 I. 236, 10 P. 228; an order refusing to dismiss an appeal from an order of the probate court denying a motion to quash an execution, Connell v. Warren (1891) 3 I. 117, 27 P. 730; an order quashing an information in a proceeding to remove county officers, Mahoney v. Elliott (1902) 8 I. 356, 69 P. 108; an order dismissing an appeal from a judgment of the probate court and an order denying leave to amend the undertaking on such appeal, Matter of Paige (1906) 12 I. 410, 86 P. 273; an order granting an injunction in futuro (Stewart, J. dissents) Porter v. Speno (1907) 13 I. 600, 92 P. 367; an order denying a motion for judgment notwithstanding the verdict, Cady v. Keller (1916) 28 I. 368, 371, 154 P. 629; an order refusing to bring in additional parties, Weiser Irr. Dist. v. Middle Valley etc. Co. (1916) 28 I. 548, 155 P. 484; a default entered by clerk of district court or an order of the court setting aside such default, Omaha Structural Steel Wks. v. Lemon (1917) 30 I. 363, 164 P. 1011.

Review of nonappealable orders: All orders or decisions of the district court or judges thereof that are not final judgments or orders or decisions specifically provided for by statute from which a direct appeal may be taken prior to final judgment, if duly excepted to or deemed to be excepted to as provided by law, will be reviewed by the supreme court on appeal from a final judgment, or from an order granting or denying a new trial. Weiser Irr. Dist. v. Middle Valley etc. Co. (1916) 28 I. 548, 155 P. 484; Maple v. Williams (1908) 15 I. 642, 98 P. 848; Richards v. Richards (1913) 24 I. 87, 132 P. 576. (See § 7170.)

Time for taking appeal: An appeal from a judgment must be taken within one year from the entry thereof (the time formerly fixed) or the same will be dismissed. Robson v. Colson (1903) 9 I. 215, 72 P. 591; McCrea v. McGrew (1903) 9 I. 382, 75 P. 67; Smith v. American Falls etc. Co. (1908) 15 I. 89, 95 P. 1059; Wood v. Tanner (1909) 15 I. 689, 99 P. 123.

An appeal from an order denying a new trial must be taken within 60 days after the entry of the order. Tootle v. French (1891) 3 I. 1, 25 P. 1091; Arthur v. Mounce (1895) 4 I. 487, 42 P. 509; Trull v. M. W. A. (1906) 12 I. 318, 85 P. 1081.

Unless good cause is shown for the delay, an appeal from an order denying a new trial taken more than a year after the entry of judgment, will be dismissed on motion. McCrea v. McGrew (1903) 9 I. 382, 75 P. 67; Livingstone v. Aberdeen-Springfield C. Co., 31 I. 592, 173 P. 1086.

An appeal from a judgment of the district court rendered on an appeal from an order of the board of commissioners may be taken within the 90 days allowed by this section, and need not be taken within the five days prescribed by '99, p. 249. Latah Co. v. Hasfurther (1907) 12 I. 797, 88 P. 433.

An appeal from an order made after final judgment must be taken within 60 days after the entry or filing of the order. Oliver v. Kootenai Co. (1907) 13 I. 281, 90 P. 107. This applies to an order taxing costs. Campbell v. First Nat. Bk. of Rexburg (1907) 13 I. 95, 88 P. 639; and to an order refusing to vacate a default judgment. Balfour v. Eves (1895) 4 I. 488, 42 P. 508.

An appeal from an interlocutory judgment in partition must be taken within 60 days after the judgment is made and entered or the same will be dismissed. Richardson v. Ruddy (1904) 10 I. 151, 77 P. 972.

The time within which an appeal may be taken is jurisdictional and the supreme court can neither extend the time nor cure a defect in failing to take the appeal within that time, although such defect is caused by the laches of the clerk. Moe v. Harger (1904) 10 I. 194, 77 P. 645; McElroy v. Whitney (1913) 24 I. 210, 133 P. 118; Chapman v. Boehm (1915) 27 I. 150, 147 P. 289.

Entry of judgment: No appeal can be taken from a judgment until the judgment has been entered, and if the clerk neglects to enter the same either party may compel him to do so by writ of mandate. Oliver

v. Kootenai Co. (1907) 13 I. 281, 90 P. 107; Santti v. Hartman (1916) 29 I. 490, 161 P. 249. Unless final judgment has been signed, filed and entered supreme court is without jurisdiction and no appeal can be taken. Santti v. Hartman, supra. An appeal taken before entry of judgment in the judgment book is premature, and the supreme court is without jurisdiction. Yeomans v. Lamberton (1917) 29 I. 801, 162 P. 674. An entry on the judgment docket raises prima facie presumption that the clerk has done his duty and that the judgment has actually been entered. Athey v. O. S. L. Ry. Co., 30 I. 318, 165 P. 1116. (But see § 6899 as now amended.)

Review of evidence: The evidence will not be reviewed in order to determine its sufficiency to sustain the verdict on an appeal from the judgment where such appeal is not taken within 60 days after the rendition of the judgment. Holt v. Spokane & Palouse Ry. Co. (1893) 3 I. 703, 35 P. 39; Brady v. Linehan (1898) 5 I. 732, 51 P. 761; Mahoney v. Board Co. Comrs. (1902) 8 I. 375, 69 P. 108; Moe v. Harger (1904) 10 I. 194, 77 P. 645; Cunningham v. Stoner (1905) 10 I. 549, 79 P. 228; Walker v. Elmore Co. (1909) 16 I. 696, 102 P. 389; Haas v. Teters (1910) 19 I. 182, 113 P. 96. Nor can the error be considered in such a case under an assignment that the verdict is against law which attempts to raise the same in a different form. Young v. Tiner (1894) 4 I. 269, 38 P. 697. Nor will the evidence be considered in order to determine whether the verdict is in accordance with the instructions. Trull v. M. W. A. (1906) 12 I. 318, 85 P. 1081.

But an appeal may be taken from an order denying a new trial within 60 days after the entry or filing of the order, and on such appeal the sufficiency of the evidence to support the verdict may be considered, although the appeal from the judgment is not taken within 60 days after its rendition. White v. Whitcomb (1907) 13 I. 490, 90 P. 1080, aff. 214 U. S. 15, 29 S. C. R. 599, 53 L. ed. 889.

Appeal after death: The supreme court has no jurisdiction to entertain an appeal, all the proceedings in which were taken subsequent to the death of one of the parties and before any substitution of said party's representatives was made. Coffin v. Edgington (1890) 2 I. 627, 23 P. 80.

Appeal from commissioners: An appeal from the judgment of the district court rendered on an appeal from an order of the county commissioners is governed by the general statutes of appeal and an undertaking is essential to its validity. Foresman v. Comrs. Nez Perce Co. (1905) 11 I. 11, 80 P. 1131.

Appeal by third person: Where a writ of assistance is issued, a party to the suit at the time of its issuance must appeal direct from the order of issuance if he desires to contest the same, but one who is not a party at such time and whose interests are affected by the order, may appear and move to set the same aside, and in case of refusal, appeal from the order denying his motion. Mills v. Smiley (1903) 9 I. 317, 76 P. 783.

§ 7153. [4808] **Mode of taking appeals.** An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing. [R. S. § 4808.]

Hist. (See C. C. P. '81, § 643) R. S. § 4808, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 940; same as amended: Kerr's C. ib. Nelson Bennett Co. v. Twin Falls L. & W. Co. (1907) 13 I. 767, 777, 92 P. 980; The Diamond Bk. v. Van Meter (1910) 18 I. 243, 108 P. 1042, 21 Ann. Cas. 1273.

N. D. Similar: C. C. P. § 7821.

Cited: Reynolds v. Corbus (1901) 7 I. 481, 63 P. 884; Robson v. Colson (1903) 9 I. 215, 72 P. 951; Perkins v. Bridges (1904) 10 I. 189, 77 P. 329; Finney v. American Bonding Co. (1907) 13 I. 534, 90 P. 859; West v. Dygert (1908) 15 I. 350, 97 P. 961; Carlson v. Mullen (1917) 29 I. 795, 162 P. 332; Weiser River Fruit Assn. v. Feltham, 31 I. 633, 175 P. 583.

Notice of appeal: An appeal is not taken until the notice is filed and served, both of which acts must be done within the statutory time allowed for taking the appeal. Moe v. Harger (1904) 10 I. 194, 77 P. 645. It was formerly held that the filing of notice must precede or be contemporaneous with the service of a copy on the adverse party. Slocum v. Slocum (1875) 1 I. 589. But it is now settled that the order of filing and serving the notice is immaterial, but both acts must be performed within the prescribed time. Arthur v. Mounce (1895) 4 I. 487, 42 P. 509.

Where notice of appeal is not filed until after time fixed by statute, this court acquires no jurisdiction. Glenn v. Aultman etc. Co. (1917) 30 I. 719, 167 P. 1163.

Waiver of notice. Defective service of notice of appeal is waived by an admission of service contained in the transcript. Wilson v. Wilson (1899) 6 I. 597, 57 P. 708.

Sufficiency of notice: The same notice of appeal may specify both the appeal from the judgment and the appeal from the order upon motion for a new trial. McCoy v. Oldham, 1 I. 465.

Orders from which the statute makes no provision for appeal may be reviewed on appeal from the judgment or order

denying a new trial, without being specified in the notice of appeal. Warren v. Stoddart (1899) 6 I. 692, 59 P. 540.

A notice of appeal is defective in form which states that such appeal is from a judgment in favor of the plaintiffs, when in fact it is in favor of some of the defendants, but where such defect does not affect the substantial rights of the respondents it will be disregarded. Taylor v. McCormick (1901) 7 I. 524, 64 P. 239.

An attorney admitted to practice in the district court in which a cause is tried, but not in the supreme court can legally sign a notice of appeal and take all steps necessary to perfect such appeal, for until the appeal is perfected the case is in the trial court. Ib.

The right to appeal from a specific part of a judgment lies, without appealing from the entire judgment. McClain v. Lewiston Interstate etc. Assn. (1909) 17 I. 63, 104 P. 1015, 20 Ann. Cas. 39, 25 L. R. A. (N. S.) 691.

Same: To whom directed. It is not necessary that the notice of appeal be directed to the clerk of the lower court. Westheimer v. Thompson (1893) 3 I. 560, 32 P. 205.

A notice of appeal from a judgment and order denying a new trial is sufficient although it is entitled solely with the names of the original parties to the action, and is addressed only to the attorneys of the original adverse party, whereas other parties were brought in by way of cross complaint filed by appellant, where the additional parties appeared by the same counsel as the original adverse party to whose attorneys the notice is directed. Idaho Comstock etc. Co. v. Lundstrum (1903) 9 I. 257, 74 P. 975.

Where notice of appeal is addressed to the clerk of the court and to the attorney for the defendants, the fact that the attorney designated in the notice did not represent all the defendants is not sufficient to vitiate such notice. Frost v. Alturas Water Co. (1905) 11 I. 294, 81 P. 996.

Where a notice of appeal is addressed to certain parties, naming them, its legal effect is limited to such parties. Glenn v. Aultman etc. Co. (1917) 30 I. 727, 167 P. 1163.

Persons entitled to notice: Notice of appeal must be served on each party whose interest would be affected by modification or reversal of the judgment appealed from, whether such party be plaintiff, defendant or intervenor, and whether he appears or is in default. Titiman v. Alamance M. Co. (1903) 9 I. 240, 74 P. 529; Miller v. Wallace (1914) 26 I. 373, 143 P. 524; Bridgham v. Nat. Pole Co. (1915) 27 I. 214, 147 P. 1056; S. Bk. v. Watson (1915) 27 I. 211, 148 P. 470.

Adverse party, as used in this section, means any party who would be prejudicially affected by a reversal of the judgment, a party who has an interest in conflict with a reversal of the judgment. Nelson Bennett Co. v. Twin Falls L. & W. Co. (1907) 13 I. 767, 92 P. 980.

A safe rule to apply in determining whether a party to a judgment is adverse is, if the judgment be reversed and the cause again tried, could a judgment be entered which would injuriously affect the liability of such person by changing or increasing his liability or rights as fixed by the former judgment? If so, then such person is an adverse party within the meaning of the statute. The Diamond Bk. v. Van Meter (1910) 18 I. 243, 108 P. 1042, 21 Ann. Cas. 1273.

Where a joint judgment is rendered against two or more parties, and an appeal is taken by one of them then all other parties against whom such joint judgment has been rendered are adverse parties, and notice of appeal must be served upon each in order to give the appellate court jurisdiction. Jones v. Quantrell (1886) 2 I. 153, 9 P. 418; Coffin v. Edgington (1890) 2 I. 627, 23 P. 80; Lydon v. Goddard (1897) 5 I. 607, 51 P. 459; Lewiston Nat. Bk. v. Tefft (1898) 6 I. 104, 53 P. 271; Doust v. Rocky Mt. Bell Tel. Co. (1908) 14 I. 677, 95 P. 209; Diamond Bk. v. Van Meter, supra; Glenn v. Aultman etc. Co. (1917) 30 I. 727, 167 P. 1163.

Where a judgment is rendered in favor of the defendants, all the defendants must be served with notice of plaintiff's appeal although some of such defendants defaulted. Baker v. Drews (1903) 9 I. 276, 74 P. 1130.

Where there is a several judgment for a different amount against each defendant, one defendant is not an adverse party to an appeal by another defendant such as to be entitled to notice. Aulbach v. Dahler (1895) 4 I. 522, 43 P. 192. Defaulting defendants are not entitled to notice on an appeal by the other defendants. Ib.

Where a motion for nonsuit is sustained as to one of several defendants, and a verdict is rendered against the other defendants, the defendant in whose favor the judgment of nonsuit is entered is not an adverse party, and need not be served with notice of appeal. McClain v. Lewiston Interstate etc. Assn., supra.

Where the same counsel is attorney for three defendants and only one of them appeals, the notice of the appeal need not be served upon the nonappealing defendants or their counsel. (Sullivan, J., dissenting) Weeter L. Co. v. Fales (1911) 20 I. 255, 118 P. 289, Ann. Cas. 1913A 403.

Though a person may be named in the complaint as a party to the action, he is not an adverse party upon whom notice of appeal must be served, where he was not served with process, did not appear in the action, and no judgment was entered either for or against him. McKinnon v. McIlhargey (1913) 24 I. 720, 135 P. 826; Kissler v. Moss (1914) 26 I. 516, 144 P. 647.

On appeal from an order refusing to vacate a writ of assistance issued after judgment in foreclosure proceedings, the judgment of foreclosure is in no way reviewable and parties to the foreclosure proceedings who are not interested in the writ of assistance, need not be served with notice of appeal. Mills v. Smiley (1904) 9 I. 325, 76 P. 786.

Since under R. S. § 5701, the title to the property of an intestate passes to the heirs, such heirs are interested parties in the sale of the property, and where a sale has been confirmed by the probate court

and the purchaser appeals from such confirmation, such heirs or their guardian ad litem are adverse parties and must be served with notice of appeal. Reed v. Stewart (1906) 12 I. 699, 87 P. 1002.

An intervenor is an adverse party within the meaning of this section and notice of appeal should be served on him. Berlin Mach. Wks. v. Bradford-Kennedy Co. (1912) 21 I. 669, 123 P. 637.

The husband is not an adverse party to his wife who intervenes in an attachment suit against him by a third party, where, if she can prosecute the action at all, she must do so for their joint benefit, and her appeal will not be dismissed for failure to serve on him. Holt v. Empey, 32 I. —, 178 P. 703.

Filing of undertaking: In order to perfect an appeal, a notice must be filed and copy thereof must be served and an undertaking must be filed within five days after the date of filing the notice. Shissler v. Crooks (1871) 1 I. 369.

The supreme court has no jurisdiction to permit an undertaking on appeal to be filed unless such an undertaking has first been filed in the court below within the time prescribed by this section. Brown v. Hanley (1891) 3 I. 219, 28 P. 425.

An undertaking must be given on an appeal from a judgment of the district court rendered on appeal from the board of county commissioners. Foresman v. Bd. of Comrs. (1905) 11 I. 11, 80 P. 1131.

An appeal is taken by filing and serving the notice, but the appeal is of no effect unless an undertaking is filed within five days after filing and serving the notice. Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 831; Haas v. Teters (1910) 17 I. 550, 106 P. 305; Woodmansee & Webster Co. v. Woodmansee, 31 I. 747, 176 P. 148.

It is not sufficient that the undertaking is forwarded by mail to the clerk within five days after service of notice, but the undertaking must be placed in the hands of the clerk for filing within that time. Cole v. Fox (1907) 13 I. 123, 88 P. 561.

The undertaking can not be legally filed before the notice. Shissler v. Crooks (1871) 1 I. 369; People v. Hunt (1871) 1 I. 371; Clark v. Lowenberg (1877) 1 I. 654; Wilson v. Bartlett (1900) 7 I. 269, 62 P. 415. An undertaking on appeal from an order denying a new trial, executed and verified by the sureties on the day after the order was made, but before the same was filed by the clerk, is sufficient where it is shown that the undertaking was filed simultaneously with the notice of appeal, but after the order appealed from had been filed by the clerk. Zienke v. N. P. Ry. Co. (1901) 7 I. 746, 65 P. 431.

The appellate court is not authorized to extend the time for filing an undertaking on appeal. West v. Dygert (1907) 13 I. 641, 92 P. 753.

Where no undertaking on appeal has been filed in the lower court, the requirements of the statute can not be complied with by filing an undertaking on appeal in the supreme court, which is approved by a justice thereof, under § 7168. Hailey v. Riley (1907) 13 I. 749, 92 P. 756.

A stipulation extending the time for filing briefs, entered into after the time for filing the undertaking on appeal has expired, is not a waiver of the filing of the undertaking. Ib.

In so far as the filing of an undertaking is to be waived, it must be done within the time for filing; otherwise, the appeal is lost. Ib.

Whenever an action is brought by or against state, county or municipal officers, and such officers prosecute or defend in said action in their official capacity, acting for or defending the rights of the state, county or municipality, or any legal subdivision thereof, they are permitted to so act without furnishing costs or undertakings on appeal. (§ 7238.) Coon v. Sommercamp (1915) 26 I. 776, 146 P. 728.

Record must show service: It must affirmatively appear from the transcript that the notice of appeal has been served as required by this section, or the appeal will be dismissed. Anderson v. Knott (1876) 1 I. 626; Tootle v. French (1891) 3 I. 1, 25 P. 1091; Adams v. McPherson (1893) 3 I. 718, 34 P. 1095; Doust v. R. M. B. Tel. Co. (1908) 14 I. 677, 95 P. 209; Diamond Bk. v. Van Meter (1910) 18 I. 243, 108 P. 1042, 21 Ann. Cas. 1273; St. Bk. v. Watson (1915) 27 I. 211, 148 P. 470; Chapman v. Boehm (1915) 27 I. 150, 147 P. 289; Bridgham v. Nat. Pole Co. (1915) 27 I. 214, 147 P. 1056; Cook v. Miller (1917) 30 I. 749, 168 P. 911.

An affidavit filed subsequent to the transcript attempting to show timely service of the transcript will not be considered as sufficient proof of service. Coon v. Sommercamp, supra.

Loss of undertaking: Proof that an undertaking on appeal was duly filed in the court below and was lost should be addressed to the supreme court, as it is the only tribunal with jurisdiction to act. Woodmansee & Webster Co. v. Woodmansee, supra.

Nunc pro tunc order: A nunc pro tunc order of a district judge, requiring the clerk to file an undertaking on appeal as of date within the statutory period, can not render the appeal effectual. Ib.

§ 7154. Undertaking on appeal. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding $300; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal: *Provided*, That when more than one appeal in the same action, whether from the judgment and an appealable order or orders, or from two or more appealable orders, is taken at the same

time, but one such undertaking or deposit for damages and costs need be filed or made. If any undertaking be insufficient or defective in any respect, such insufficiency or defect shall be deemed waived unless the respondent, within 20 days after the filing of such undertaking, shall file and serve upon the appellant or his attorney a notice, in writing, pointing out specifically the defects and insufficiencies of such undertaking. No defect or insufficiency not thus specifically pointed out shall subsequently be urged against the undertaking or the appeal. The appellant may, within five days after such service of said notice, file a new undertaking which shall be in lieu of the one previously filed. [C. L. § 4809.]

Hist. (See C. C. P. '81, § 643) R. S. § 4809; am. '07, p. 134, § 1, reen. R. C. § 4809; compiled and reen. C. L. ib.

Comp. leg.—Cal. Same to proviso, rest omitted: C. C. P. 1872, § 941: Kerr's C. ib.

N. D. Similar: C. C. P. § 7824.

Cross ref. Statutory form of undertaking: § 7236. Justification of sureties: § 7237. State, county or city need not give bond: § 7238.

Cited: Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267; Foresman v. Board of Comrs. (1905) 11 I. 11, 80 P. 1131; Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261; Carlson v. Mullen (1917) 29 I. 795, 162 P. 332; Equitable etc. Co. v. Great Shoshone etc. Co. (1917) 245 F. 697; Bohannon Dredging Co. v. England (1917) 30 I. 721, 168 P. 12; Weiser River Fruit Ass'n v. Feltham, 31 I. 633, 175 P. 583.

Applied: This section has no relation to the time within which a transcript shall be filed in the supreme court or proof of service of the transcript or insufficiency of the certificate of the clerk to the transcript. Coon v. Sommercamp (1915) 26 I. 776, 780, 146 P. 728.

Recitals of bond: An appeal bond conditioned to pay all damages and costs which may be awarded on the appeal but failing to mention a dismissal of the appeal, is insufficient. (Stockslager, C. J., dissents.) Jackson v. Barrett (1906) 12 I. 465, 86 P. 270.

Where a notice of appeal recites that the appeal is taken from the judgment and the whole thereof, while the undertaking recites that it is given on appeal from a judgment for costs, the appeal may be dismissed. Walker v. McGinness (1903) 9 I. 162, 72 P. 885. An undertaking on appeal intended to apply to several appeals in the same action, must specify each of such appeals and will not be construed to apply to appeals not mentioned therein, and such appeals will be dismissed. Young v. Tiner (1894) 4 I. 269, 38 P. 697.

Same: Double appeals: Where an appeal is taken both from a judgment and from an order denying a new trial, a bond reciting both appeals and conditioned to pay all costs and damages awarded on the appeal, without specifying on which appeal, is void as to both appeals, and both will be dismissed. Mathison v. Leland (1878) 1 I. 712; Motherwell v. Taylor (1886) 2 I. 148, 9 P. 417; Hoskins v. Wooden (1895) 4 I. 292, 38 P. 933; Schiller v. Small (1895) 4 I. 422, 40 P. 53; Weil v. Sutter (1896) 4 I. 748, 44 P. 555; Kelly v. Leachman (1897) 5 I. 521, 51 P. 407; Wallace v. McKinley (1898) 6 I. 95, 53 P. 104; Baker v. O. R. N. Ry, Co, (1901) 8 I. 36, 66 P. 806; Thum v. Bailey (1906) 12 I. 510, 86 P. 279.

An undertaking on appeal which specifically recites that the appeal is from both the judgment and the order denying a new trial, and obligates the sureties to pay the penalty of the bond in the event of a judgment against the appellants or a dismissal of the appeals, naming them, is sufficient. Vane v. Towle (1897) 5 I. 471, 50 P. 1004. An undertaking providing that the appellant will pay all damages that may be awarded on "either appeal", and reciting both the appeal from the judgment and the appeal from the order denying a new trial, is sufficient. Idaho Comstock etc. Co. v. Lundstrum (1903) 9 I. 257, 74 P. 975.

When an appeal is taken both from the judgment and from the order denying a new trial, and the undertaking refers only to the appeal from the judgment, the supreme court acquires no jurisdiction over the appeal from the order. McCoy v. Oldham (1873) 1 I. 465; Sebree v. Smith (1888) 2 I. 357, 16 P. 477; Stine Lumber and Shingle Co. v. Hemenway, 32 I. —, 179, P. 505.

Under the provisions of this section, when more than one appeal in the same action is taken at the same time, but one undertaking of $300 for damages and costs is required to be filed, and such undertaking should refer to both appeals. Nobach v. Scott (1911) 20 I. 558, 119 P. 295.

Breach of bond: A bond conditioned that the appellant shall prosecute the appeal to effect, requires the appeal to be prosecuted with success and the condition of the bond is broken whether the appeal is dismissed for want of jurisdiction or on other grounds. Ray v. Ray (1878) 1 I. 705.

Amendment of bond: An appeal bond which fails to bind the sureties to pay any damages that may be awarded on the dismissal of the appeal, may be amended upon seasonable application. Jackson v. Barrett (1906) 12 I. 465, 86 P. 270. But a void bond, such as one which is intended to apply to two appeals, and is conditioned merely to pay damages awarded on "the appeal," without specifying which appeal, can not be amended. Kelly v. Leachman (1897) 5 I. 521, 51 P. 407.

Waiver: Unless one raises the question of the sufficiency of an undertaking as provided herein, same is waived. King v. Seebeck (1911) 20 I. 223, 118 P. 292; (On rehearing) Martin v. Wilson (1913) 24 I. 363, 134 P. 532; Clear Lake P. and I. Co. v. Chriswell, 1918, 31 I. 339, 173 P. 326.

§ 7155. [4810] **Same: Supersedeas: Money judgment.** If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency. [R. S. § 4810.]

Hist. (See C. C. P. '81, § 645) R. S. § 4810, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 942; same as amended: Kerr's C. ib.; Naylor v. Lewiston etc. Ry. Co. (1909) 14 I. 722, 95 P. 827.

N. D. Similar: C. C. P. § 7825.

Cited: Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261.

Sufficiency of bond as stay: A judgment foreclosing a chattel mortgage is not a money judgment, within the meaning of this section, and consequently an undertaking in the sum of $300 stays the execution thereof pending appeal, and no further undertaking can be required. Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267.

A judgment and decree foreclosing a mechanic's or laborer's lien and directing the sale of the property on which the lien is claimed is not a money judgment within the meaning of this section. Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 722, 95 P. 827.

By reference to § 7420 the above sections apply to condemnation proceedings. The perfecting of an appeal from a judgment in the matter of condemning land for a railway stays all proceedings in the district court upon the judgment and order appealed from, and pending the appeal the commissioners have no jurisdiction to act. McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

Judgment against sureties: No judgment can be issued against sureties on an appeal bond not authorized by statute, and which the court had no jurisdiction to require the appellant to give. Ib.

Where, after affirmance on appeal, appellee filed in the trial court a motion to proceed, containing a notice to the sureties on appellant's supersedeas bond that he would apply for a summary decree on the bond, service of which notice was admitted by the surety, such surety was a quasi party to the proceeding, and the court was authorized to render summary judgment against it, both under the provision of this section and independent thereof. Empire State-Idaho Min. & Dev. Co. v. Hanley (1905) 136 F. 99.

Not appeal bond: A supersedeas bond, given in accordance with the provisions of this section, cannot be construed to include the $300 undertaking on appeal required by secs. 7153 and 7154. Weiser River Fruit Ass'n v. Feltham, 31 I. 633, 175 P. 583.

§ 7156. [4811] **Same: Judgment in replevin.** If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order can not be stayed by appeal unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court or judge thereof may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal. [R. S. § 4811.]

Hist. (See C. C. P. '81, § 646) R. S. § 4811, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Substantially same: C C. P. 1872, § 943; additional provision as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7826.

Cited: Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

§ 7157. [4812] **Same: Judgment for specific performance.** If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order can not be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court. [R. S. § 4812.]

Hist. (See C. C. P. '81, § 647) R. S. § 4812, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 944: Kerr's C. ib.

N. D. Similar: C. C. P. § 7827.

Cited: Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann Cas. 1915D 542.

§ 7158. [4813] **Same: Judgment in ejectment.** If the judgment or order appealed from direct the sale or delivery of possession of real property the execution of the same can not be stayed unless a written undertaking be executed on the part of the appellant with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency. [R. S. § 4813.]

Hist. (See C. C. P. '81, § 648) R. S. § 4813, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 945: Kerr's C. ib.

N. D. Similar: C. C. P. § 7828.

Cited: Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann Cas. 1915D 542.

Application of section: This section applies solely to appeals from judgments or orders directing the sale or delivery of possession of real property, and has no application to an appeal from a judgment foreclosing a chattel mortgage. Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267.

On an appeal from a judgment and decree foreclosing a mechanic's or laborer's lien, in order to stay further proceedings for the collection of the judgment appealed from, it is necessary that the amount of the stay bond to cover waste and the use and occupation of the premises directed to be sold, be fixed by the trial judge, and such a supersedeas bond is properly given under the provisions of this section. Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 722, 95 P. 827.

The closing sentence of this section, which provides that in cases of a mortgage foreclosure a supersedeas bond shall cover any deficiency that may arise on the sale of the property, does not apply to judgments and decrees foreclosing mechanics' and laborers' liens, and in the latter case a supersedeas bond is not required to cover any deficiency that may arise from the sale of the property. Ib.

§ 7159. [4814] **Stay of proceedings: Preservation of attachment.** Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person, acting in another's right. An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him; that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless within 20 days after the entry of the order appealed from such appeal be perfected. [R. S. § 4814.]

Hist. (See C. C. P. '81, § 649) R. S. § 4814, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but time specified for perfecting appeal is five days: C. C. P. 1872, § 946; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7833.

Cited: Richardson v. Bohney (1910) 18 I. 328, 109 P. 727; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542; Utah Imp.-Vehicle Co. v. Kenyon (1917) 30 I. 407, 164 P. 1176.

Appeal: When perfected: An appeal is perfected when the notice of appeal is served and filed, and the undertaking is placed on file according to law. Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 831.

Proceedings after appeal: An execution issued pending an appeal perfected by service of notice and a filing of a supersedeas bond, is without authority of law and should be quashed on motion. Miller v. Pine Mining Co. (1893) 3 I. 603, 32 P. 207.

This section does not deprive the district court of jurisdiction to order the payment of suit money to pay the expenses incurred in the prosecution of an appeal which has already been taken in divorce proceedings. Roby v. Roby (1903) 9 I. 371, 74 P. 957.

§ 7160. [4815] **Undertakings may be in one instrument.** The undertakings prescribed by sections 7154, 7155, 7156 and 7158 may be in one instrument or several, at the option of the appellant. [R. S. § 4815.]

Hist. (See C. C. P. '81, § 650) R. S. § 4815, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except numbers of sections: C. C. P. 1872, § 947; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7836.

Cited: Richardson v. Bohney (1910) 18 I. 328, 109 P. 727; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

§ 7161. [4816] **Justification of sureties.** The adverse party may except to the sufficiency of the sureties to the undertakings mentioned in sections 7154, 7155, 7156 and 7158 at any time within 30 days after the filing of such undertaking; and, unless they or other sureties, within 20 days after the appellant has been served with notice of such exception, justify before a judge of the court below, or the probate judge of the county, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and $300 in addition, is equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent. [R. S. § 4816.]

Hist. (See C. C. P. '81, § 651) R. S. § 4816, reen R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 948; again amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7837.

Cited: Miller v. Pine Mining Co. (1893) 3 I. 603, 32 P. 207; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

§ 7162. [4817] Proceedings stayed by appeal. In cases not provided for in sections 7155, 7156, 7157 and 7158, the perfecting of an appeal by giving the undertaking, or making the deposit mentioned in section 7154, stays proceedings in the court below, upon the judgment or the order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping or intruding into, or unlawfully holding, a public office, civil or military, within this state; and except, also, where the order grants, or refuses to grant, a change of the place of trial of an action. [R. S. § 4817.]

Hist. (See C. C. P. '81, § 652) R. S. § 4817, reen. R. C. ib., reen. C. L. ib.

Cross ref. Supersedeas on appeal in election contests: § 7298.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 949; additional provisions added by amendment: Kerr's C. ib. Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261.

N. D. Analogous: C. C. P. § 7838.

Cited: Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

Applied: Where an appeal is taken from an order, the trial court has no jurisdiction to change or correct such order after the appeal therefrom has been taken, at least until the case is remanded and jurisdiction is again obtained. Richardson v. Bohney (1910) 18 I. 328, 109 P. 727.

An appeal from an order denying an application for a temporary restraining order does not operate as a supersedeas of the order appealed from, and at the same time in effect grant the restraining order pending the appeal. Roberts v. Kartzke (1910) 18 I. 552, 111 P. 1.

Court's discretionary power in equity: The trial court has the power and jurisdiction to suspend the operation of a judgment during the pendency of an appeal. The court has discretionary power to decline to enforce an injunctive judgment and to suspend its operation pending an appeal. Waters v. Dunn (1910) 18 I. 450, 110 P. 258.

The court has inherent power to preserve the property in litigation pending an appeal, and, if necessity requires it, may place the same in the hands of a receiver for that purpose. The giving of an appeal bond does not suspend the appointment of a receiver, or supersede his functions during the appeal. Morbeck v. Bradford-Kennedy Co. (1910) 18 I. 458, 110 P. 261.

§ 7163. Papers to be furnished on appeal. On an appeal from a final judgment the appellant must furnish the court with copy of the notice of appeal, of the judgment roll and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in section 6886, upon which the appellant relies, and of all papers, records and files designated in the praecipe filed by appellant with the clerk of the district court. ['19, c. 143, p. 437.]

Hist. (See C. C. P. '81, § 653) R. S. § 4818, reen. R. C. ib.; am. '11, c. 117, § 1, p. 375, reen. C. L. § 4818; am. '19, c. 143, p. 437.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 950; am. Kerr's C. ib.; (On rehearing) Steve v. Bonners Ferry L. Co. (1907) 13 I. 392, 92 P. 363.

N. D. Analogous: C. C. P. § 7822.

Cited: (Before '19 amendment) Zion's Cooperative etc. Inst. v. Armstrong (1899) 6 I. 464, 56 P. 168; Hays v. Crutcher (1904) 10 I. 260, 77 P. 620; Hall v. Jensen (1908) 14 I. 165, 93 P. 962; (On petition for rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696; Kelley v. Clark (1912) 21 I. 231, 121 P. 95; First Nat. Bk. of Am. Falls v. Shaw (1913) 24 I. 134, 132 P. 802; Fischer v. Davis (1913) 24 I. 216, 225, 133 P. 910; Behrensmeyer v. Gwinn (1913) 25 I. 186, 136 P. 623; Coon v. Sommercamp (1915) 26 I. 776, 146 P. 728; Athey v. O. S. L. Ry. Co. (1917) 30 I. 318, 165 P. 1116; Bumpas v. Moore, 31 I. 668, 175 P. 339.

Rule of court: This section and the two following sections require the appellant to furnish a transcript of the record of the court below to the appellate court, and a rule of the supreme court which requires a respondent to furnish any part of said record, or to pay therefor, in the first instance, is in conflict with these sections, and in conflict with R. S. § 3863, and void. (Dis. op.) Lydon v. Godard (1897) 5 I. 607, 51 P. 459.

Final judgment: A judgment of nonsuit is a final judgment within the meaning of this section, and as a part of the record upon appeal from such judgment, the

appellate court is to be furnished as required by such statute with the papers therein enumerated. Spongberg v. First Nat. Bk. (1909) 15 I. 671, 99 P. 712.

Printing of transcript: This section does not prohibit or forbid the printing of transcript on appeal, and costs may be taxed for printed transcripts. Ulbright v. Baslington (1911) 20 I. 546, 119 P. 294.

Record must contain notice: On an appeal from the judgment the record must contain a copy of the notice of appeal; it is insufficient for the clerk to certify that the notice was filed. Stevens v. Hall (1903) 9 I. 233, 73 P. 527; Caldwell v. Ruddy (1880) 1 I. 760.

Contents of record: The sections of the statute upon the subject of appeal specify the papers or documents which the transcript on appeal must contain and only those should be put in it. Taylor v. McCormick (1901) 7 I. 524, 63 P. 239. On appeal from a judgment on the judgment roll only the papers enumerated in R. S. § 4456, subd. 2, can be considered, and any other papers than those enumerated in that section will be stricken from the record. Williams v. Boise Basin M. Co. (1905) 11 I. 233, 81 P. 646.

Under this section a bill of exceptions forms no part of the judgment roll and is not necessarily brought up by an appeal on the judgment roll. Graham v. Linehan (1880) 1 I. 780.

A purported statement on motion for a new trial can not be considered by the supreme court, where no motion for a new trial was ever made or passed upon by the lower court. Steffy v. Esler (1898) 6 I. 228, 55 P. 239.

On appeal from a judgment a motion to strike certain matter from the complaint is not any part of the record in the absence of a statement or bill of exceptions. Swanson v. Groat (1906) 12 I. 148, 85 P. 384.

Contents of record: When papers are not contained in a bill of exceptions and are no part of the judgment roll they are not properly a part of the transcript on appeal and must be stricken out. King v. Seebeck (1911) 20 I. 223, 229, 118 P. 292.

The opinion of the trial court, although incorporated into the record, is not properly a part thereof. Corker v. Cowen (1917) 30 I. 213, 164 P. 85.

The statutes of this state require the appellant to furnish all the papers of which the judgment roll is constituted. Where the certificate of the clerk of the district court certifies that the transcript contains all of the papers provided in the praecipe, and the praecipe is not included in such transcript, such certificate is insufficient to certify to this court the judgment roll in such proceedings. Witt v. Beals (1917) 31 I. 84, 169 P. 182.

Same: Statements: A statement which is not properly certified by the trial judge and which should not have been regarded by him on the motion for new trial, can not be used on appeal from the judgment. Hyde v. Harkness (1876) 1 I. 623.

Where an appeal is taken within 60 days after the rendition of judgment as provided for in § 437 of the practice act, a statement settled after the denial of a motion for a new trial may be used on appeal for the purpose of reviewing the facts. Ainslie v. Idaho World Ptg. Co. (1877) 1 I. 641.

A statement can be used on appeal from a judgment only when first used on a motion for a new trial. Bradbury v. Idaho & Oregon L. I. Co. (1886) 2 I. 239, 10 P. 620.

A statement on motion for a new trial may be used as a bill of exceptions on an appeal from the judgment upon such questions as are authorized to be heard upon such appeal, regardless of whether the statement was used on a motion for a new trial or not. (On rehearing) Steve v. Bonners Ferry L. Co. (1907) 13 I. 392, 92 P. 363; Quayle v. Ream (1910) 17 I. 545, 106 P. 610.

Bill of exceptions: A bill of exceptions containing the evidence given on the trial may be used on appeal from the judgment in determining errors of law, although it may have been settled after the judgment roll was made up. Bk. of Com. v. Ada Co. Abstract Co. (1906) 11 I. 756, 85 P. 919.

Though a bill of exceptions is a part of the judgment roll it may be omitted from the transcript by stipulation of counsel where it has no bearing on questions presented on the appeal; but if not excluded, it is the duty of the appellant to include it in the transcript, and it will not be stricken therefrom on respondent's motion. Fouch v. Bates (1910) 18 I 374, 110 P. 265.

A bill of exceptions found in the transcript is properly there when appellant relies upon it on his appeal. Haas v. Teters (1911) 19 I. 182, 113 P. 96.

Review of evidence (before amendment): On appeal from a final judgment there are only two ways of bringing the evidence before the supreme court for review, viz: by incorporating the same in a bill of exceptions or by incorporating it into a statement on motion for a new trial. Stickney v. Hanrahan (1900) 7 I. 424, 63 P. 189.

Where evidence offered and refused by the court is not made a part of the judgment roll by a bill of exceptions, this court will not examine such evidence upon an appeal from the judgment. Olympia M. Co. v. Kerns (1908) 15 I. 371, 97 P. 1031.

Assignments of error when not made a part of bill of exceptions are no part of the transcript on appeal, and will be stricken out on motion. Humphrey v. Whitney (1909) 17 I. 14, 103 P. 389.

Same (after amendment): On appeal from a final judgment where appellant furnishes the supreme court with a copy of the notice of appeal, judgment roll, reporter's transcript as prepared and settled as provided by § 6886, and the insufficiency of the evidence is properly presented by specifications in the brief, the court has full power and authority to determine whether the evidence is sufficient. Buster v. Fletcher (1912) 22 I. 172, 125 P. 226.

§ 7164. [4819] **Same: From judgment on appeal or order.** On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below. [R. S. § 4819.]

Hist. (See C. C. P. '81, § 654) R. S. § 4819, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except last clause is "and of the bill of exceptions relating thereto": C. C. P. 1872, § 951; same as amended: Kerr's C. ib.

N. D. See C. C. P. § 7842.

Cited: Simmons Hdw. Co. v. Alturas Com. Co. (1895) 4 I. 386, 39 P. 553; (Dis. op.) Lydon v. Godard (1897) 5 I. 607, 51 P. 459; Bunnell & Eno Investment Co. v. Curtis (1897) 5 I. 652, 51 P. 767; Sandpoint v. Doyle (1903) 9 I. 236, 74 P. 861; Walling v. Bown (1904) 9 I. 740, 76 P. 318; Dougal v. Eby (1906) 11 I. 789, 85 P. 102; (In brief of counsel) Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363; Hall v. Jensen (1908) 14 I. 165, 93 P. 962; Libby v. Spokane Valley etc. Co. (1908) 15 I. 467, 98 P. 715; First Nat. Bk. of American Falls v. Shaw (1913) 24 I. 134, 132 P. 802; Walsh v. Niess (1917) 30 I. 325, 164 P. 528.

Papers to be furnished: On appeal to the supreme court from a judgment of the district court, rendered on appeal from the probate court, the appellant must furnish the clerk of the supreme court a copy of the notice of appeal, of the judgment or order appealed from, and of all papers used on the hearing in the court below, and the copies of such papers must be certified to be correct by the clerk or the attorneys; the minutes of the court need not be furnished, and, to properly present the same, they must be preserved by a bill of exceptions. Re Paige (1906) 12 I. 410, 86 P. 273.

Certificate: A certificate that a transcript contains the papers required by this section, enumerating them, and that "the said record constitutes a full, true and correct record of the above entitled action, with indorsements thereon as the same are now of record and on file in my office" is sufficient. Kootenai Co. v. Hope Lbr. Co. (1907) 13 I. 262, 89 P. 1054.

Where, upon an appeal from an order, dismissing a motion for a new trial because the same was not prosecuted with due diligence, the transcript contains no certificate showing that the papers and records therein were used by the judge upon the hearing of such motion, but merely contains a certificate from the clerk to the effect that it is a true and correct transcript of the proceedings therein contained, such certificate does not comply with the statutory requirement, and the rules of this court, and the appeal will be dismissed. Dudacek v. Vaught (1916) 28 I. 442, 154 P. 995.

§ 7165. [4820] **Same: Order granting or refusing new trial.** On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section 6892 of this code. [R. S. § 4820.]

Hist. (See C. C. P. '81, § 655) R. S. § 4820, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 952; same as amended except number of section mentioned is different: Kerr's C. ib.

Cited: Rumpel v. O. S. L. Ry. Co. (1894) 4 I. 13, 35 P. 700; (Dis. op.) Lydon v. Godard (1897) 5 I. 607, 51 P. 459; Steve v. Bonners Ferry Lbr. Co. (1907) 13 I. 384, 92 P. 363; Hall v. Jensen (1908) 14 I. 165, 93 P. 962; (On petition for rehearing) Perkins v. Loux (1908) 14 I. 614, 95 P. 696; Doust v. Rocky Mt. Bell Tel. Co. (1908) 14 I. 677, 95 P. 209; Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573; Ulbright v. Baslington (1911) 20 I. 546, 119 P. 294; First Nat. Bk. of American Falls v. Shaw (1913) 24 I. 134, 132 P. 802.

§ 7166. Same: Manner of procuring transcript. The copies which the appellant is required by sections 7163, 7164 and 7165 to furnish to the supreme court shall be procured and furnished in the manner following, to wit:

1. The appellant, within five days from the filing of the notice of appeal, shall file with the clerk a praecipe for a transcript of the papers which he desires, and shall pay to the clerk the sum of 10 cents a folio of 100 words for such papers as are required, which fee shall be in full payment for the services of the clerk in preparing an original and four carbon typewritten copies of the papers required, and a further fee of $5 for the service and expense of the clerk in certifying and transmitting the said transcripts to the clerk of the supreme court. He shall likewise at the same time deposit with the clerk such sum as may

be required by the rules of the supreme court as a deposit to secure payment of appellant's costs on appeal.

2. Upon receipt of said fees the clerk shall prepare an original and four carbon typewritten copies of the papers designated by the praecipe, with the exception of any reporter's transcript prepared under section 6886. Upon the completion of said transcript the clerk shall deliver two copies to the appellant or his attorney, and shall bind the remaining three copies in substantial cardboard binding, suitably stapled or tied, binding therewith any reporter's transcript prepared under section 6886, and shall append thereto his certificate that the same is compiled and bound under his direction as a true and correct transcript of the proceedings therein contained. In the preparation of said transcript he shall omit the title of all papers subsequent to the first, inserting in place thereof the words "Title of court and cause," and shall, likewise, omit all verifications, inserting in place thereof the words "Duly verified," unless he is specifically directed to insert a designated title or verification.

3. The clerk shall complete said transcript and transmit the original and two copies to the clerk of the supreme court or to his deputy at the place where the appeal is to be heard, together with the fees of the clerk of the supreme court collected by him as aforesaid, within such time as is now or shall be designated by rule of the supreme court, and shall, within the said time, deliver the remaining two copies to the appellant or his attorney, who shall forthwith serve one copy upon the adverse party or his attorney, or if there be more than one adverse party appearing by separate attorneys, then on one of said parties or his attorney, and shall serve a notice, designating the party or attorney upon whom he has made such service, upon such other adverse parties or their attorneys, and shall file appropriate affidavit or admission of service with the clerk of the supreme court or his deputy, as the case may be.

4. Upon the receipt by the clerk of the supreme court of said transcripts and affidavits or admissions of service, the cause shall be docketed by him and shall be heard upon said typewritten transcripts without requirement of printed copies. The supreme court shall have power to make any rules, not inconsistent with the spirit and effect of this article, relating to the form and substance of said transcripts, with suitable provisions as to binding, margins, spacing, size of page, character of ribbon and the like, and may make appropriate regulations with respect to costs and penalties for failure to comply with said rules; but until such provision is made, no transcript shall be rejected for want of form or insufficiency which is neatly and clearly typewritten in any standard typewriter type on white paper of legal cap size and containing a margin of at least 1 inch on the left hand side, 2 inches at top and 1 inch at bottom, and divided into folios of 10 lines numbered on the left hand margin and consecutively paged by paging stamp or in writing. [C. L. § 4820a.]

Hist. R. C. § 4820a, enacted by '11, c. 117, § 2, p. 375; modified by amendments of R. C. § 3821, '13, c. 52, p. 161, and '17, c. 42, p. 93, and harmonized with R. C. § 221; compiled and reen. C. L. § 4820a.

Cited: Buster v. Fletcher (1912) 22 I. 172, 125 P. 226; First Nat. Bk. of American Falls v. Shaw (1913) 24 I. 134, 132 P. 802.

Diligence required: If the clerk fails to perform his duty with diligence relief may be had by application to the district or supreme court. Fischer v. Davis (1913) 24 I. 216, 133 P. 910.

It is appellant's duty to procure from the district judge the necessary order directing the court reporter to prepare a transcript of the evidence, or specified portions thereof. It is also incumbent upon counsel to file with the clerk within the time allowed under the statute a praecipe

for a transcript of the papers which he desires to be used on appeal, and should such praecipe fail to contain a request for all necessary papers or transcript and they are not found in the transcript on appeal, the responsibility will rest in the first instance with the counsel for appellant. It must also affirmatively appear that service upon counsel for respondent has been duly made of the transcript and brief within the time prescribed by the rules of this court; otherwise, upon motion, said appeal may be dismissed. Coon v. Sommercamp (1915) 26 I. 776, 146 P. 728.

Extension of time for filing transcript, granted by justice of supreme court, is of no avail where time had already expired and party failed to use due diligence. Stout v. Cunningham (1917) 29 I. 809, 162 P. 928.

Filing of praecipe: The fact that an appellant does not file a praecipe designating the papers desired to be included in the transcript with the clerk within five days, as required by this section, is not a ground for dismissing an appeal, where the record shows that the attorneys certify that the transcript does contain all the papers desired to be included in the transcript, and the clerk certifies that the transcript contains all the files and records of the case. Strand v. Crooked River M. & M. Co. (1913) 23 I. 577, 131 P. 5; Bohannon Dredging Co. v. England (1917) 30 I. 721, 168 P. 12.

Service and jurisdiction: Failure to file and serve the transcript within the time fixed by rule is not jurisdictional, but filing the notice and undertaking on appeal within the time prescribed by statute gives jurisdiction. Stout v. Cunningham, supra.

The service provided for in this section and § 6886 is mandatory, and failure to make such service as required by the sections of the statute referred to divests this court of jurisdiction to entertain the appeal. Bohannon Dredging Co. v. England, supra.

The failure to make the service required by this section and § 6886 would divest this court of jurisdiction to consider on appeal the record or that portion thereof involved in the failure of service. Such failure of service might, in proper cases, be ground for a motion to strike. Boise-Payette Lbr. Co. v. McCarthy (1918) 31 I. 305, 170 P. 920.

Service of copies of the clerk's transcript of the record and the reporter's transcript of the testimony, bound together, within the time required by § 6886, is a compliance with the mandatory requirements of that section and this section as to service, and in case the respondent's attorney fails to return his copy to the clerk for completion prior to the time of settlement of the reporter's transcript by the trial judge, the appellant is not required to make any additional service of the record. Stine Lumber & Shingle Co. v. Hemenway, 32 I.—, 179 P. 505.

§ 7167. Same: Certificate of transcript. The copies provided for in sections 7163, 7164 and 7165 must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys, that an undertaking on appeal in due form has been properly filed or a stipulation of the parties waiving an undertaking. [C. L. § 4821.]

Hist. (See C. C. P. '81, § 656) R. S. § 4821, reen. R. C. ib.; compiled and reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 953; same as amended: Kerr's C. ib. Hailey v. Riley (1907) 13 I. 749, 92 P. 756.

Cited: Bunnell & Eno etc. Co. v. Curtis (1897) 5 I. 652, 51 P. 767; Walling v. Bown (1904) 9 I. 740, 76 P. 318; Steve v. Bonners Ferry L. Co. (1907) 13 I. 384, 92 P. 363; Doust v. Rocky Mt. Bell Tel. Co. (1908) 14 I. 677, 95 P. 209; (In brief of counsel) Primrose v. Armstrong Mach. Co. (1913) 23 I. 551, 131 P. 14; Dudacek v. Vaught (1916) 28 I. 442, 154 P. 995.

Rule of court: A rule of the supreme court which requires the attorney of an adverse party on appeal to certify to the correctness of a transcript on appeal within a certain time after request to do so, and fixes, as a penalty for failure of said attorney so to do, that the cost of procuring a certificate from the clerk of the proper court shall be taxed against the party whose attorney has refused to so certify, is valid and does not conflict with the provisions of this section. Sullivan, C. J. dissents) Lydon v. Godard (1897) 5 I. 607, 51 P. 459.

Necessity of certificate: On an appeal from an order other than an order granting or refusing a new trial, the papers contained in the transcript must be identified by proper certificate showing that they are the papers used upon the hearing in the court below, and a certificate that the papers are true copies of the originals on file is not enough without showing that they are the papers used upon the hearing. Sandpoint v. Doyle (1903) 9 I. 236, 74 P. 861.

Where the record fails to show that an undertaking on appeal has been filed or that the same has been waived, the appeal will be dismissed. Rich v. French (1893) 3 I. 727, 35 P. 173.

An appeal will be dismissed where the transcript does not contain any certificate that the papers therein constitute all the records, papers and files used or considered by the judge on the hearing. Glenn v. Aultman & Taylor M. Co. (1917) 30 I. 719, 727, 167 P. 1163; Walsh v. Niess (1917) 30 I. 325, 164 P. 528, and may be dismissed on the court's own motion. Ib.

In the absence of such a certificate the orders complained of could not be reviewed. Bumpas v. Moore, 31 I. 668, 175 P. 339; Bell v. Stadler, 31 P. 568, 174 P. 129.

Conclusiveness of certificate: Only the record as certified by the clerk or attorneys of record can be considered by the

supreme court, and a motion to strike a supplement from the record which was not called to the attention of the court, or was no part of the record in the case, will be sustained. First Nat. Bk. of Lewiston v. Sampson (1901) 7 I. 564, 64 P. 890.

Where it is shown by the certificate of the judge and clerk of the court in the transcript that such transcript contains all the papers, pleadings, etc., used on the hearing of a motion to release certain property from attachment after final judgment in the lower court, and thereafter the judge and deputy clerk furnish certificates or affidavits that other papers were used on the hearing, the supreme court will not dismiss the appeal, especially when it is shown that the missing paper was a part of the record evidence of the respondent; a certified copy should have been furnished for the record by the moving party. Coey v. Cleghorn (1904) 10 I. 162, 77 P. 331.

The supreme court on an appeal from an order dissolving an injunction can not consider affidavits found in the transcript where the trial judge certifies that certain papers (which do not include such affidavits) and no other were considered by the judge, and there is no showing that such affidavits were presented or called to the attention of the trial judge at the hearing. Dougal v. Eby (1906) 11 I. 789, 85 P. 102.

Who must certify: The clerk of the court or the attorney for the parties is the proper officer to certify to papers used on the hearings of a motion in the lower court. Simmons Hdw. etc. Co. v. Alturas Com. Co. (1895) 4 I. 386, 39 P. 553.

An affidavit of the parties or of the attorneys can not be substituted for the certificate of the clerk or attorneys. Hailey v. Riley (1907) 13 I. 749, 92 P. 756.

The certificates of the clerk of the district court that certain affidavits were used in the application for a new trial and that they were all the affidavits used, is not sufficient to authorize the supreme court to consider such affidavits; but such certificate must be made by the trial judge or in an authenticated record certified by the judge, showing what papers were used on the application. Crowley v. Croesus Gold etc. Co. (1906) 12 I. 530, 86 P. 536; overruled by Hall v. Jensen (1908) 14 I. 165, 93 P. 962.

Under this section the copies of the papers provided for by §§ 7163-65 to be used on appeal may be certified or identified by the clerk or by stipulation of attorneys, or may be certified and identified by the judge. On the question of the certification of papers or documents used on the hearing of a motion the case of Crowley v. Croesus M. Co., supra, is expressly overruled in so far as it applies to civil cases. Hall v. Jensen, supra.

The papers and documents considered by the trial court must be identified in an appeal either by certificate of the trial judge, a stipulation of counsel, or a certificate of the clerk of the district court. A certificate made by the trial judge and appearing in the record is a compliance with the statute. Libby v. Spokane Valley etc. Co. (1908) 15 I. 467, 472, 98 P. 715.

Sufficiency of certificate: A stipulation signed by the attorneys that the transcript contains true and correct copies, inter alia, of the "undertaking on appeal," is a sufficient certificate of the filing of the undertaking. Idaho Comstock etc. Co. v. Lundstrum (1903) 9 I. 257, 74 P. 975.

A clerk's certificate is insufficient where it appears therefrom that it is not a true and correct transcript of all of the proceedings had in the trial court. Coon v. Sommercamp (1915) 26 I. 776, 146 P. 728.

Amendment of certificate: Where no proper certificate of identification was attached to the transcript on appeal an amended certificate may be filed before the final submission of the case on appeal, and a motion to dismiss the appeal will be denied. Steensland v. Hess (1913) 25 I. 181, 136 P. 1124; Burgess v. Corker (1913) 25 I. 217, 136 P. 1127; Witt v. Beals (1917) 31 I. 84, 169 P. 182.

§ 7168. [4822] Failure to furnish papers: Dismissal. If the appellant fails to furnish the requisite papers the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal. [R. S. § 4822.]

Hist. (See C. C. P. '81, § 657) R. S. § 4822, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 954; additional provisions as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7845.

Cited: (In brief of counsel) Martin v. Wilson (1913) 24 I. 353.

Construed: Where no undertaking on appeal is filed in the lower court the requirements of the statute can not be complied with by filing an undertaking on appeal in this court which is approved by a justice of this court, under this section. Hailey v. Riley (1907) 13 I. 749, 92 P. 756.

Grounds for dismissal: A motion to dismiss an appeal on the ground that certain papers, which are part of the record upon such appeal, are not included in the transcript is no ground for dismissal, the remedy being by suggestion of diminution of the record. Zienke v. N. P. Ry. Co. (1901) 7 I. 746, 65 P. 431.

Sufficiency of motion: A motion to dismiss an appeal must specify with particularity the precise ground upon which the moving party will base his right to the relief sought; a motion alleging "that no sufficient undertaking on appeal was ever filed in said cause" is insufficient. Jackson v. Barrett (1906) 12 I. 465, 86 P. 270.

Disposition of merits: An appeal from an order dissolving a preliminary injunction will be dismissed where the merits

of the case have been determined by final judgment, and the time for appealing from such final judgment has expired without an appeal having been taken. Wallace v. Deane (1902) 8 I. 344, 69 P. 62.

An appeal from an order denying a new trial will be dismissed where all the questions involved therein have been disposed of on appeal from the judgment. Coats v. Harris (1904) 9 I. 470, 75 P. 246.

Amendment of undertaking: This section does not authorize the filing of a sufficient undertaking in place of one which is void. Motherwell v. Taylor (1886) 2 I. 148, 9 P. 417.

See also cases cited under § 7154: "Amendment of bond."

§ 7169. [4823] **Same: Effect of dismissal.** The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal. [R. S. § 4823.]

Hist. (See C. C. P. '81, § 658) R. S. § 4823, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 955; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7841.

Dismissal without prejudice: The court may order the dismissal of an appeal without prejudice to another appeal, and will do so where the appeal is absolutely void so that the court is without jurisdiction over the appellants and can make no order that will be binding upon them. Coffin v. Edgington (1890) 2 I. 627, 23 P. 80.

Effect of dismissal: The dismissal of an appeal for failure to file the requisite papers, unless expressly made without prejudice, is in effect an affirmance of the judgment and bars a subsequent appeal. Fahey v. Belcher (1893) 3 I. 644, 32 P. 1135; West v. Dygert (1908) 15 I. 350, 97 P. 961.

Where there is no issue or controversy presented to the court the appeal should, in conformity with the statute and rules of the court, be dismissed, which would in effect affirm the judgment. (Con. op.) Sunnyside Irr. Dist. v. Stephens (1911) 21 I. 94, 120 P. 169; Crane Creek Irr. Dist. v. Martin (1911) 21 I. 96, 120 P. 169.

New appeal: Where a respondent moves to dismiss the appeal and the motion is confessed by appellant and allowed by the court, and an order is entered dismissing the appeal without prejudice, a new appeal may ge taken as soon as the order of dismissal is made and prior to the filing of the remittitur in the lower court. Jackson v. Barrett (1906) 12 I. 465, 86 P. 270.

§ 7170. [4824] **What may be reviewed on appeal.** Upon an appeal from a judgment the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: *Provided,* That whenever there is substantial evidence to support a verdict the same shall not be set aside. ['07, § 1, p. 483.]

Hist. (See C. C. P. '81, § 659) R. S. § 4824; am. '07, § 1, p. 483, reen. R. C. § 4824, reen. C. L. ib.

Cross ref. Orders disposing of community property or homestead in actions for divorce may be reviewed on appeal: § 4652. Court may reverse, affirm or modify order or judgment appealed from: § 6446. When a new trial is granted all questions of law shall be determined: § 6446.

All orders and decisions may be reviewed upon an appeal from the judgment except such decisions or orders as may be directly appealed from under the provisions of subd. 3, § 7152. Maple v. Williams (1908) 15 I. 642, 98 P. 848.

Comp. leg.—Cal. See C. C. P. 1872, § 956; similar as amended: Kerr's C. ib.

Cited: Miller-Cahoon Co. v. Lawrence, 31 I. 704, 176 P. 774.

Harmless errors: The fact that there have been many errors and defects in the pleadings and proceedings in the various stages of the case is not ground for reversal where it does not appear that they affect the substantial rights of the appellant. Dangel v. Levy (1878) 1 I. 722.

Review of intermediate order: An order sustaining a demurrer to a counterclaim may be reviewed on appeal from a final judgment. Miller v. Hunt (1899) 6 I. 523, 57 P. 315.

Substantial conflict in evidence. Where there is substantial evidence to support the verdict, the same will not be set aside on appeal. Roseborough v. Whittington (1908) 15 I. 100, 105, 96 P. 437; Bowers v. Cottrell (1908) 15 I. 221, 96 P. 936; McCallum v. McClarren (1908) 15 I. 374, 98 P. 200; Valley Lbr. Co. v. McGilvery (1909) 16 I. 338, 101 P. 94; Just v. Idaho Canal etc. Co. (1909) 16 I. 639, 102 P. 381, 133 A. S. R. 140; Lamb v. Licey (1909) 16 I. 664, 671, 102 P. 378; Leggett v. Evans (1909) 16 I. 760, 102 P. 486; Fleenor v. O. S. L. Rr. Co. (1909) 16 I. 781, 803, 102 P. 897; Wolfe v. Ridley (1909) 17 I. 173, 104 P. 1014; Eaves v. Sheppard (1909) 17 I. 268, 105 P. 407, 134 A. S. R. 256; (On petition for rehearing) Swanson v. Kettler (1910) 17 I. 321, 341, 105 P. 1059; Snowy Peak M. Co. v. Tamarack etc. Co. (1910) 17 I. 630, 107 P. 60; Quayle v. Ream (1910) 17 I. 545, 549, 106 P. 610; Seawell v. Pacific etc. Ry. Co. (1912) 21 I. 277, 121 P. 556; Herculith

Co. v. Gustafson (1912) 22 I. 537, 126 P. 1050; (In brief of counsel) Calkins v. Blackwell L. Co. (1912) 23 I. 128; (In brief of counsel) Edwards v. Anderson (1913) 23 I. 508, 130 P. 1001; Denbeigh v. O. W. R. & N. Co. (1913) 23 I. 663, 680, 132 P. 112; (In brief of counsel) Osborn v. Carey (1913) 24 I. 158, 132 P. 967; Meeker v. Trappett (1913) 24 I. 198, 133 P. 117; Davidson Gro. Co. v. Johnston (1913) 24 I. 336, 133 P. 929, Ann. Cas. 1915 C 1129; (On rehearing) Morris-Roberts v. Mariner (1913) 24 I. 801, 135 P. 1170; Miller v. Blunck (1913) 24 I. 234, 133 P. 383; Richardson v. Bohney (1914) 26 I. 35, 140 P. 1106; (In dis. and con. op) McLean v. Hayden Creek M. & M. Co. (1914) 25 I. 416, 433, 138 P. 331; Tilden v. Hubbard (1913) 25 I. 677, 690, 138 P. 1133; McAlinden v. St. Maries Hospital Assn. (1916) 28 I. 657, 677, 156 P. 115; (In dis. op.) Woodland v. Hodson (1915) 28 I. 45, 52, 152 P. 205; (In dis. op.) Snoderly v. Bower (1917) 30 I. 484, 490, 166 P. 265; Bowers v. Bennett (1917) 30 I. 188, 195, 164 P. 93.

An appellate court will not disturb the judgment of a trial court, because of conflict in the evidence, where there is sufficient proof, if uncontradicted, to sustain it. Sweeten v. Ezell, 30 I. 154, 163 P. 612; Davenport v. Burke, 30 I. 599, 167 P. 481; Lambrix v. Frazier, 31 I. 382, 171 P. 1134; Wallace v. Hartford Fire Ins. Co., 31 I. 481, 174 P. 1009; Labonte v. Davidson, 31 I. 644, 175 P. 588. Fleming v. Benson, 32 I. —, 178 P. 482.

Same: Criminal Cases: The same rule applies to criminal cases. S. v. Silva (1912) 21 I. 247, 120 P. 835; S. v. Downing (1913) 23 I. 540, 130 P. 461; S. v. Hopkins (1915) 26 I. 741, 145 P. 1095; S. v. Bouchard (1915) 27 I. 500, 149 P. 464.

Same: Equity cases: This rule applies as well in equity cases heard upon oral testimony as in law cases. Snowy Peak etc. M. Co. v. Tamarack etc. M. Co. (1910) 17 I. 630, 107 P. 60; Panhandle Lbr. Co. v. Rancour (1913) 24 I. 603, 135 P. 558; Darry v. Cox (1916) 28 I. 519, 155 P. 660; Jensen v. Bumgarner (1916) 28 I. 706, 156 P. 114; Jones v. Vanausdeln (1916) 28 I. 743, 156 P. 615.

Where the trial court has heard and determined a case solely on depositions and documentary evidence, and an appeal is taken from the judgment on the ground that it is not supported by the evidence, the appellate court will examine and weigh the evidence the same as if the case were being tried de novo. Spofford v. Spofford (1910) 18 I. 115, 108 P. 1054.

Where evidence not substantial: If it is found upon review that there is no substantial conflict in the evidence there may be a reversal of the judgment where the evidence is insufficient to sustain the verdict. Quayle v. Ream (1909) 15 I. 666, 99 P. 707.

Where affidavits made prima facie evidence by statute are flatly contradicted by positive proof, such affidavits do not make a substantial conflict in the evidence. Dickens-West M. Co. v. Crescent etc. Co. (1914) 26 I. 153, 141 P. 566.

Where there is a substantial conflict in the evidence the trial court has the authority to set aside the verdict if such court concludes that substantial justice has not been done, whereas the supreme court is prohibited from setting aside a verdict whenever there is substantial evidence to support the verdict. Buster v. Fletcher (1912) 22 I. 172, 181, 125 P. 226.

§ 7171. [4825] **Remedial powers of appellate court: Damages for delay.** When the judgment or order is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just. [R. S. § 4825.]

Hist. (See C. C. P. '81, § 660) R. S. § 4825, reen. R. C. ib., reen. C. L. ib.

Cross ref. Power to modify judgment: § 6446.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 957; now same: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7844.

Right to restitution: Where it appears from the record that property has been sold under decree of the district court and has been purchased by plaintiff, defendant is entitled to restitution on a reversal of the judgment Vermont Loan Co. v. Hoffman (1897) 5 I. 376, 49 P. 314.

Damages for delay: A party who takes an appeal but fails to furnish a record of the case within the time prescribed by law and the rules of the court, is liable to damages for delay. Day v. Gridley (1899) 6 I. 489, 56 P. 77.

Affidavits can not be read in support of a motion for damages for failure to prosecute an appeal. Cody v. Scaniker (1867) 1 I. 168.

Appellate court has express power to grant complete restitution of all property and rights lost by an erroneous judgment, in the event same is reversed or modified. McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

Damages: Request for damages denied. Anderson v. Coolin (1916) 28 I. 494, 155 P. 677.

§ 7172. [4826] **Remittitur.** When the judgment is rendered upon the appeal it must be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed or modified by the supreme court on appeal. [R. S. § 4826.]

Hist. (See C. C. P. '81, § 661) R. S. § 4826, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judgment to be remitted to lower court: § 6446.

Comp. leg.—Cal. Same: C. C. P. 1872, § 958; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7845.

Proceedings on remand: Where a case has been reversed and remanded with directions that a new trial be granted, "or if either party does not care to introduce new testimony, the court may make findings of fact and conclusions of law and enter judgment in accordance with the views herein expressed," and when the case is called for trial the plaintiff elects to submit his case on the evidence introduced by him on the previous trial, and defendant thereupon moves for a nonsuit, and declines to introduce any evidence, and the court makes findings on the evidence taken at the former trial and enters judgment accordingly, such judgment will not be disturbed on appeal upon the contention by appellant that no evidence was introduced and no new trial was had. Huber v. Mother Aurelia (1907) 13 I. 276, 89 P. 942.

ARTICLE 3.

APPEALS FROM PROBATE COURT TO DISTRICT COURT IN PROBATE MATTERS.

Cross ref. Appeals from probate court in civil cases: § 7179.

§ 7173. [4831] **Appealable judgments and orders.** An appeal may be taken to the district court of the county from a judgment or order of the probate court in probate matters:

1. Granting, refusing or revoking letters testamentary, or of administration, or of guardianship.
2. Admitting, or refusing to admit, a will to probate.
3. Against or in favor of the validity of a will, or revoking the probate thereof.
4. Against or in favor of setting apart property, or making an allowance for a widow or child.
5. Against or in favor of directing the partition, sale or conveyance of real property.
6. Settling an account of an executor, administrator or guardian.
7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share.
8. Confirming report of appraiser setting apart the homestead. [R. S. § 4831.]

Hist. (See C. C. P. '81, § 662) R. S. § 4831, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction of district court on appeals from the probate court: § 6457. Appeals must be taken within 60 days after entry of judgment: § 7766.

Comp. leg.—Cal. Similar, but appeal is taken to supreme court instead of district court and there is an additional subdivision: C. C. P. 1872, § 969; now the appeal is taken from the superior court to the supreme court, as amended: Kerr's C. § 963.

N. D. See Pro. C. § 8590.

Cited: Re Estate of Christensen (1909) 15 I. 692, 99 P. 829; Connolly v. Probate Court (1913) 25 I. 35, 136 P. 205; Diamond v. Connolly, 251 F. 234.

Nature of right of appeal: The constitution does not confer any absolute and unqualified right of appeal from an order or judgment of a probate court; on the contrary, the matter of appeals in such cases is left to the discretion of the legislature, which may either confer or withhold the right of appeal in any and all

matters coming before the probate court. Re Sharp (1909) 15 I. 120, 96 P. 563, 18 L. R. A. (N. S.) 886.

The right of appeal in probate matters is purely statutory, and can be taken only from the judgments, orders, decrees and proceedings enumerated in the statute. Estate of Coryell, 16 I. 201, 101 P. 723.

Appealable orders: An order denying the issuance of an order to show cause why the real estate of the decedent should be sold to pay debts is appealable. S. v. Whelan (1898) 6 I. 78, 53 P. 2. An order of the probate court refusing to admit a will to probate is appealable. Re Paige (1906) 12 I. 410, 86 P. 273.

A parent or guardian is not bound by the order of the probate court in adjudging a child delinquent and sending him to the industrial training school unless such parent or guardian appeared or was brought into the proceeding. If he was a party he has a right of appeal under this section. Re Sharp, supra.

An order which in effect amounts to a disallowance of the respondent's claims against an estate is an appealable order. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

Orders not appealable: An appeal does not lie from the order of the probate judge vacating a settlement or continuing part of an administrator's account for future consideration. Est. of Coryell, supra.

There is no provision for an appeal from an order of the probate court made subsequent to the closing of the estate. Chandler v. Probate Court (1914) 26 I. 173, 141 P. 635.

Scope of review: An appeal from an order directing a conveyance of property will not authorize a review of the action of the court in directing a sale, since appeals are specifically authorized from each of said orders. Reed v. Stewart (1907) 12 I. 707, 87 P. 1152.

§ 7174. [4832] **Undertaking not required of executor.** When an executor, administrator or guardian who has given an official bond, appeals from a judgment or order of the probate court made in the proceedings had upon the estate of which he is administrator, executor or guardian, his official bond stands in the place of an undertaking on appeal, and the sureties therein are liable as on such undertaking. [R. S. 4832.]

Hist. (See C. C. P. § 663) R. S. § 4832 reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Same except "or guardian" omitted, and "undertaking" for "official bond": C. C. P. 1872, § 970; same, as amended: Kerr's C. § 965.

N. D. Analogous: Pro. C. § 8603.

§ 7175. [4833] **Effect of reversal.** When the order or decree appointing an executor, administrator or guardian is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, administrator or guardian, if he have qualified, are as valid as if such order or decree had been affirmed. [R. S. § 4833.]

Hist. (See C. C. P. '81, § 664) R. S. § 4833, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except words "for error, and not for want of jurisdiction of the court" are omitted: C. C. P. 1872, § 971; as amended: Kerr's C. § 966.

N. D. Analogous: Pro. C. § 8622.

Cited: (Erroneously for R. C. § 3843) [§ 6468] Chandler v. Probate Court (1914) 26 I. 173, 141 P. 635.

§ 7176. [4834] **Manner of taking appeal.** An appeal from the probate court in probate matters is taken by filing with the clerk of the probate court in which the judgment or order appealed from is made or entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice upon the administrator, administratrix, executor or executrix (unless they be the appellants), and upon all other parties interested who appeared upon the motion or proceeding which the appellant desires to have reviewed, or upon their attorneys. The notice of appeal must be filed and served within 60 days after the order, decree or judgment is entered. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within 10 days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing. ['03, p. 372, § 1.]

Hist. '03, p. 372, § 1, reen. R. C. § 4834, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pro. C. § 8606.

Cited: Diamond v. Connolly, 251 F. 234.

What appealable: Final decree of distribution is not indivisible, but a part thereof may be appealed from. Re Blackinton's Est. (1916) 29 I. 310, 158 P. 492.

Persons entitled to notice: A proceeding for the sale of the property of an intestate to pay debts, constitutes a single proceeding from the time of filing the petition for the sale until the confirmation thereof and delivery of the deed, and heirs who appear by their guardian ad litem on the hearing of the petition for the sale are entitled to have the guardian served with notice of appeal by the purchaser from an order confirming the sale, although the guardian did not appear at the hearing of the confirmation of the sale. Reed v. Stewart (1907) 12 I. 707, 87 P. 1152.

Undertaking or deposit: Where the probate court in a probate matter enters one judgment and includes therein more than one order, and the appeal is taken from the judgment, only one bond or one deposit of $100 under this section is required. (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

Where an appeal is taken from two orders, which are in proper form and which are specifically referred to, the undertaking on appeal is not insufficient for its failure to specify which appeal the undertaking was intended to secure; the undertaking is sufficient if the amount of the penalty of the bond is sufficient for both appeals. Re Blackinton's Est., supra.

§ 7177. [4835] **Undertaking.** The undertaking on appeal must be in writing and must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding $100, or that sum must be deposited with the clerk with whom the judgment or order was entered to abide the event of the appeal. ['03, p. 372, § 2.]

Hist. '03, p. 372, § 2, reen. R. C. § 4835, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pro. C. § 8608.

Cross ref. Form of undertaking: § 4933a: Blackinton's Est. (1916) 29 I. 310, 158 P. 492.

Sufficiency of undertaking: An undertaking which fails to provide that appellant will pay all damages and costs which may be awarded against him on the dismissal of the appeal, is insufficient. Re Paige (1906) 12 I. 410, 86 P. 273.

Where an appeal is taken both from a decree and an order denying motion to reopen decree, and both are specifically referred to in the undertaking on appeal in the form into which the statute imports every condition required by law, and the amount of penalty is sufficient for both appeals, the legal effect is to comprise two bonds in one instrument, and it must be so construed. Blackinton's Est. (1916) 29 I. 310, 158 P. 492.

§ 7178. [4836] **Hearing of appeal.** The appeal may be taken upon questions of law or upon questions of both law and fact. If taken upon questions of law alone, the district court may review any such question which sufficiently appears upon the face of the record or proceeding, without the aid of a bill of exceptions, and no bill of exceptions shall be allowed or granted in the probate court in probate matters. If the appeal be upon questions of both law and fact, the trial in the district court shall be de novo. ['03, p. 372, § 3.]

Hist. '03, p. 372, § 3, reen. R. C. § 4836, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pro. C. §§ 8617, 8620.

Constitutionality: This section is in harmony with Const. V. 21, giving original jurisdiction to probate courts in probate matters, and confers appellate jurisdiction only upon district courts in conformity to Const. V. 20, Est. of McVay (1907) 14 I. 56, 93 P. 28.

Trial de novo: Issues: Trial de novo, as used in this section, means to try anew, or a second time; that is, to retry the case upon the original papers and upon the same issues as the case was tried in the probate court. (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

When an appeal is taken to the district court upon issues of law and fact, it is the duty of the district judge to pass upon the same issues tried in the probate court, and the refusal to pass upon such questions is reversible error. Kent v. Dalrymple (1913) 23 I. 694, 132 P. 301.

Same: Procedure: Under this statute and the constitution, if an appeal is taken upon a probate matter upon questions of law alone, the district court may review such questions of law which appear upon the face of the record, and may affirm or reverse the decision of the probate court. (On rehearing) Est. of McVay, supra.

Where an appeal is taken from the probate court to the district court in a probate matter on both questions of law and fact, if the district court reverses the probate court on questions of law, the issues

of fact are not to be tried. Kent v. Dalrymple, supra.

When an appeal is taken upon both questions of law and fact, if the court should affirm the action of the probate court upon questions of law, the cause may then be tried upon the same questions of fact as were raised in the probate court in the same way as other cases are tried in the district court. (On rehearing) Est. of McVay, supra; Kent v. Dalrymple, supra.

And whatever judgment may be entered in the district court shall be certified back to the probate court for execution in accordance therewith. Fraser v. Davis (1916) 29 I. 70, 156 P. 913.

Same: Evidence. While the failure to offer proof upon the hearing in the district court would be a matter to be considered by that court, yet the failure to offer such proof in the probate court is not a matter which in any way concerns the district court upon the hearing upon appeal, as the hearing in the district court is de novo upon the issues made in the probate court. Est. of Christensen (1909) 15 I. 692, 99 P. 829.

On an appeal from an order confirming a sale, if it appears that the proceedings were fair and the sum bid not disproportionate to the value of the property, it is the duty of the district court to affirm the order of the probate court. McGregor v. Jensen (1910) 18 I. 320, 109 P. 729.

ARTICLE 4.

APPEALS FROM PROBATE AND JUSTICE'S COURTS TO DISTRICT COURTS.

Cross ref. Appeals from probate court in probate matters: § 7173.

§ 7179. [4838] **Time and manner of taking appeal.** Any party dissatisfied with a judgment rendered in a civil action in a probate or justice's court may appeal therefrom to the district court of the county at any time within 30 days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from part, what part, and whether the appeal is taken on questions of law or fact, or both. [R. S. § 4838.]

Hist. (See C. C. P. '81, § 665) R. S. § 4838, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction of district court over appeals from justices' courts: § 6457.

Comp. leg.—Cal. Same except "police" for "probate", and "county court" for "district court", C. C. P. 1872, § 974; as amended "superior court" for "county court": Kerr's C. ib.

N. D. Similar: Jus. C. § 9163.

Cited: Snyder v. Wooden (1905) 11 I. 150, 81 P. 377; Perkins v. Bridge (1904) 10 I. 189, 77 P. 329.

Appealable judgments: An entry made by the probate judge in his docket, "damages, $310.00," is not a judgment within the meaning of this section from which an appeal will lie to the district court. Gray v. Cederholm (1884) 2 I. 34, 3 P. 12.

Perfection of appeal: The order in which the various steps in the perfection of an appeal are taken is immaterial and there is no objection to filing the bond and notice prior to service of notice. Salt Lake Br. Co. v. Gillman (1886) 2 I. 195, 10 P. 32; Reynolds v. Corbus (1901) 7 I. 481, 63 P. 884.

This section gives the right of appeal from any judgment, whether in a contested case or upon default for want of an answer. Smith v. Clyne (1908) 15 I. 254, 97 P. 40.

Where a notice of appeal states that it is taken upon both questions of law and fact, and it appears that no questions of fact were presented or tried in the lower court, the appeal will be treated upon questions of law alone, as the appellant can not change or alter the nature of the appeal or the questions to be determined on appeal by any statement contained in the notice of appeal. Ib.

Waiver of notice: Where notice of appeal is not served but party opposing voluntarily appears and asks leave to file answer and proceeds to trial, such procedure amounts to waiver of notice of appeal. Bates v. Price (1917) 30 I. 521, 166 P. 261.

Time of filing undertaking: Where an appeal is taken from the decision of the district court, dismissing an appeal from the probate court, on the ground that the appeal was not perfected within 30 days after the rendition of the judgment in the probate court, and the transcript fails to show that the appeal was perfected by filing the required undertaking on appeal within the 30 days, the order of the court will be sustained. Watt v. Decker (1909) 16 I. 184, 101 P. 253.

Right to appeal: Justices of the peace and probate courts are not vested with any discretion as to granting or refusing appeals. Hanson v. Weniger, 31 I. 540, 173 P. 1085.

§ 7180. [4839] **Appeals on questions of law.** When a party appeals to the district court on questions of law alone, unless the question arises upon the pleadings or files in the action, or appears from the docket of the court, he must, within 10 days from the rendition of the judg-

ment, prepare a statement of the case, and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds and no more. Within 10 days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge, and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the district court. [R. S. § 4839.]

Hist. (See C. C. P. '81, § 666) R. S. § 4839, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 975; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9164.

When statement not required: When questions of law arise upon the pleadings or files in the action or appear from the docket of the court, no statement is required. It is the duty of the district court to hear and try such questions of law as arise upon the pleadings or files in the action or as appear from the docket of the court. Smith v. Clyne (1908) 15 I. 254, 97 P. 40; Smith v. Peterson (1917) 31 I. 34, 169 P. 290.

Erroneous judgment by probate judge: Where an appeal is taken from the probate court in a civil matter to the district court, upon questions of law alone, the district court is called upon not only to pass upon the issues of law presented to the probate court, but also the question of law as to whether the probate judge erred in entering judgment. Smith v. Clyne (1909) 16 I. 466, 101 P. 819.

§ 7181. [4840] **Same: Questions of law and fact.** When a party appeals to the district court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the district court. [R. S. § 4840.]

Hist. (See C. C. P. '81, § 667) R. S. § 4840, reen. R. C. ib., reen. C. L. ib.

Cross ref. Trial de novo on appeals from determinations of county commissioners: § 3512.

Comp. leg.—Cal. Same: C. C. P. 1872, § 976: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9164.

Cited: (In brief of counsel) Est. of McVay (1907) 14 I. 56; Gaiser v. Steele (1914) 25 I. 412, 137 P. 889.

Appeal from default judgment: Where a defendant fails to appear and answer or raise any issue of fact in a justice or probate court, and appeals from a judgment entered by default to the district court on questions of both law and fact, he will not be allowed to file an answer in the district court and raise an issue of fact for the first time. A trial de novo as provided in this section implies and signifies the trying anew of an issue that has been previously tried. Where no issue has been previously raised, there is no issue to try anew. Zimmerman v. Bradford-Kennedy Co. (1908) 14 I. 681, 95 P. 825.

Review by supreme court: Since the trial is de novo in the district court, the supreme court can not, on appeal from that court, consider any proceedings anterior to those in the district court. Chase v. Hagood (1893) 3 I. 682, 34 P. 811.

§ 7182. [4841] **Transcript of docket.** Upon receiving the notice of appeal, and on payment of the fees of the court or justice and filing an undertaking as required in the next section, and after settlement or adoption of a statement, if any, the clerk or justice must, within five days, transmit to the clerk of the district court, if the appeal be on questions of law alone, the pleadings and files in the action, a certified copy of his docket, the statement, if any, as admitted or as settled, the notice of appeal and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed; and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the district

court either party may have the benefit of all legal objections made in the probate or justice's court. And the district court has the same power to grant relief by amendment and otherwise, as in actions commenced in the district court. [R. S. § 4841.]

Hist. (See C. C. P. '81, § 668) R. S. § 4841, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 977; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9170.

Cited: (In brief of counsel) Est. of McVay (1907) 14 I. 56; Santti v. Hartman (1916) 29 I. 490, 161 P. 249.

Waiver of objections: Where a party moves to quash summons in the probate court, he does not by demurring and answering in that court, preclude himself from again moving to quash in the district court, before answering in that court. Chase v. Hagood (1893) 3 I. 682, 34 P. 811. Where a defendant in probate court denies generally and files answer after his motion to quash summons has been overruled, he thereby waives defects in the summons and can not take advantage of the same either on appeal to the district court or to the supreme court. Morris v. Miller (1895) 4 I. 454, 40 P. 60.

Allowance of amendments: Amendments to an answer may be allowed on appeal from the probate to the district court, as well as in suits originally commenced in the latter court. Sebree v. Smith (1888) 2 I. 359, 16 P. 915.

Summary remedy: This section provides a summary remedy. It is plain and speedy and mandamus will not lie when the relief afforded by it is available. Hanson v. Weniger, 31 I. 540, 173 P. 1085.

§ 7183. Undertaking. An appeal from a justice's or probate court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in the sum of $100, for the payment of the costs on the appeal; and, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the district court.

When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the district court, and will obey any order made by the court therein.

When the judgment appealed from directs the delivery of possession of real property, the execution of the same can not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding the sum to be fixed by the judge or justice of the court from which the appeal is taken, and which sum must be specified in the undertaking.

A deposit of the amount of the judgment, including all costs, appealed from, or of the value of the property, including all costs, in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking; and in such cases the justice or judge must transmit the money to the clerk of the district court, to be by him paid out on the order of the court.

The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge from whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given. [C. L. § 4842.]

Hist. (See C. C. P. '81, § 669) R. S. § 4842, reen. R. C. ib.; compiled and reen. C. L. ib. Wilson v. Doyle (1906) 12 I. 295, 85 P. 928; Libbey v. Spokane Valley etc. Co. (1908) 15 I. 467, 98 P. 715.

Cross ref. Requirement of surety companies to justify: 5107. Qualifications of surety companies in justifying: 5104. Libby v. Spokane Valley etc. Co. (1908), supra.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 978: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9165.

Cited: Lovel v. Joyce (1903) 9 I. 386, 74 P. 1073.

Time of filing undertaking. The appeal must be perfected by filing the undertaking within the 30 days provided in § 7179. Watt v. Decker (1909) 16 I. 184, 101 P. 253.

Sufficiency of bond: An undertaking "for the payment of costs on the appeal to the district court and for a stay of execution" which binds the sureties in a sum exceeding $100, but not in an amount sufficient to stay the proceedings, and which contains all the obligations required in an appeal bond, is sufficient to protect the appeal. Edminston v. Steele (1906) 12 I. 613, 87 P. 677.

Supersedeas: This statute requires in cases of appeal from justice's courts to the district court, where execution of the judgment is to be stayed, two obligations (which may be in the same undertaking), one in the sum of $100, to cover cost of appeal, the other for double the amount of judgment and costs in the justice court, to secure the payment of whatever judgment and costs may finally be recovered by respondent against appellant. Numbers v. Rocky Mountain Bell Tel. Co. (1900) 7 I. 408, 63 P. 381. An undertaking in twice the amount of the judgment, including costs for the stay of proceedings, is ineffectual for any purpose where there is no obligation for the payment of the costs on appeal. Wilson v. Doyle (1906) 12 I. 295, 85 P. 928; Libby v. Spokane Valley etc. Co. (1908) 15 I. 467, 98 P. 715.

Exception to sureties: This section does not in terms require notice of the filing of exception to the sufficiency of sureties to be served upon appellant or his attorney, but professional courtesy and the better practice require such notice to be served. Holcomb v. Reed (1896) 5 I. 60, 46 P. 1019.

It is intimated that the provisions of this statute authorizing an exception to the sufficiency of sureties within five days after filing the undertaking, is merely directory, and an insufficient undertaking may be objected to when a substantial defect is ascertained or that the defect may be waived. Salt Lake Br. Co. v. Gillman (1886) 2 I. 195, 10 P. 32.

Justification of sureties: Where exception to the sufficiency of sureties is made, they or other sureties must appear and justify within the time stated upon notice to the adverse party; the appearance of the sureties in making affidavit without notice to the adverse party is insufficient. Davelin v. Post Falls Woolen Mills (1896) 4 I. 735, 44 P. 554.

On appeal from a justice court to the district court, respondent excepted to the sufficiency of the sureties; within five days thereafter, appellant filed a new undertaking executed by a surety company, but did not give respondents notice of the filing of said new undertaking with prima facie evidence of its sufficiency; held that the appeal was ineffectual and should be dismissed. Numbers v. Rocky Mt. Bell Tel. Co. (1900) 7 I. 408, 63 P. 381.

In case sureties to whom exception is taken fail to appear and justify, the undertaking signed by them is void, but the appellant may file a new undertaking at any time prior to the expiration of the 30 day period allowed by § 7179 for the taking of an appeal; notice of the filing of such undertaking should be given to the adverse party. Perkins v. Bridges (1904) 10 I. 189, 77 P. 329.

An undertaking may be filed any time within the 30 days allowed for an appeal after the entry of the judgment, and the respondent may except to the sufficiency of the sureties within five days thereafter, whereupon the appellant is given a further period of five days in which to cause the sureties, or other sureties, to justify. Snyder v. Wooden (1905) 11 I. 150, 81 P. 377.

Where exception is taken to the original undertaking and a substitute undertaking is drawn, the respondent may waive the justification of the substitute sureties, and if he does so the appeal will be effectual without such justification. Ib.

When other sureties than those who signed the original undertaking justify, after exception being taken to the sufficiency of the original sureties, it is better practice to execute a new undertaking and have the sureties justify thereto. Ib.

Amendment of bond: It is too late to apply for leave to amend a defective undertaking on appeal from the probate to the district court after a motion to dismiss the appeal has been made and sustained. Re Paige (1906) 12 I. 410, 86 P. 273.

If the action of the district court on appeal from a judgment of the probate court, in refusing to permit the appellant to file an amended undertaking on appeal, is assigned as error, and the transcript does not contain the original undertaking, the judgment of the district court, dismissing the appeal from the probate court on the ground that the undertaking did not comply with the statute, must be sustained. Watt v. Decker (1909) 16 I. 184, 101 P. 523.

§ 7184. [4843] **Same: Stay of proceedings.** If an execution be issued, on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same. [R. S. § 4843.]

Hist. (See C. C. P. '81, § 670) R. S. § 4843, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 979: Kerr's C. ib.

N. D. Analogous: Jus. C. §§ 9166, 9171.

Mandamus to justice: Mandamus is an appropriate remedy to compel the performance of this duty by the justice or judge. Hanson v. Weniger, 31 I. 540, 173 P. 1085.

§ 7185. [4844] **Hearing of appeal: Judgment.** Upon an appeal on questions of law alone, the district court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify, any or all of the proceedings subsequent to, and dependent upon such judgment, and may, if necessary or proper, order a new trial in the district court. When the action is tried anew on appeal, the trial must be conducted in all respects as trials in the district court. The provisions of this code as to changing the place of trial, and all the provisions as to trial in the district court, are applicable to trials on appeal in the district court. For a failure to prosecute on appeal, or unnecessary delay in bringing it to a hearing, the district court, after notice, may order the appeal to be dismissed with costs, and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding 25 per cent of the judgment appealed from. Judgments rendered in the district court on appeal have the same force and effect, and may be enforced in the same manner as judgments in actions commenced in the district court. [R. S. § 4844.]

Hist. (See C. C. P. '81, § 671) R. S. § 4844, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 980; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9172. See also: Jus. C. § 9173.

Appeal on law questions: When an appeal is taken on questions of law alone, the district court is not authorized to try the case de novo after deciding the questions of law, unless it is made to appear that it is necessary or proper to try such case anew. If the record fails to show the grounds for ordering a new trial, the district court being a court of general jurisdiction, the proper showing will be presumed to have been made. Holt v. Gridley (1900) 7 I. 416, 63 P. 188.

Where there has been no trial of facts in probate or justice court, it can not be tried in the first instance in the district court on appeal, but must, if reversed, be remanded to the tribunal in which it originated. Smith v. Clyne (1908) 15 I. 254, 97 P. 40; Zimmerman v. Bradford-Kennedy Co. (1908) 14 I. 681, 95 P. 825; Gaiser v. Steele (1914) 25 I. 412, 137 P. 889; Smith v. Peterson (1917) 31 I. 34, 169 P. 290.

An order of the probate court sustaining respondent's motion to strike appellant's motion from the files is such an order as contemplated by this section. Smith v. Peterson, supra.

When the record of a probate court fails to show what disposition was made of a demurrer and motion filed, but does show a default entered against the defendant, the presumption on appeal is that the judgment and motion were overruled and that the defendant was in default. Smith v. Clyne (1909) 16 I. 466, 101 P. 819.

Trial de novo: On appeal from a justice's judgment, taken on questions of law and fact, the case stands for trial de novo, and it is error to render judgment without trial, affirming the judgment of the justice's court. Swinehart v. Pocatello Meat etc. Co. (1902) 8 I. 710, 70 P. 1054.

A new trial implies that the cause has been once tried, and if there was no issue of fact and no trial of the same in the lower court, there can be no new trial of such issue in the district court, on appeal. The appellate power includes not only the power to reserve a judgment, but also to control and direct the subsequent action of the subordinate court. Smith v. Clyne (1908) 15 I. 254, 97 P. 40.

CHAPTER 262.

MISCELLANEOUS PROVISIONS.

ARTICLE 1.

PROCEEDINGS AGAINST JOINT DEBTORS.

§ 7186. [4860] **Summons after judgment.** When a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by proceeding as provided in section 6679, those who were not originally served with the summons and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons. [R. S. § 4860.]

Hist. (See C. C. P. '81, § 672) R. S. § 4860, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7850.

Comp. leg.—Cal. Same: C. C. P. 1872, § 989: Kerr's C. ib.

§ 7187. [4861] **Same: Contents and service.** The summons, as provided in the last section, must describe the judgment and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time, as the original summons. It is not necessary to file a new complaint. [R. S. § 4861.]

Hist. (See C. C. P. '81, § 673) R. S. § 4861, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7851.

Comp. leg.—Cal. Same: C. C. P. 1872, § 990: Kerr's C. ib.

§ 7188. [4862] **Affidavit of balance due.** The summons must be accompanied by an affidavit of the plaintiff, his agent, representative or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon. [R. S. § 4862.]

Hist. (See C. C. P. '81, § 674) R. S. § 4862, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7852.

Comp. leg.—Cal. Same: C. C. P. 1872, § 991: Kerr's C. ib.

§ 7189. [4863] **Answer to summons.** Upon such summons the defendant may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently, except a discharge from liability by the statute of limitations, or he may deny his liability on the obligation upon which the judgment was recovered. [R. S. § 4863.]

Hist. (See C. C. P. '81, § 675) R. S. § 4863, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7853.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 992; Kerr's C. ib.

§ 7190. [4864] **Pleadings: What constitute.** If the defendant in his answer deny the judgment or set up any defense which may have arisen subsequently, the summons with the affidavits annexed, and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer, constitute such written allegations. [R. S. § 4864.]

Hist. (See C. C. P. '81, § 676) R. S. § 4864, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. C. P. § 7854.

Comp. leg.—Cal. Same: C. C. P. 1872, § 993: Kerr's C. ib.

§ 7191. [4865] **Trial and verdict.** The issues formed may be tried as in other cases, but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon. [R. S. § 4865.]

Hist. (See C. C. P. '81, § 677) R. S. § 4865, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 994: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7854.

ARTICLE 2.

OFFER OF THE DEFENDANT TO COMPROMISE.

§ 7192. [4870] **Offer of judgment.** The defendant in any action may at any time before the trial or judgment serve upon the plaintiff an offer to allow judgment to be given against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn and can not be given in evidence upon the trial, and if the plaintiff fail to obtain a more favorable judgment, he can not recover costs accruing subsequently to the offer but must pay the defendant's costs from the time of the offer. [R. S. § 4870.]

Hist. (See C. C. P. '81, § 678) R. S. § 4870, reen. R. C. ib., reen. C. L. ib.

Cross ref. In justices' courts: § 7116. Costs in case of tender: § 7215.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 997; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7856.

ARTICLE 3.

INSPECTION OF WRITINGS.

§ 7193. [4875] **Judge may order inspection.** Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of account in any book or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be, and the court may also punish the party refusing, for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness. [R. S. § 4875.]

Hist. (See C. C. P. '81, § 679) R. S. § 4875, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1000; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7861.

ARTICLE 4.

MOTIONS AND ORDERS.

§ 7194. [4880] **Orders and motions defined.** Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order. An application for an order is a motion. [R. S. § 4880.]

Hist. (See C. C. P. '81, § 680) R. S. § 4880, reen. R. C. ib., reen. C. L. ib.

Cross ref. Successive applications for the same order prohibited: § 6506.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1003: Kerr's C. ib.

N. D. Identical: C. C. P. §§ 7939, 7940.

Cited: Dahlstrom v. Portland Min. Co. (1906) 12 I. 87, 85 P. 916.

Motion: Necessity of signing: Motion is not specifically required to be signed, but in our practice motions are usually signed and it is the proper practice to have them signed by the parties or their counsel. Nobach v. Scott (1911) 20 I. 558, 119 P. 295.

Order: When effective: An order is made when the judge by judicial act signs the same, not when the clerk by ministerial act files the same. Exchange Nat. Bk. v. Nor. Idaho Co. (1913) 24 I. 671, 135 P. 747.

§ 7195. [4881] **Same: Where made.** Motions must be made in the county in which the action is pending or in any county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the state. [R. S. § 4881.]

Hist. (See C. C. P. '81, § 681) R. S. § 4881, reen. R. C. ib., reen. C. L. ib.

Cross ref. Motions may be heard at chambers: § 6493.

Comp. leg.—Cal. Same except "an adjoining county" for "in any county"; C. C. P. 1872, § 1004; similar as amended: Kerr's C. ib.; Callahan v. Dunn (1917) 30 I. 225, 164 P. 356.

N. D. Analogous: C. C. P. § 7941.

Cited: Exchange Nat. Bk. v. Nor. Idaho Co. (1913) 34 I. 671, 135 P. 747.

Construed: All motions of which notice must be given and which may be contested, must be made and heard in county in which action is pending or in any county in the same judicial district. Orders which may be made in any part of state as provided in this section are ex parte orders which may be made without notice. Callahan v. Dunn (1917) 30 I. 225, 164 P. 356.

§ 7196. [4882] **Notice of motion.** When a written notice of a motion is required by this code, it must be given, unless a different time is prescribed, if the hearing is had in the same district in which the action is pending or the proceeding had, five days before the time appointed for the hearing; otherwise, 10 days. When the notice is served by mail, the number of days before the hearing must be increased one day for every 25 miles of distance between the place of deposit and the place of service, such increase, however, not to exceed in all 30 days, but the court or judge may prescribe a shorter time. Copies of all the moving papers, except records of the court and files in the action, must be served with the notice or with an order to show cause. But no written notice of any motion affecting the pleadings or for judgment, or for any motion made during the progress of the trial shall be required. [R. S. § 4882.]

Hist. (See C. C. P. '81, § 682) R. S. § 4882, reen. R. C. ib., reen. C. L. ib.

Cross ref. Notice of hearing motion at chambers: § 6495. Service of papers: § 7201.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1005; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7947.

Waiver of notice: Voluntary appearance of an attorney and participation in the argument of a motion waives notice of such motion. Curtis v. Walling (1888) 2 I. 416, 18 P. 54.

Does not apply: This section has no application to a notice of motion for new trial. Times Printing etc. Co. v. Babcock, 31 I. 770, 176 P. 776.

§ 7197. [4883] **Continuance and transfer of motion.** When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be continued or transferred by his order to some other judge. [R. S. § 4883.]

Hist. (See C. C. P. '81, § 683) R. S. § 4883, reen. R. C. ib., reen. C. L. ib.

Comp leg—Cal. Same except the words "before whom it might originally have been brought" are added: C. C. P. 1872, § 1006: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7948.

§ 7198. [4884] **Orders for payment of money: Enforcement.** Whenever an order for the payment of a sum of money is made by a court or

judge pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment. [R. S. § 4884.]

Hist. (See C. C. P. '81, § 684) R. S. § 4884, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or judge" omitted: C. C. P. 1872, § 1007: Kerr's C. ib.

ARTICLE 5.

SERVICE OF PAPERS, NOTICE AND APPEARANCE.

§ 7199. [4889] **Service of notices and papers.** The service of notice or other paper may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office, or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post office, directed to such attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the post office, directed to such party. [R. S. § 4889.]

Hist. (See C. C. P. '81, § 685) R. S. § 4889, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1011: Kerr's C. ib.

Cited: Collins v. Brown (1911) 19 I. 360, 114 P. 671.

Strict construction: This section provides for constructive service and being in derogation of the common law, which requires personal service, must be strictly construed. Warner v. Teachenor (1884) 2 I. 38, 2 P. 717.

Service by mail: Service of transcript under certain circumstances may be made by mail. Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 831. A nonresident defaulting defendant may be served with a notice of appeal by depositing the same in the post office. Titiman v. Alamance M. Co. (1903) 9 I. 240, 74 P. 529.

Service on attorneys: An affidavit of service of notice of appeal "upon the attorney for respondent by leaving a true copy thereof at his office in Boise City, Ada county, Idaho territory, on the 21st day of May, 1883," is insufficient to show service. Warner v. Teachenor, supra.

In order to justify service of notice on any one else than the attorney personally it must be shown that the attorney was absent from his office, and that the person served, if any, was the clerk of the attorney, or a person having charge of his office. Peter v. Kalez (1905) 11 I. 552, 83 P. 526.

§ 7200. [4890] **Service by mail.** Service by mail may be made where the person making the service and the person on whom it is to be made reside, or have their offices, in different places between which there is a regular communication by mail. [R. S. § 4890.]

Hist. (See C. C. P. '81, § 686) R. S. § 4890, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or have their offices" omitted: C. C. P. 1872, § 1012; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7952.

Cited: Hattabaugh v. Vollmer (1896) 5 I. 23, 46 P. 831; (In dis. op.) Blackwell L. Co. v. Empire Mill Co. (1916) 29 I. 236, 158 P. 792; Keller v. Keller (1917) 30 I. 79, 162 P. 927.

Service of notice in condemnation proceedings: Service as provided herein is sufficient under §§ 7420 and 7422. Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 149 P. 499; Empire Mill Co. v. Dist. Ct. (1915) 27 I. 400, 149 P. 505.

§ 7201. [4891] **Same: How made.** In case of service by mail the notice or other paper must be deposited in the post office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service, a right may be exercised or an act is to be done by the adverse party, the time within

which such right may be exercised or an act is to be done is extended one day for every 25 miles distance between the place of deposit and the place of address; such extension, however, not to exceed 30 days in all. [R. S. § 4891.]

Hist. (See C. C. P. '81, § 687) R. S. § 4891, reen. R. C. ib., reen. C. L. ib.

Cross ref. Notice of motion: § 7196.

Comp. leg.—Cal. Same except "90" for "30": C. C. P. 1872, § 1013; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7953-5.

Cited: Dahlstrom v. Featherstone (1910) 18 I. 179, 110 P. 243; Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 149 P. 499; Keller v. Keller (1917) 30 I. 79, 162 P. 927.

§ 7202. [4892] **Appearance.** A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned in the action for want of bail. [R. S. § 4892.]

Hist. (See C. C. P. '81, § 688) R. S. § 4892, reen. R. C. ib., reen. C. L. ib.

Cross ref. Effect of voluntary appearance: § 6681.

Comp. leg.—Cal. Same except "in the action" is omitted: C. C. P. 1872, § 1014: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7956.

Cited: (In brief of counsel) Nelson Bennett Co. v. Twin Falls L. & W. Co. (1907) 13 I. 767; (Dis op.) Valley State Bk. v. Post Falls etc. Co. (1916) 29 I. 587, 161 P. 242.

Appearance: The written notice of appearance contemplated by this section is a statement in writing by the defendant or his attorney whereby the plaintiff is informed that the defendant has appeared, generally or specially, in the case and has submitted himself to the jurisdiction of the court. Domer v. Stone (1915) 27 I. 279, 149 P. 505.

General appearance: A plaintiff, in demurring to a cross complaint filed against him by the defendant, appears thereto, and can not withdraw or affect such appearance by assuming to make a special appearance when he files his answer. Willman v. Friedman (1894) 4 I. 209, 38 P. 937.

The making of a motion to quash summons and dismiss action is a general appearance. (Ailshie, J. dissents) Shaw v. Martin (1911) 20 I. 168, 175, 117 P. 853.

Special appearance: Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of defendant to move that the service be set aside nor after such motion is denied, by his answering to the merits. Objection to the illegal service is considered as abandoned only when the party pleads to the merits in the first instance. Harkness v. Hyde (1879) 98 U. S. (8 Otto) 476, 25 L. ed. 237.

No appearance: A stipulation that the defendant have until a certain date to make settlement of the amount claimed by plaintiff and containing a promise on the part of the defendant that in the event the settlement is not made by that time, it will confess judgment in the action then pending between the parties, is not an appearance contemplated by this section. Washington etc. Co. v. Weiser Nat. Bk. (1915) 26 I. 717, 146 P. 116.

A motion to require nonresident to give security for costs is not an appearance and where granted, unless there is a further appearance, default may be entered. A nonresident plaintiff is not required to advise the defendant when the required bond has been given, and defendant is entitled to no further notice than that contained in the summons. Domer v. Stone, supra.

Right to notice: After an action is commenced and the defendant has appeared, the court has no jurisdiction to appoint a receiver without notice to the defendant, except in case of emergency when the defendant has absconded and material injury will result to the plaintiff unless the order is made. Cummings v. Steele (1899) 6 I. 666, 59 P. 15.

A respondent is not entitled to notice of application by appellant for an extension of time within which to prepare and file a statement of the case. White v. Whitcomb (1907) 13 I. 490, 90 P. 1080, aff. 214 U. S. 15, 29 S. C. R. 599, 53 L. ed. 889.

This section does not modify or change the mandatory provisions of § 7153. The requirement that notice of appeal shall be served on the adverse party or his attorney is jurisdictional. Diamond Bk. v. Van Meter (1910) 18 I. 243, 108 P. 1042, 21 Ann Cas. 1273.

Where a defendant has been served by process, and within the time allowed for answer files a demurrer and thereafter withdraws the demurrer and is given five days in which to further plead, and fails to make any further appearance within the time granted, he is thereafter in default, the same as he would have been had he not appeared within the time originally allowed under the statute after the service of summons, and the clerk or court may properly enter his default, and he is not entitled to any notice of application or motion for default. Hall v. Whittier (1911) 20 I. 120, 116 P. 1031.

§ 7203. [4893] **Service on nonresident.** When a plaintiff or a defendant, who has appeared, resides out of the state and has no attorney resident of the state in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has such resident attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. If there be no such resident attorney of record, service may be made upon the party. [R. S. § 4893.]

Hist. (See C. C. P. '81, § 689) R. S. § 4893, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1015: Kerr's C. ib.

N. D. Similar: C. C. P. § 7957.

Cited: Dahlstrom v. Featherstone (1910) 18 I. 179, 110 P. 243; (Dis. op.) Valley State Bk. v. Post Falls etc. Co. (1916) 29 I. 587, 161 P. 242.

Service on attorneys: It is the proper practice to serve papers in an action upon the resident attorney. Beck v. Lavin (1908) 15 I. 363, 97 P. 1028.

Where a defendant files a cross complaint and all the parties to be affected thereby have appeared in the main action and are represented by counsel, it is a sufficient service of such cross complaint to serve the same upon the attorneys who have appeared for the respective parties affected thereby. Collins v. Brown (1911) 19 I. 360, 114 P. 671.)

Nonresident service: Service of motion to amend decree of divorce need not be personal upon party who has appeared in action and thereafter departed from and resides out of state. Keller v. Keller (1917) 30 I. 79, 162 P. 927.

§ 7204. [4894] **Limitation of foregoing provisions.** The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt. [R. S. § 4894.]

Hist. (See C. C. P. '81, § 690) R. S. § 4894, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1016: Kerr's C. ib.

N. D. Identical: C. C. P. § 7960.

Cited: (In brief of counsel) Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 385.

§ 7205. [4895] **Service by telegraph.** Any summons, writ or order in any civil suit or proceeding, and all other papers requiring service may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ or order, or paper so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects as the original thereof might be if delivered to him, and the officer or person serving or executing the same has the same authority and is subject to the same liabilities as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof preserved in the telegraph office from which it was sent. In sending it either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or devices thereon, but the same may be expressed in the telegraphic copy by the letters "L. S." or by the word "seal." [R. S. § 4895.]

Hist. (See C. C. P. '81, § 691) R. S. § 4895, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1017; Kerr's C. ib.

ARTICLE 6.

COSTS.

§ 7206. Parties entitled to costs. Parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided. ['11, c. 167, p. 563, last part.]

Hist. (See C. C. P. '81, § 696) R. S. § 4900, reen. R. C. ib.; am. '11, c. 167, p. 563; remainder of section transferred to § 6576, reen. C. L. § 4900.

Cross. ref. Recovery of attorney's fees in actions against railroads for killing stock: § 4817. Expense of securing surety company bond may be taxed as costs: § 5112. Costs in actions to condemn rights of way for mining purposes: § 5548. Reporter's fees as costs: § 6560. Costs in case of disclaimer in actions to determine adverse claims: § 6962. Costs in partition: § 6992. Costs of partition: § 7020. Cost of abstract of title: § 7022. Costs after offer to compromise: § 7192. Recorder's and attorney's fees allowed as costs in mechanic's lien cases: § 7352. Filing and attorney's fees allowed as costs in suits to enforce log liens: § 7368. Costs in condemnation proceedings: § 7421.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1021: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7789.

Cited: (In brief of counsel) Young v. Extension Ditch Co. (1908) 14 I. 126.

Not limited to court: The allowance of costs, according to the statute, is governed entirely by the character of the action and is not limited to the court in which the action is brought. (Dis. op.) Cronan v. Dist. Ct. (1908) 15 I. 465, 98 P. 614.

§ 7207. [4901] **Allowance to plaintiff.** Costs are allowed of course to plaintiff upon a judgment in his favor in the following cases:

1. In an action for the recovery of real property.
2. In an action to recover the possession of personal property where the value of the property amounts to $100 or over; such value shall be determined by the jury, court or referee by whom the action is tried.
3. In an action for the recovery of money or damages when the plaintiff recovers $100 or over.
4. In a special proceeding.
5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine. [R. S. § 4901.]

Hist. (See C. C. P. '81, § 693) R. S. § 4901, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "$300" for "$100," subds. 2 and 3: C. C. P. 1872, § 1022: Kerr's C. ib.

N. D. Similar: C. C. P. § 7794. See also C. C. P. § 7790-3.

Cited: Lovel v. Joyce (1903) 9 I. 386, 74 P. 1073; Boise Irr. etc. Co. v. Stewart (1904) 10 I. 38, 77 P. 25, 321; (Con. op.) Campbell v. First Nat. Bk. (1907) 13 I. 95, 105, 88 P. 639; (In brief of counsel) Roseborough v. Whittington (1908) 15 I. 100; Wolfe v. Ridley (1909) 17 I. 173, 104 P. 1014. 20 Ann. Cas. 39; (In brief of counsel) Shaw v. Johnston (1910) 17 I. 676; Fischer v. Davis (1913) 24 I. 216, 233, 133 P. 910; (In brief of counsel) St. Michael's Monastery v. Steele (1917) 30 I. 609.

Costs statutory: At common law costs were not recoverable eo nomine. Costs can therefore be recovered only in cases where there is statutory authority therefor. Cronan v. Dist. Ct. (1908) 15 I. 462, 98 P. 614; Schmelzel v. Bd. County Com'rs, 16 I. 32, 100 P. 106; Smith v. Faris-Kesl Const. Co., 27 I. 407, 150 P. 25; Rhodenbaugh v. Stingel, 31 I. 594, 174 P. 604.

Incident to final judgment: By this section and sec. 7209 the allowance of costs as a matter of course is made dependent upon, and a mere incident to, a final judgment. Rhodenbaugh v. Stingel, supra.

Insufficient recovery: In an action against several defendants where the verdict is for less than $100 against each defendant, the plaintiff can not recover costs. Richards v. Scott (1901) 7 I. 726, 65 P. 433.

Actions involving title to irrigating ditches: Actions involving title to irrigating ditches are within meaning of §§ 7207 and 7209, and party in whose favor judgment is rendered is entitled to recover costs of suit. Brunzell v. Stevenson (1917) 30 I. 202, 164 P. 89.

Action for real property: Plaintiff held entitled to recover costs, considering the effect of the judgment on the issues presented. Printz v. Brown, 31 I. 443, 174 P. 1012.

§ 7208. [4902] **Same: Several actions on single cause.** When several actions are brought on one bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendant in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state, but the disbursements of the plaintiff must be allowed to him in each action. [R. S. § 4902.]

Hist. (See C. C. P. '81, § 694) R. S. § 4902, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1023: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7794.

§ 7209. [4903] Same: Allowance to defendant. Costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in section 7207, and in special proceedings. [R. S. § 4903.]

Hist. (See C. C. P. '81, § 695) R. S. § 4903, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1024: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7794.

Cited: Wolfe v. Ridley (1909) 17 I. 173, 104 P. 1014, 20 Ann. Cas. 39; Fischer v. Davis (1913) 24 I. 216, 233, 133 P. 910; Brunzell v. Stevenson (1917) 30 I. 202, 164 P. 89; St. Michael's Monastery v. Steele (1917) 30 I. 609, 107 P. 349; Rhodenbaugh v. Stingel, 31 I. 594, 174 P. 604.

§ 7210. [4904] Discretionary allowance. On other actions than those mentioned in section 7207, costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court, but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than $100, nor in an action to recover the possession of personal property when the value of the property is less than $100. [R. S. § 4904.]

Hist. (See C. C. P. '81, § 696) R. S. § 4904, reen. R. C. ib., reen. C. L. ib.

Cross ref. Costs in probate proceedings discretionary: § 7771. Costs of proceedings to determine heirship discretionary: § 7931.

Comp. leg.—Cal. Same except "$300" for "$100": C. C. P. 1872, § 1025: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7795.

Cited: (In brief of counsel) Fischer v. Davis (1913) 24 I. 216. Lovel v. Joyce (1903) 9 I. 386, 74 P. 1073.

Discretion of court: On granting a new trial it is discretionary with the court to require the party in whose favor the order is made to pay a part or all of the costs incurred upon the previous trial. Wolfe v. Ridley (1909) 17 I. 173, 104 P. 1014, 20 Ann. Cas. 39.

The court may when satisfied that justice demands, divide or apportion costs between parties. Simmons v. Simmons (1913) 23 I. 485, 130 P. 784.

Insufficient recovery: In an action against several defendants where the judgment is less than $100 against each defendant the plaintiff can not recover costs. Richards v. Scott (1901) 7 I. 726, 65 P. 433.

Appeal from justice court: This section applies to actions originally brought in the district court and not to actions brought in the probate or justice's court and taken by appeal to a higher court. The prevailing party on appeal from a justice's court is entitled to his costs, even if the judgment be less than $100. Roseborough v. Whittington (1908) 15 I. 100, 96 P. 437.

Attorney's fees: Foreclosure of mechanic's lien: In the foreclosure of a mechanic's lien the attorney's fees are no part of the costs, and therefore recoverable even though the judgment is less than $100. Shaw v. Johnston (1910) 17 I. 676, 685, 107 P. 399.

§ 7211. [4905] Severance of costs. When there are several defendants in the actions mentioned in section 7207, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor. [R. S. § 4905.]

Hist. (See C. C. P. '81, § 697) R. S. § 4905, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1026: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7795.

§ 7212. [4906] Costs on appeal. In the following cases the costs of appeal are in the discretion of the courts:

1. When a new trial is ordered.
2. When a judgment is modified. In all other cases the prevailing party shall recover costs, including his costs below when the appeal is to the district court. [R. S. § 4906.]

Hist. (See C. C. P. '81, § 698) R. S. § 4906, reen. R. C. ib., reen. C. L. ib.

Cross ref. Costs in probate appeals discretionary: § 7771. Supreme court: § 7219.

Comp. leg.—Cal. Same except second sentence of subd. 2 is omitted: C. C. P. 1872, § 1027: Kerr's C. ib.

N. D. Similar: C. C. P. § 7796.

Discretion of court: Where a defendant appeals from a justice's judgment against him and succeeds in reducing such judgment, the award of costs is in the discretion of the court. (Dis. op.) Lovel v. Joyce (1903) 9 I. 386, 74 P. 1073.

§ 7213. [4907] **Fees of referees.** The fees of referees are $5 to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed. [R. S. § 4907.]

Hist. (See C. C. P. '81, § 699) R. S. § 4907, reen. R. C. ib., reen. C. L. ib.

Cross ref. References and trial by referees: § 6870 et seq.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1028; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7645.

§ 7214. [4908] **Costs of continuance.** When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same. [R. S. § 4908.]

Hist. (See C. C. P. '81, § 700) R. S. § 4908, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1029; Kerr's C. ib.

N. D. Identical: C. C. P. § 7803.

No application to opening default: This section can not be invoked as authority for imposing terms for opening a default. Kerney v. Hatfield (1917) 30 I. 90, 162 P. 1077; Kerney v. Kerney (1917) 30 I. 97, 162 P. 1079.

§ 7215. [4909] **Costs in case of tender.** When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff can not recover costs, but must pay costs to the defendant. [R. S. § 4909.]

Hist. (See C. C. P. '81, § 701) R. S. § 4909, reen. R. C. ib., reen. C. L. ib.

Cross ref. On appeal to supreme court: § 7192.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1030; Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7856-9.

Cited: Nampa etc. Irr. Dist. v. Briggs (1915) 27 I. 84, 107, 147 P. 75.

§ 7216. [4910] **Actions by or against administrators, etc.** In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered as in actions by and against a person prosecuting or defending in his own right, but such costs must, by the judgment, be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense. [R. S. § 4910.]

Hist. (See C. C. P. '81, § 702) R. S. § 4910, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1031; Kerr's C. ib.

N. D. Similar: C. C. P. § 7806.

§ 7217. [4911] **Costs on review of special proceedings.** When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case. [R. S. § 4911.]

Hist. R. S. § 4911, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1032; Kerr's C. ib.

§ 7218. [4912] **Taxation of costs.** The party in whose favor the judgment is rendered and who claims his costs, must, within five days after the verdict or notice of the decision of the court or referee, file with the clerk, and serve upon the adverse party or his attorney, a copy of a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

A party dissatisfied with costs claimed may within five days after the service upon him of the copy of the memorandum, file and serve upon the adverse party or his attorney, a notice of a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. ['95, p. 6, § 1.]

Hist. (See C. C. P. '81, § 703) R. S. § 4912; am. '95, p. 6, § 1, reen. '99, p. 231, § 1, reen. R. C. § 4912, reen. C. L. ib.

Comp. leg.—Cal. See C. C. P. 1872, § 1033; similar as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7800.

Decision defined: Decision of the court refers to a formal decision or findings of fact, conclusion of law and decree or judgment. Smith v. Faris-Kesl Const. Co. (1915) 27 I. 407, 150 P. 25.

Filing and service of cost bill: This provision is mandatory in its terms and unless a cost bill is filed within the required time such bill will be stricken from the files. Stickney v. Berry (1900) 7 I. 302, 62 P. 925.

A party who fails to file with the clerk a memorandum of costs within the time limited by this section waives his right thereto, whether they are clerk's or sheriff's fees or other costs, and, in the absence of such a memorandum the clerk has no power to include the costs in the judgment. Cantwell v. McPherson (1892) 3 I. 321, 29 P. 102.

Where the jury returns an advisory verdict in an equitable action the memorandum of costs may be filed within five days after the judge announces that he adopts the findings of the jury. Peters v. Leflang (1898) 6 I. 364, 55 P. 857.

While this section does not provide for giving notice to the opposite party of the filing of a cost bill, yet where no such notice is given the failure of the opposite party to file his motion to tax costs within three days after the filing of the cost bill does not deprive him of all remedy against an exorbitant cost bill, and he may apply for relief under § 6726 as in case of an order taken against him through surprise or excusable neglect. McDonald v. Burke (1892) 3 I. 266, 28 P. 440, 35 A. S. R. 276.

Where the plaintiff dismisses it is necessary for the defendant to file his cost bill within five days after a notice of the dismissal. C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687, 694, 112 P. 210.

A failure to both serve and file the same within the time prescribed by the statute is fatal and costs can not be allowed where the statute is not complied with. Filing and service of cost bill is jurisdictional. It is the evident purpose of the statute to require the party claiming costs to furnish the adverse party with an itemized statement of the same so as to enable him to file his objections to any item therein contained or to the whole cost bill for any cause which may appear to be good grounds for disallowing the same. Steensland v. Hess (1913) 25 I. 181, 136 P. 1124.

Memorandum of costs and disbursements filed before making of formal decision is prematurely filed and will be stricken on motion. Smith v. Faris-Kesl. Const. Co., supra.

Contents of bill: A memorandum of costs should not only show the amount due each witness but should show the number of days that each attended court and the number of miles traveled by each. Stickney v. Berry, supra.

A motion to strike plaintiff's cost bill from the files, or failing in that, that the court tax the costs, on the ground that the sheriff's fees are excessive, and given in said bill in a lump sum, if denied by the court as to the first prayer should be granted as to the second, and the costs should be taxed and such legal costs allowed to plaintiff as he had necessarily incurred in the action and no more. Berry v. G. V. B. Mining Co. (1897) 5 I. 691, 51 P. 746.

Burden of proof: Where none of the items on the face of a cost bill appear to be illegal such bill with the affidavit verifying the same is sufficient to prevail against a motion to tax the costs, unsupported by any affidavit controverting the cost bill. Thiessen v. Riggs (1897) 5 I. 487, 51 P. 107; Elliott v. Collins (1898) 6 I. 157, 53 P. 453. But where a cost bill is contested none of the contested items should be allowed unless the court is satisfied from the evidence produced on the hearing that the contested items have been necessarily incurred. Griffith v. Montandon (1894) 4 I. 75, 35 P. 704.

Hearing and review: Where a motion to tax costs is heard upon evidence within the knowledge of the judge such evidence should be presented on the hearing. Griffith v. Montandon (1895) 4 I. 329, 39 P. 195.

The supreme court in reviewing an order taxing costs can only consider the evidence contained in the record, and can not consider facts dehors the record which

it is claimed the trial judge took into consideration in making the order. Griffith v. Montandon (1894) 4 I. 75, 35 P. 704.

An order made by the trial court after judgment taxing costs is an order from which a separate appeal is allowed, and an appeal from the judgment does not present to the appellate court for review the action of the trial court in taxing costs. The memorandum of costs and the motion to retax are not properly a part of the record on appeal from the judgment. Keane v. Pittsburg L. M. Co. (1909) 17 I. 179, 195, 105 P. 60.

Items.

Briefs: Where the custom of the supreme court is to receive typewritten briefs in all original proceedings, it is not necessary to have a brief printed; hence the cost of a printed brief is not a necessary disbursement and can not be taxed as a part of the costs in the case. (Stewart, J. dissents) Cronan v. Dist. Ct. (1908) 15 I. 462, 98 P. 614.

Certified copies of records: The successful party is not entitled to recover for the fee paid the clerk of the district court for certifying certain papers that he desires to attach to his complaint or petition, at least until after opposing counsel has denied the correctness of such copies. Ib.

Elisor's fees: Where an elisor appointed by the court makes no charge for services performed by him, the fees to which the elisor would be entitled had he claimed them, can not be taxed as costs against the losing party. Griffith v. Montandon, supra.

Land office proceedings: This section refers only to such costs and disbursements as are occasioned in an action or proceeding in the courts of this state and does not contemplate costs occasioned by proceedings in the United States land office. Golden Marguerite Co. v. Nat. M. Co. (1915) 28 I. 290, 154 P. 207.

Stenographer's fees: In order to entitle a party to tax stenographer's fees as costs it must appear that such services were rendered by the court stenographer and incurred under the provisions of the statute in relation thereto. McDonald v. Burke, supra.

Survey in water adjudication: The expenses of a survey made under § 7032 are not properly included in the cost bill, but should be apportioned to the several parties. Farmers' etc. Ditch Co. v. Nampa & Meridian Irr. Dist. (1908) 14 I. 450, 94 P. 761.

Witness fees: The fees of expert witnesses in excess of the regular witness fees are not a necessary disbursement within this section and are not taxable as costs. McDonald v. Burke, supra.

The successful party can not charge in his cost bill more for the witnesses than they are entitled to under the statute providing for their compansation, nor can he tax costs for witnesses who do not testify (unless there is some legal excuse for their not testifying) nor for witnesses who make no charge for their fees. Griffith v. Montandon, supra.

Parties to an injunction suit are not entitled to tax as costs fees for witnesses produced by them on the hearing of an order to show cause or on an application for dissolution of the injunction, unless the witnesses are produced either by consent, and their testimony is taken in place of affidavits, or such witnesses are affiants in the affidavits and are produced for cross examination pursuant to notice, under § 6778. Raft River etc. Co. v. Langford (1898) 6 I. 30, 51 P. 1027.

The fact that witnesses who were subpoenaed by the prevailing party were not sworn and examined does not necessarily deprive the party of the right to tax costs for such witnesses, but in order to tax such costs, he must satisfactorily show the reasons for the attendance of such witnesses and the causes which made it unnecessary for them to testify. Betchel v. Evans (1904) 10 I. 147, 77 P. 212.

The prevailing party has a right to tax witness fees and mileage for a witness who attended from another county and traveled more than 30 miles to the place of trial, although such witness was not obliged to attend and his testimony could have been taken by deposition. Anderson v. Ferguson-Bach Sheep Co. (1906) 12 I. 418, 86 P. 41.

Costs may be taxed for witness fees and mileage of the wife of the prevailing party. Ib.

Mileage for the distance necessarily traveled by the witness within the state in attending the trial is taxable as costs, although the witness resided out of the state so that he could not be required to attend. S. v. Baird (1907) 13 I. 126, 89 P. 298.

Costs allowing witnesses five days' attendance when their entire testimony was given in one day upheld on ground that trial court was conversant with all the facts of the case. Zilka v. Graham (1914) 26 I. 163, 141 P. 639.

§ 7219. Same: Costs on appeal in supreme court. Whenever costs are awarded to a party by an appellate court, if he claims such costs he must tax the same before the clerk of the supreme court, subject to exception and review by the supreme court or the judges thereof, within such time and subject to such regulations as the supreme court shall by rule direct, and the same when taxed shall be certified by the clerk of the supreme court to the clerk of the court from which the appeal was taken, to be there entered as a judgment and to be enforced by execution as in the case of other judgments. ['11, c. 204, § 1, p. 673.]

Hist. (See C. C. P. '81, § 704) R. S. § 4913, reen. R. C. ib; am. '11, c. 204, § 1, p. 673, reen. C. L. § 4913.

Cross ref. Costs in the discretion of the court: § 7212.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1034; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7796.

Cited: Northwestern etc. Bk. v. Rauch (1901) 8 I. 50, 66 P. 807.

Items: Printed transcript: The appellate court will allow costs to be taxed for a printed transcript at the rate fixed by rule of court. Ulbright v. Baslington (1911) 20 I. 546, 119 P. 294.

§ 7220. [4914] **Insertion of costs in judgment.** The clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment. [R. S. § 4914.]

Hist. (See C. C. P. '81, § 705) R. S. § 4914, reen. R. C. ib,. reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1035; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7793.

Construed: Costs become a part of the judgment: Interest due at the date of the judgment is computed and entered as part of the judgment. The total judgment, including the interest so computed and costs, then bears interest at the statutory rate of 7 per cent from the date of its entry until satisfied. Bashor v. Beloit (1911) 20 I. 592, 604, 119 P. 55.

§ 7221. [4915] **Security for costs.** When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk to the effect that they will pay such costs and charges as may be awarded against the plaintiff by the judgment, or in the progress of the action, not exceeding the sum of $300. A new or an additional undertaking may be ordered by the court or judge upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed. [R. S. § 4915.]

Hist. (See C. C. P. '81, § 706) R. S. § 4915, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1036; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7812-14.

Utah: Identical: R. S. § 3354. Kissler v. Budge (1913) 24 I. 246, 250, 133 P. 125.

Substantial compliance: If the party required fails in the first instance to give a bond in the required amount, and upon notice and demand immediately gives one in the required amount, the action should not be dismissed for failure to provide the undertaking. Kissler v. Budge (1913) 24 I. 246, 133 P. 125.

Amount of bond: The amount of bond required is $300, the court has nothing to do with fixing the amount. Ib.

Waiver: The undertaking may be waived by failure to demand it or by proceeding with the trial. Ib.

Notice of filing security: Notice of filing of bond with clerk is not required to be served on opposing party. Domer v. Stone (1915) 27 I. 279, 149 P. 505.

§ 7222. [4916] **Same: Dismissal of action.** After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed. [R. S. § 4916.]

Hist. (See C. C. P. '81, § 707) R. S. § 4916, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1037; similar as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7797.

Construed: Failure to give the required bond within 30 days does not ipso facto oust the court of jurisdiction. Even though the 30-day period has expired, the party may give the bond at any time thereafter prior to the dismissal of the action by the court. Kissler v. Budge (1913) 24 I. 246, 133 P. 125.

§ 7223. [4917] **Costs against the state.** When the state is a party and costs are awarded against it, they must be paid out of the state treasury, and the state auditor shall draw his warrant therefor on the general fund. [R. S. § 4917.]

Hist. (See C. C. P. '81, § 708) R. S. § 4917, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except last clause omitted: C. C. P. 1872, § 1038; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7807.

§ 7224. [4918] **Costs against a county.** When a county is a party and costs are awarded against it, they must be paid out of the county treasury. [R. S. § 4918.]

Hist. (See C. C. P. '81, § 709) R. S. § 4918, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1039; Kerr's C. ib.

ARTICLE 7.

GENERAL PROVISIONS.

§ 7225. [4923] **Lost papers: How supplied.** If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original. [R. S. § 4923.]

Hist. (See C. C. P. '81, § 710) R. S. § 4923, reen. R. C. ib., reen. C. L. ib.

Cross ref. Negotiable receipts: § 6132.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1045; Kerr's C. ib.

N. D. Similar: C. C. P. § 7962. Analogous: C. C. P. § 7968.

Jurisdiction: Authority to determine whether or not a paper tendered as a copy of an original instrument is a true copy of such instrument is vested in the district court alone; the clerk of the district court has no power to determine that matter as a prerequisite to entering a default. Leonard v. Brady (1915) 27 I. 78, 147 P. 284.

§ 7226. [4924] **Papers with defective titles.** An affidavit, notice or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refers to such action or proceeding. [R. S. § 4924.]

Hist. (See C. C. P. '81, § 711) R. S. § 4924, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1046; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7964.

Cited: Idaho Comstock etc. Co. v. Lundstrum (1903) 9 I. 257, 74 P. 975; Frost v. Alturas Water Co. (1905) 11 I. 294, 81 P. 996.

Defective title: The fact that a party in interest in a matter pending before the board of county commissioners is not named in the title of the notice of appeal to the district court, nor in the other papers, nor in the judgment of the district court, does not divest him of his interest and consequent right to sue out a writ of error to review the judgment. Van Camp. v. Bd. of Comrs. (1884) 2 I. 29, 2 P. 721.

§ 7227. [4925] **Successive actions on same contract.** Successive actions may be maintained upon the same contract or transaction whenever, after the former action, a new cause of action arises therefrom. [R. S. § 4925.]

Hist. (See C. C. P. '81, § 712) R. S. § 4925, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1047; Kerr's C. ib.

§ 7228. [4926] **Consolidation of actions.** Whenever two or more actions are pending at one time between the same parties in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated. [R. S. § 4926.]

Hist. (See C. C. P. '81, § 713) R. S. § 4926, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1048; Kerr's C. ib.

N. D. Similar: C. C. P. § 7965.

§ 7229. [4927] **Action: When deemed pending.** An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. [R. S. § 4927.]

Hist. (See C. C. P. '81, § 714) R. S. § 4927, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1049; Kerr's C. ib.

N. D. Identical: C. C. P. § 7966.

Cited: Roby v. Roby (1903) 9 I. 371, 74 P. 957.

§ 7230. [4928] **Actions to determine adverse claims and by sureties.** An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former, for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as a surety. [R. S. § 4928.]

Hist. (See C. C. P. '81, § 715) R. S. § 4928, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1050; Kerr's C. ib.

Nature of action: The action provided for in this section is an action at law and triable in the ordinary course of law and by jury unless waived. Ada Co. v. Bullen Bridge Co. (1896) 5 I. 79, 47 P. 818.

This section provides a remedy which is adequate, certain and complete. It may be invoked in behalf of a county and protects a county from any mistake of holders of due and payable warrants in bringing suit upon such warrants and any legal defense which the county has against the payment of such warrants may be interposed. Ada Co. v. Bullen Bridge Co. (1897) 5 I. 188, 47 P. 824.

An action brought to prevent a board of county commissioners from changing nonnegotiable instruments, whose validity is questioned, into negotiable instruments, does not come under the provisions of this section, as the relief is purely equitable and there is no remedy at law to prevent such act. Dunbar v. Board of Comrs. (1897) 5 I. 407, 49 P. 409.

In an action under this section the plaintiff must prove the allegations of his complaint and has the right to open and close the case, as the action is not one to require the defendant to bring suit upon his pretended claim or obligation, but is purely a statutory action in which the adverse claim may be adjudicated and determined. Harrison v. Russell & Co. (1909) 17 I. 196, 105 P. 48.

§ 7231. [4929] **Clerk to write testimony.** On the trial of an action in a court of record, if there is no shorthand reporter of the court in attendance, the court may require the clerk to take down the testimony in writing. [R. S. § 4929.]

Hist. (See C. C. P. '81, § 716) R. S. § 4929, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "either party" for "the court": C. C. P. 1872, § 1051; Kerr's C. ib.

§ 7232. [4930] **Register of actions.** The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein. [R. S. § 4930.]

Hist. (See C. C. P. '81, § 717) R. S. § 4930, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1052; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7967.

§ 7233. [4931] **Majority of referees may act.** When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all. [R. S. § 4931.]

Hist. (See C. C. P. '81, § 718) R. S. § 4931, reen. R. C. ib., reen. C. L. ib.

Cross ref. References and trials by referee: § 6870 et seq. Similar provision in relation to arbitrators: § 7432.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1053; Kerr's C. ib.

§ 7234. [4932] **Extensions of time.** When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices, other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending or the judge thereof. [R. S. § 4932.]

Hist. (See C. C. P. '81, § 719) R. S. § 4932, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1054; amended: Kerr's C. ib.

Cited: Titiman v. Alamance M. Co. (1903) 9 I. 240, 74 P. 529; Eagleson v. Rubin (1909) 16 I. 92, 100 P. 735; (In brief of counsel) Howes v. Dols (1915) 27 I. 576.

Presumptions: It will be presumed that an order extending the time for the pre-

paration and serving of a statement was made upon good cause shown, in the absence of proof to the contrary; the record need not contain the evidence upon which the order was based. Snyder v. Viola M. etc. Co. (1891) 3 I. 28, 26 P. 127.

§ 7235. [4933] **Actions against sheriffs: Notice to indemnitors.** If an action is brought against a sheriff for an act done by virtue of his office, and he gives written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein is conclusive evidence of his right to recover against such sureties; and the court, or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs. [R. S. § 4933.]

Hist. (See C. C. P. '81, § 720) R. S. § 4933, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1055; similar as amended: Kerr's C. ib.

§ 7236. [4933a] **General form of undertaking.** Whenever a party to an action or proceeding desires to give an undertaking provided to be given by law, it shall be sufficient if the sureties sign an undertaking indicating that they are thereby bound to the obligations of the statute requiring the undertaking to be given. Such undertaking may be in form as follows:

(Title of court. Title of cause.)

Whereas, the.....desires to give an undertaking for (state what).....; now, therefore, we the undersigned sureties, do hereby obligate ourselves jointly and severally, to (name who).....under said statutory obligations in the sum of.....dollars.

The sureties so signing such undertaking are bound to the full statutory obligations of the statute requiring the undertaking. ['95, p. 18, §§ 1, 2, 3.]

Hist. '95, p. 18, §§ 1, 2, 3, reen. '99, p. 235, §§ 1, 2, 3, reen. R. C. § 4933a, reen. C. L. ib.

Cited: Edminston v. Steele (1906) 12 I. 613, 87 P. 677; (In brief of counsel) Browder v. Etchersor (1913) 25 I. 128.

Constitutionality: This statute providing a form for undertakings in civil and criminal actions is constitutional. Smith v. Haner (1902) 8 I. 370, 69 P. 109.

Applied: This section applies to appeals from probate court: Est. of Blackinton (1916) 29 I. 310, 158 P. 492.

Sufficiency of undertaking: An undertaking on attachment which recites that the "plff." desires to give the undertaking and obligating the sureties to the "deft." is sufficient. Finney v. Moore (1903) 9 I. 284, 74 P. 866.

Where an appeal is taken both from a decree and an order denying motion to reopen decree, and both are specifically referred to in the undertaking on appeal, in the form into which the statute imports every condition required by law, and the amount of penalty is sufficient for both appeals, the legal effect is to comprise two bonds in one instrument, and it must be so construed. Est of Blackinton, supra.

§ 7237. [4934] **Justification of sureties.** In all cases where an undertaking, with sureties, is required by the provisions of this code, the officer taking the same must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and each are worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds $2000, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. [R. S. § 4934.]

Hist. (See C. C. P. '81, § 721) R. S. § 4934, reen. R. C. ib., reen. C. L. ib.

Cross ref. Certificate of authority of surety company constitutes a sufficient justification of such companies as surety: § 5107. Bonds of surety companies constitute a sufficient compliance with this section: § 5109. Proceedings for release of sureties from liability: § 5110.

Comp. leg.—Cal. Same except "3000" for "2000" dollars: C C. P. 1872, § 1057; additional provisions as amended: Kerr's C. ib.

Absence of justification: Justification of sureties constitutes no part of the undertaking, but the undertaking is complete without it. Miller v. Pine M. Co. (1893) 3 I. 603, 32 P. 207. A bond is valid although the affidavit fails to state that the bondsmen are householders or freeholders. Wilson v. Eagleson (1903) 9 I. 17, 71 P. 613.

§ 7238. [4935] **Parties not required to give bond.** In any civil action or proceeding wherein the state or the people of the state is a party plaintiff, or any state officer, in his official capacity, or on behalf of the state, or any county or city, is a party plaintiff or defendant, no bond, written undertaking or security can be required of the state, or the people thereof, or any officer thereof, or any county or city; but on complying with the other provisions of this code the state, or the people thereof, or any state officer acting in his official capacity, or any county or city, have the same rights, remedies and benefits as if the bond, undertaking or security were given and approved as required by this code. [R. S. § 4935.]

Hist. (See C. C. P. '81, § 722) R. S. § 4935, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "city or town" for "or city," and the words "or any county or city" omitted: C C. P. 1872, § 1058; similar as amended: Kerr's C. ib. Coon v. Sommercamp (1915) 26 I. 776, 782, 146 P. 728.

Construed: Whenever an action is brought by or against state officers and such officers prosecute or defend in said action in their official capacity, acting for or defending the rights of the state, or any legal subdivision thereof, they are permitted to so act without furnishing costs or undertakings on appeal. This same rule applies to all state, county, district and municipal officers, while engaged in protecting the rights of the people in the courts. Ib.

County treasurer: This section applies to a county treasurer and ex officio tax collector, against whom an action is brought, on behalf of a rural high school district to enjoin the collection of a school tax; and, if judgment goes against the officer, he is not required to furnish an undertaking on appeal; in such case he is acting on behalf of a legal subdivision of the state government and not as the agent of a rural high school district. Ib.

Villages: This section applies to villages organized under the laws of this state governing the organization of cities and villages. Trueman v. St. Maries (1912) 21 I. 632, 123 P. 508.

§ 7239. [4936] **Subrogation of sureties.** Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor and is entitled to control, enforce and satisfy such judgments in all respects as if he had recovered the same. [R. S. § 4936.]

Hist. (See C. C. P. '81, § 723) R. S. § 4936, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; same: Kerr's C. § 1059.

N. D. Analogous: C. C. P. § 6687.

TITLE LVI. SPECIAL PROCEEDINGS.

CHAPTER 263.

PRELIMINARY PROVISIONS.

§ 7240. [4955] **Designation of parties.** The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant. [R. S. § 4955.]

Hist. (See C. C. P. '81, § 724) R. S. § 4955, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1063; Kerr's C. ib.

N D. Analogous: C. C. P. § 8443.

Cited: Connolly v. Woods (1907) 13 I. 591, 92 P. 573; Bragaw v. Gooding (1908) 14 I. 288, 94 P. 438; Epperson v. Howell (1916) 28 I. 338, 154 P. 621.

Nature of proceedings: The special proceedings of a civil nature which are provided for in the title beginning with this section are not civil actions within the meaning of R. S. § 4020, providing that there shall be but one form of civil action. Nelson v. Steele (1906) 12 I. 762, 88 P. 95.

§ 7241. [4956] **Definitions.** A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding. [R. S. § 4956.]

Hist. (See C. C. P. '81, § 725) R. S. § 4956, reen. R. C. ib., reen. C. L. ib.

Cross ref Judgment in civil actions: § 6826. Motions and orders in civil actions: § 7194.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1064; Kerr's C. ib.

N. D. Identical: C. C. P. § 8444.

CHAPTER 264.

WRITS OF REVIEW, MANDATE AND PROHIBITION.

ARTICLE 1.

WRITS OF REVIEW.

§ 7242. [4961] **Designation.** The writ of certiorari may be denominated the writ of review. [R. S. § 4961.]

Hist. (See C. C. P. '81, § 726) R. S. § 4961, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1067; as amended: Kerr's C. ib.

Nature of writ: In the adoption and ratification of the constitution the power to issue the writ therein granted to the supreme court was limited to the writ then known and in use in the territory. Neil v. Public Utilities Commission, 32 I. —, 178 P. 271. (Budge, J. dissents.)

§ 7243. [4962] **When granted.** A writ of review may be granted by any court except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. [R. S. § 4962.]

Hist. (See C. C. P. '81, § 727) R. S. § 4962, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction of supreme court: Const. V, 9; Codes § 6444; of district court, § 6457. Writ may be issued and judgment entered at chambers: § 6493.

Comp. leg.—Cal. Similar except "police" for "probate," line 2: C. C. P. 1872, § 1068; Kerr's C. ib. Canadian Bk. of Commerce v. Wood (1907) 13 I. 794, 804, 93 P. 257.

N. D. Analogous: C. C. P. § 8445.

Cited: McConnell v. State Board etc. (1905) 11 I. 652, 83 P. 494; Weiser Nat. Bk. v. Washington Co. (1917) 30 I. 332, 164 P. 1014; Kootenai Co. v. S. Bd. of Equalization (1917) 31 I. 155, 169 P. 935.

Time of application: The time within which an appeal may be taken in appealable cases will be deemed to be the limit of a reasonable time for an application for a writ of review, unless exceptional circumstances be shown which justify an extension of time. Pullman Co. v. S. Bd.

of Equalization (1918) 31 I. 316, 171 P. 260.

To whom issued: The board of county commissioners is not a judicial tribunal to which a writ of review may issue. Rogers v. Hays (1893) 3 I. 597, 32 P. 259. The writ may issue out of the supreme court to the state board of equalization to review its action in improperly reducing or increasing the assessed valuation of classes of property. Orr. v. S. Bd. of Equalization (1891) 3 I. 190, 28 P. 416. It may issue out of the district court to probate or justice's courts. Gans v. Steele (1900) 7 I. 143, 61 P. 286. But it will not issue out of the supreme court to review a judgment of a justice of the peace. Nordyke & Marmon Co. v. McConkley (1901) 7 I. 562, 64 P. 893.

When issued: In order that a writ of certiorari may be granted under this section it must appear: 1. That the lower court exceeded its jurisdiction; 2. That there was no appeal; 3. That there was no other plain, speedy or adequate remedy. People v. Lindsay (1871) 1 I. 394; Dahlstrom v. Portland Min. Co. (1906) 12 I. 87, 85 P. 916.

Writ will only issue where officer or board has exceeded jurisdiction, not for erroneous action. First Nat. Bk. v. Washington Co. (1909) 17 I. 306, 105 P. 1053.

The writ will lie: To review an order appointing a receiver, Sweeny v. Mayhew (1899) 6 I. 455, 56 P. 85; Cummings v. Steele (1899) 6 I. 666, 59 P. 15; to review an order disbarring an attorney made without application therefor or notice to the attorney, Good v. Steele (1902) 8 I. 538, 69 P. 319; McNamee v. Steele (1902) 8 I. 539, 69 P. 319; to review an order of the probate judge in supplementary proceedings requiring the garnishee to pay certain money, claimed to be exempt, to the sheriff, in satisfaction of the judgment, Gans v. Steele (1900) 7 I. 143, 61 P. 286.

Certiorari and not mandate is the proper remedy to review and correct an order of the district court quashing a jury panel made in excess of the jurisdiction of the court. (Sullivan, J. dissents.) Heitman v. Morgan (1905) 10 I. 562, 79 P. 225.

When not issued: The writ will not issue: To review a judgment while the case is still pending on motion for a new trial. People v. Lindsay (1871) 1 I. 394; to review an order denying a change of venue in disbarment proceedings, S. v. Goode (1896) 4 I. 730, 44 P. 640; to review a ministerial act on the part of the city council, such as the letting of a paving contract, Adelman v. Pierce (1898) 6 I. 294, 55 P. 658; to review an order made after judgment, from which an appeal will lie, Porter v. Steele (1900) 7 I. 414, 63 P. 187; Dahlstrom v. Portland Min. Co. (1906) 12 I. 87, 85 P. 916; to review illegal acts of the board of county commissioners from which an appeal will lie, Rogers v. Hays (1893) 3 I. 597, 32 P. 259; Bobbitt v. Blake (1913) 25 I. 53, 136 P. 211; to review decision of district judge appointing commissioners in eminent domain proceedings unless he has exceeded his jurisdiction, Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210; to review a judgment of conviction in police court appeal from which is pending, S. v. Hosford (1915) 27 I. 185, 147 P. 286; to review exercise of discretion or judgment in performance of official duties by state elective officers, Northwest L. & W. Co. v. Alexander (1916) 29 I. 557, 160 P. 1106.

An allegation in a petition for writ of certiorari that if an appeal be taken the expense will be heavy and disproportionate to the amount the plaintiff will recover, is not a reason why the appeal will not be a plain, speedy and adequate remedy, and does not warrant this court in reviewing the judgment by writ of certiorari. Canadian Bk. of Commerce v. Wood (1907) 13 I. 794, 93 P. 257.

An order made by a district court within the jurisdiction of such court and after having acquired jurisdiction of the person and subject matter, however erroneous it may have been, is not an excess of jurisdiction that can be corrected by writ of review. Utah Assn. of Credit Men. v. Budge (1909) 16 I. 751, 102 P. 691; Shumake v. Shumake (1910) 17 I. 649, 658, 107 P. 42.

The state board of canvassers in canvassing election returns sent up by the boards of canvassers of the several counties and computing the total vote received by each candidate and certifying to the secretary of state the names of the persons who received the majority or plurality, as the case may be, of all votes cast for each respective office, is discharging a ministerial duty rather than a judicial function. Mathematical computation and calculation does not constitute the exercise of judicial functions. Lansdon v. S. Bd. of Canvassers (1910) 18 I. 596, 111 P. 133.

The supreme court is without power under the constitution to issue the writ mentioned in § 2504 for the purpose of having the lawfulness of an original order or decision of the public utilities commission inquired into and determined. Neil v. Public Utilities Commission, 32 I. —, 178 P. 271. (Budge, J. dissents.)

The constitutional writ is not available when there is a plain, speedy and adequate remedy at law. Ib.

Distinguished from prohibition: If a court undertakes to proceed in a matter without or in excess of its jurisdiction, the remedy of one who is affected by such contemplated action is by writ of prohibition, not by writ of review. Gunderson v. Dist. Ct. (1908) 14 I. 478, 94 P. 166.

§ 7244. [4963] **Application and order to show cause.** The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice. [R. S. § 4963.]

Hist. (See C. C. P. '81, § 728) R. S. § 4963, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1069; Kerr's C. ib.

N. D. Identical: C. C. P. § 8446.

Cited: Canadian Bk. of Commerce v. Wood (1907) 13 I. 794, 93 P. 257.

Who entitled to writ: One who is not a party to a cause has no right to ask for a writ of review as to any matters occurring in said cause. Gold Hunter Min. etc. Co. v. Holleman (1891) 3 I. 99, 27 P. 413; Washington Co. Abstract Co. v. Stewart (1904) 9 I. 376, 74 P. 955.

An insolvent debtor is "beneficially interested" in the review of an order requiring him to account for certain property in such sense as to be entitled to a writ of review. Madison v. Piper (1898) 6 I. 137, 53 P. 395.

§ 7245. [4964] **Writ: How directed.** The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required. [R. S. § 4964.]

Hist. (See C. C. P. '81, § 729) R. S. § 4964, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1070; Kerr's C. ib.

N. D. Similar: C. C. P. § 8447.

§ 7246. [4965] **Same: Contents.** The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings, describing or referring to them with convenient certainty, that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. [R. S. § 4965.]

Hist. (See C. C. P. '81, § 730) R. S. § 4965, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1071; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8448.

§ 7247. [4966] **Stay of proceedings.** If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended nor the proceedings stayed. [R. S. § 4966.]

Hist. (See C. C. P. '81, § 731) R. S. § 4966, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1072: Kerr's C. ib.

N. D. Similar: C. C. P. § 8450.

§ 7248. [4967] **Service of writ.** The writ must be served in the same manner as a summons in a civil action except when otherwise expressly directed by the court. [R. S. § 4967.]

Hist. (See C. C. P. '81, § 4967, reen. R. C. ib., reen. C. L. ib.

Cross ref. Service of summons: § 6676.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1073: Kerr's C. ib.

N. D. Identical: C. C. P. § 8452.

Cited: Canadian Bk of Commerce v. Wood (1907) 13 I. 794, 93 P. 257.

§ 7249. [4968] **Extent of review.** The review upon this writ can not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer. [R. S. § 4968.]

Hist. (See C. C. P. '81, § 733) R. S. § 4968, reen. R. C. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1074: Kerr's C. ib.

N. D. Similar: C. C. P. § 8453.

Cited: Heitman v. Morgan (1905) 10 I. 562, 79 P. 225. Neil v. Public Utilities Commission, 32 I. —, 178 P. 271.

Scope of review: The writ of review is not a remedy for correcting errors and mistakes of judgment, nor for the purpose of reviewing the facts upon which the inferior tribunal, board or officer acted, but its province is limited entirely to a review of questions of law, confined to the specific question as to whether or not the action complained of was beyond and

in excess of the jurisdiction conferred on the tribunal, board or officer. McConnell v. Board etc. (1905) 11 I. 652, 83 P. 494.

On certiorari to review an order appointing a receiver, the court may review the evidence introduced in the district court, so far as is necessary to determine whether the jurisdictional facts authorizing such appointment were or were not proved. Sweeny v. Mayhew (1899) 6 I. 455, 56 P. 85.

On certiorari to review an order of the board of equalization raising an assessment, the only question which can be considered is the jurisdiction of the board; mere irregularities will not be reviewed. Murphy v. Board of Equalization (1899) 6 I. 745, 59 P. 715.

On certiorari this statute limits the inquiry of the appelate court to the question of the jurisdiction of the judge to make the order complained of. Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210.

Writ does not lie to review facts, except in so far as the facts are essential to determine the jurisdictional question. First Nat. Bk. of Weiser v. Washington Co. (1909) 17 I. 306, 105 P. 1053; Lansdon v. S. Bd. of Canvassers (1910) 18 I. 596, 111 P. 133.

Where state elective officers are invested with certain discretion, involving the exercise of judgment in the performance of their official duties, no court has the right by writ of certiorari to interpose its judgment or influence their action. Northwest L. & W. Co. v. Alexander (1916) 29 I. 557, 160 P. 1106.

In proceedings upon writ of review, the constitutionality of the statute upon which the inferior tribunal, the action of which is reviewed, based its authority can not be passed upon. Weiser Nat. Bk. v. Washington Co. (1917) 30 I. 332, 164 P. 1014.

When discharged: Where the writ of review is asked upon the ground that the judge of the district court had exceeded his jurisdiction in hearing and determining the cause at chambers, and the return, which contains a copy of the court record, shows that the cause was heard and determined by the court at a regular term thereof, the writ will be discharged. Porter v. Steele (1900) 7 I. 414, 63 P. 187.

§ 7250. [4969] **Defective return: Hearing.** If the return of the writ be defective the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below. [R. S. § 4969.]

Hist. (See C. C. P. '81, § 734) R. S. § 4969, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1075: Kerr's C. ib.

N. D. Similar: C. C. P. § 8454.

§ 7251. [4970] **Remittitur.** A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceedings certified up. [R. S. § 4970.]

Hist. (See C. C. P. '81, § 735) R. S. § 4970, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1076: Kerr's C. ib.

N. D. Similar: C. C. P. § 8455.

§ 7252. [4971] **Judgment roll.** A copy of the judgment signed by the clerk, entered upon or attached to the writ and return, constitutes the judgment roll. [R. S. § 4971.]

Hist. (See C. C. P. '81, § 736) R. S. § 4971, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1077: Kerr's C. ib.

N. D. Identical: C. C. P. § 8456.

ARTICLE 2.

WRITS OF MANDATE.

§ 7253. [4976] **Designation.** The writ of mandamus may be denominated a writ of mandate. [R. S. § 4976.]

Hist. (See C. C. P. '81, § 737) R. S. § 4976, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1084; same as amended: Kerr's C. ib.

§ 7254. [4977] **When issued.** It may be issued by any court except a justice's or probate court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and the enjoyment of a right

or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person. [R. S. § 4977.]

Hist. (See C. C. P. '81, § 738) R. S. § 4977, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction of supreme court: Const. V. 9. Elector may obtain writ of mandate requiring register to register him: § 568. Codes § 6444; of district court: § 6457.

Comp. leg.—Cal. Same except "police" for "probate", line 2: C. C. P. 1872, § 1085: Kerr's C. ib.

N. D. Similar: C. C. P. § 8457.

Cited: State v. Whelan (1898) 6 I. 78, 53 P. 2; (In brief of counsel) S. v. Twin Falls etc. Co. (1916) 30 I. 41, 166 P. 220.

Conclusiveness of judgment: A judgment in a mandamus action is as conclusive as a judgment in any other, and operates as an estoppel against further investigation in another action between the same parties of any facts necessarily in issue or which were pleaded and decided therein. Lawrence v. Corbeille, 32 I. —, 178, P. 834.

Prerequisite to issuance: Before a writ of mandate will issue commanding certain acts to be done there must be a demand and a refusal. Pfirman v. Success M. Co. (1917) 30 I. 468, 166 P. 216.

Scope of writ: The writ of mandate can not be used to correct errors of the district court or inferior tribunal, in passing upon questions regularly submitted to it in the course of a judicial proceeding or to control the exercise of its discretion. (Sullivan, C. J., dissents.) Bd. of Comrs. v. Mayhew (1897) 5 I. 572, 51 P. 411.

A writ of mandate will not issue where the officer against whom the same is prayed for has performed the acts sought to be compelled before the issuance of the writ. Chemung Min. Co. v. Morgan (1905) 11 I. 232, 81 P. 384.

On application for a writ of mandate to compel the district court to comply with an order of the supreme court, the latter court will construe its own order in connection with its opinion and if it finds that the district court has erred or acted beyond its power in construing such order or opinion the error will be corrected by issuance of the writ. Am. Hydraulic Placer Co. v. Rich (1902) 8 I. 570, 69 P. 280.

The writ of mandate can be used to compel a court to act in a matter where the law enjoins a duty but not to control its discretion or direct its decision. Connolly v. Woods (1907) 13 I. 591, 92 P. 573; Blackwell L. Co. v. Flynn (1915) 27 I. 632, 150 P. 42; St. Michael's Monastery v. Steele (1917) 30 I. 609, 107 P. 349.

Where a statute or city ordinance vests in a city official discretion in the performance of a duty, and no provision is made for reviewing such action, the determination of such matter by such official is final, and can not be controlled by mandamus. Darby v. Pence (1910) 17 I. 697, 107 P. 484, 27 L. R. A. (N. S. 1194.) A citizen has a right to a writ of mandate to compel public officers to perform a statutory public duty, even though he may have a right of action against a private individual which would redress the private injury to himself. Beem v. Davis, 31 I. 730, 175 P. 959.

To whom issued: In an action for a writ of mandate to compel the enforcement of a village ordinance, members of the board of trustees of the village and the chairman thereof are the officers to whom the writ should be directed. Ib.

When issued: Mandamus will issue: To require a water company to deliver water after the court has fixed the reasonable compensation which must be paid for the use of the water, Wilterding v. Green (1896) 4 I. 773, 45 P. 134; to compel the mayor of a city to sign warrants allowed and ordered by the council, Rice v. Gwin (1897) 5 I. 394, 49 P. 412; to compel the board of examiners to pass upon a claim, Pyke v. Steunenberg (1897) 5 I. 614, 51 P. 614; to compel an administrator to execute a conveyance pursuant to an order of the court confirming a sale, State v. Cunningham (1898) 6 I. 113, 53 P. 451; to compel the secretary of state to file and certify a proper political nominating ticket, Williams v. Lewis (1898) 6 I. 184, 54 P. 619; to require the district court to proceed with a criminal case triable in such court, Hays v. Stewart (1900) 7 I. 193, 61 P. 591; to compel a county auditor to file a ticket duly nominated by a legal county convention, Addle v. Davenport (1900) 7 I. 282, 62 P. 681; to compel a court to consider a cause after it has erroneously determined that it has no jurisdiction, Hill v. Morgan (1904) 9 I. 718, 76 P. 323; to require a trial court to try a cause in accordance with a prior opinion of the supreme court after the trial court has nonsuited the plaintiff in disregard of such opinion, Kroetch v. Morgan (1904) 10 I. 172, 77 P. 19; to compel the clerk of the district court to enter judgment, Oliver v. Kootenai Co. (1907) 13 I. 281, 90 P. 107; to compel the clerk of the district court to file an information presented by the prosecuting attorney, S. v. Quarles (1907) 13 I. 252, 89 P. 636; against public service water company to regulate charges and rates, Hatch v. Consumers Co. (1909) 17 I. 204, 210, 104 P. 670, 40 L. R. A. (N. S.) 263, 224, U. S. 148, 32 S. C. R. 465; to compel clerk to enter final judgment, Santti v. Hartman (1916) 29 I. 490, 161 P. 249; to compel a Carey act company to sell a water right, S. v. Twin Falls Co. (1911) 21 I. 410, 121 P. 1039, app. dis. 235 U. S. 690, 35 S. C. R. 205, 59 L. ed. 427.

To compel public officers to perform their official duties, though the details of such performance are left to their discretion. Beam v. Davis, supra.

To compel the state board of land commissioners to allow an entry on a Carey Act land segregation, by a person possessing the statutory qualifications and who has complied with the statutory conditions precedent. Furbee v. Alexander, 31 I. 738, 176 P. 97.

When not issued: Mandamus will not lie: To compel county commissioners to act on a claim against the county, Wright v. Kelley (1895) 4 I. 624, 43 P. 565; to compel a county auditor to draw his warrant for a claim prior to the allowance thereof by the board of commissioners, Jolly v. Woodward (1895) 4 I. 496, 42 P. 512; to compel the state board of examiners to allow a claim (Sullivan, J. dissents). Pyke v. Steunenberg (1897) 5 I. 614, 51 P. 614; to compel the issuance of an order to show cause why a decedent's real estate should not be sold to pay debts, S. v. Whelan (1898) 6 I. 78, 53 P. 2; to review an order of the district court quashing a jury panel when such order is made in excess of the jurisdiction of the court (Sullivan, J., dissents), Heitman v. Morgan (1905) 10 I. 562, 79 P. 225; to compel a railroad to permit a telephone company to install instruments in railroad depots, Ida. etc. Tel Co. v. Ore. etc. R. R. Co. (1901) 8 I. 175, 67 P. 318; to require a trial judge to proceed with a term of court in one county where it is shown that a regular term for another county convenes immediately after the date set for the hearing of the application for the writ. (Sullivan, J. dissents.) Heitman v. Morgan (1905) 10 I. 562, 79 P. 225; to correct or alter the records of the legislature, Clough v. Curtis and Burkhart v. Reed (1890) 134 U. S. 361, 33 L. ed. 945, 10 S. Ct. 573, aff. 2 I. 503 and 523; to compel the commission of a crime, Crescent B. Co. v. O. S. L. Rr. Co. (1913) 24 I. 106, 115, 132 P. 975; to litigate or determine a permanent or perpetual water right, Lewis v. Mountain Home Coop. Irr. Co. (1916) 28 I. 682, 156 P. 419; to compel the holding of an election (Budge, J., dissents.) Perrault v. Robinson (1916) 29 I. 267, 158 P. 1074; to punish for contempt officer using his best and honest judgment. Potlatch L. Co. v. Comrs. Latah Co. (1916) 29 I. 516, 160 P. 260; to compel an officer to perform his duties generally. It must be directed to a specific act or actions. Evans v. Van Deusen, 31 I. 614, 174 P. 122.

§ 7255. [4978] **Absence of adequate remedy.** The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested. [R. S. § 4978.]

Hist. (See C. C. P. '81, § 739) R. S. § 4978, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1086: Kerr's C. ib.

N. D. Identical: C. C. P. § 8458.

Cited: Connolly v. Woods (1907) 13 I. 591, 92 P. 573; St. Michael's Monastery v. Steele (1917) 30 I. 609, 107 P. 349.

Adequacy of remedy: The remedy which a claimant whose claim is disallowed, or not acted upon, by the board of examiners, has, of petitioning some future legislature for the payment of his claim is not a plain, speedy and adequate remedy at law within the meaning of this section such as to preclude him from proceeding against the board by writ of mandate. (Dis. op.) Pyke v. Steunenberg (1897) 5 I. 614, 51 P. 614.

Where an appeal is given by law and such appeal is not a plain, speedy and adequate remedy in the due course of law, a resort may be had to mandamus. Fenton v. Comrs. of Ada Co. (1911) 20 I. 392, 119 P. 41.

While the court calendar may be congested, the court can not take into consideration the annoyance, expense or delay incident to the prosecution of the usual remedies provided by law in determining whether or not a writ of mandamus or prohibition should issue. Blackwell L. Co. v. Flynn (1915) 27 I. 632, 150 P. 42.

The court, in a case that does not involve the private rights of litigants, can not be required to determine whether or not particular bodies of persons constituted a lawful legislative assembly. Clough v. Curtis and Burkhart v. Reed (1890) 134 U. S. 361, 33 L. ed. 945, 10 S. Ct. 573, aff. 2 I. 503 and 523.

The existence of an adequate remedy in the ordinary course of law, either legal or equitable in its nature, will prevent the issuance of the writ. Beem v. Davis, 31 I. 730, 175 P. 959.

Mandamus will not lie as a remedy for a state of facts coming within the purview of sec. 7182 in regard to appeals from justices' courts, since that section provides a summary remedy which is plain and speedy. Hanson v. Weniger, 31 I. 540, 173 P. 1085.

§ 7256. [4979] **Form of writ.** The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place why he has not done so. The peremptory writ must be in a similar form except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted. [R. S. § 4979.]

Hist. (See C. C. P. '81, § 740) R. S. § 4979, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1087: Kerr's C. ib.

N. D. Similar: C. C. P. § 8459.

§ 7257. [4980] **Notice of application: Hearing.** When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least 10 days. The writ can not be granted by default. The case must be heard by the court whether the adverse party appear or not. [R. S. § 4980.]

Hist. (See C. C. P. '81, § 741) R. S. § 4980, reen. R. C. ib., reen. C. L. ib.

Cross ref. Applications for mandamus may be heard and final judgment entered at chambers: § 6493.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1088: Kerr's C. ib.

N. D. Similar: C. C. P. § 8460.

Peremptory writ—When issued: A peremptory writ of mandate will issue in the first instance to require a trial court to try a cause in conformity with a prior opinion rendered in said cause by the supreme court. Kroetch v. Morgan (1904) 10 I. 172, 77 P. 19.

§ 7258. [4981] **Answer.** On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action. [R. S. § 4981.]

Hist. (See C. C. P. '81, § 742) R. S. § 4981, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1089: Kerr's C. ib.

N. D. Similar: C. C. P. § 8461.

§ 7259. [4982] **Trial by jury.** If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation on which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him. [R. S. § 4982.]

Hist. (See C. C. P. '81, § 743) R. S. § 4982, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1090: Kerr's C. ib.

N. D. Similar: C. C. P. § 8462.

Right to trial by jury: Where issues of fact are raised by the return to an alternative writ of mandate, neither of the parties is entitled to a jury trial of such issues as a matter of right, but the question of submitting the issues to a jury is left to the sound discretion of the trial court. (Stockslager, C. J., dissents.) Nelson v. Steele (1906) 12 I. 762, 88 P. 95.

§ 7260. [4983] **Objections to answer.** On the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance. [R. S. § 4983.]

Hist. (See C. C. P. '81, § 744) R. S. § 4983, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1091: Kerr's C. ib.

N. D. Identical: C. C. P. § 8463.

§ 7261. [4984] **Motion for new trial.** The motion for a new trial must be made in the court in which the issue of fact is tried. [R. S. § 4984.]

Hist. (See C. C. P. § 745) R. S. § 4984, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1092: Kerr's C. ib.

N. D. Identical: C. C. P. § 8464.

Cited: People v. George (1891) 3 I. 108, 27 P. 680.

§ 7262. [4985] **Certification of verdict: Argument.** If no notice of a motion for a new trial be given, or if given, the motion be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party. [R. S. § 4985.]

Hist. (See C. C. P. '81, § 746) R. S. § 4985, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1093: Kerr's C. ib.

§ 7263. [4986] **Trial on pleadings.** If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing, the argument of the case. [R. S. § 4986.]

Hist. (See C. C. P. '81, § 747) R. S. § 4986, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1094; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8466.

§ 7264. [4987] **Damages.** If judgment be given for the applicant, he may recover damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay. [R. S. § 4987.]

Hist. (See C. C. P. '81, § 748) R. S. § 4987, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1095: Kerr's C. ib.

N. D. Similar: C. C. P. § 8467.

Liability for damages: A judge against whom a writ of mandate is granted by the supreme court because of an error he made in a matter pending before him, is not liable to the injured party for damages. Hill v. Morgan (1904) 9 I. 777, 76 P. 765.

§ 7265. [4988] **Service of writ.** The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not. [R. S. § 4988.]

Hist. (See C. C. P. '81, § 749) R. S. § 4988, reen. R. C. ib., reen. C. L. ib.

Cross ref. Service of summons: § 6676.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1096: Kerr's C. ib.

N. D. Similar: C. C. P. § 8468.

§ 7266. [4989] **Disobedience of writ: Penalty.** When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding $1,000. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. [R. S. § 4989.]

Hist. (See C. C. P. '81, § 750) R. S. 4989, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 1097; same, as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8469.

ARTICLE 3.

WRITS OF PROHIBITION.

§ 7267. [4994] **Definition.** The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or

in excess of the jurisdiction of such tribunal, corporation, board or person. [R. S. § 4994.]

Hist. (See C. C. P. '81, § 751) R. S. § 4994, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1102; similar as amended: Kerr's C. ib. Perrault v. Robinson (1916) 29 I. 267, 289, 158 P. 1074 (Dis. op.)

N. D. Similar: C. C. P. § 8470.

Cited: Bragaw v. Gooding (1908) 14 I. 288, 94 P. 438; Gunderson v. Dist. Ct. (1908) 14 I. 478, 94 P. 166; Little v. Broxon (1918) 31 I. 303, 170 P. 918.

Nature of writ: The writ of prohibition is an extraordinary remedy, which is sometimes granted, not as a matter of right, but in the sound discretion of the court, to restrain an inferior tribunal from exceeding its jurisdiction, and where an inferior court has jurisdiction expressly conferred upon it by statute, the supreme court will not presume in advance that such court will exceed its jurisdiction; being an extraordinary writ it will not issue in doubtful cases, nor in any case where a plain, speedy and adequate remedy in the ordinary course of law exists. And where it appears that the act sought to be prohibited may speedily be reviewed in the supreme court by appeal from the order of the inferior tribunal, or if an appeal will not lie then upon a writ of error or certiorari, the writ of prohibition will not issue. Rust v. Stewart (1901) 7 I. 558, 64 P. 222.

This section must be construed with § 7268, and when so construed it is clear that two contingencies must arise before a writ of prohibition will issue, namely, that the tribunal, corporation, board or person is proceeding without or in excess of the jurisdiction of such tribunal, corporation, board or person, and that there is not a plain, speedy and adequate remedy in the ordinary course of law. Olden v. Paxton (1915) 27 I. 597, 150 P. 40.

When issued: A writ of prohibition will lie to restrain illegal action of a ministerial officer, such as the action of the secretary of state in certifying to county auditors a political nominating ticket which is not entitled to be certified. (Overruled, Stein v. Morrison, post.) Williams v. Lewis (1898) 6 I. 184, 54 P. 619.

The writ will issue against the state board of land commissioners, as such, even though the governor is a member of the board. Balderston v. Brady (1910) 17 I. 567, 575, 107 P. 493.

The writ of prohibition lies to restrain county commissioners from proceeding in cases without or in excess of their jurisdiction. Baker v. Gooding Co. (1914) 25 I. 506, 138 P. 342.

The writ will issue to prohibit the holding of an illegal, unauthorized, invalid election. (Budge, J. dissents) Perrault v. Robinson (1916) 29 I. 267, 158 P. 1074.

When not issued: Prohibition will not lie to restrain the district court from proceeding to try a cross complaint, a demurrer to which has been overruled. Willman v. Dist. Ct. (1894) 4 I. 11, 35 P. 692. The writ will not issue to restrain an act which has been performed. Bellevue Water Co. v. Stockslager (1895) 4 I. 636, 43 P. 568.

The supreme court will hesitate to issue a writ of prohibition to prevent further proceedings before the district court, unless it is claimed that that court is acting outside of its jurisdiction and there is no reasonable doubt of the fact. Re Miller (1896) 4 I. 714, 43 P. 870.

The writ of prohibition authorized by the constitution is the common law writ and the same will not issue to restrain purely ministerial acts. (Williams v. Lewis, 6 I. 184, 54 P. 619, overruled) Stein v. Morrison (1904) 9 I. 426, 75 P. 246.

Writ will not issue to restrain district court from hearing an appeal from probate court in probate matters. Fraser v. Davis (1916) 29 I. 70, 156 P. 913.

The legitimate scope and purpose of the writ of prohibition is to restrict inferior courts within the limits of their own jurisdiction, and it can not be extended to officers, boards or tribunals whose functions are not judicial. (Dis. op. by Budge, J.) Perrault v. Robinson, supra.

Writ will not issue to restrain district court from appointing a receiver in foreclosing a chattel mortgage. Only question is whether district court is acting within jurisdiction. Skéen v. Dist. Ct. (1916) 29 I. 331, 158 P. 1072.

§ 7268. [4995] **When and how issued.** It may be issued by any court except probate or justice's courts, to an inferior tribunal, or to a corporation, board or person in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested. [R. S. § 4995.]

Hist. (See C. C. P. '81, § 752) R. S. § 4995, reen. R. C. ib., reen. C. L. ib.

Cross ref. Writ may be issued and judgment entered at chambers: § 6493.

Comp. leg.—Cal. Same except "police" for "probate": C. C. P. 1872, § 1103: Kerr's C. ib.

N. D. Similar: C. C. P. § 8471.

Cited: Williams v. Lewis (1898) 6 I. 184, 54 P. 619; Stein v. Morrison (1904) 9 I. 426, 75 P. 246; Olden v. Paxton (1915) 27 I. 597, 150 P. 40; (In brief of counsel) Callahan v. Dunn (1917) 30 I. 225, 164 P. 356.

Who may apply: The same degree of strictness in regard to parties is not maintained in prohibition as in mandate. A writ of prohibition may be issued on the application of any person shown to be interested in the litigation. He need not necessarily be named as a party in the original action. He may make himself a party by showing that he has an interest

in the controversy and by moving to set aside a judgment or order made without or in excess of jurisdiction. Cronan v. Dist. Ct. (1908) 15 I. 184, 96 P. 768.

Adequacy of remedy: The adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. Willman v. Dist. Ct. (1894) 4 I. 11, 35 P. 692.

The writ of prohibition will issue whenever proper facts are shown for its issuance, even though there be an appeal, if such appeal is not a plain, speedy and adequate remedy in the ordinary course of law. Cronan v. Dist. Ct., supra.

Absence of interest: The writ of prohibition will not issue to restrain a judge from holding court at a certain place, on the ground that the act purporting to create the county of which such place is the county seat is unconstitutional, where the petitioner has no interest in the question of the constitutionality of such act, but his interest depends on his being a litigant in a case pending in the court of such judge, and no reason is apparent from the petition why the case in which he is interested can not as well be tried at the place in question as at any other place. Bellevue Water Co. v. Stockslager (1895) 4 I. 636, 43 P. 568.

§ 7269. [4996] **Alternative and peremptory writs.** The writs must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted. [R. S. § 4996.]

Hist. (See C. C. P. '81, § 753) R. S. § 4996, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1104: Kerr's C. ib.

N. D. Similar: C. C. P. § 8472.

§ 7270. [4997] **Application of preceding sections.** The provisions of the preceding sections from 7257 to 7266, both inclusive, apply to the proceedings for writ of prohibition. [R. S. § 4997].

Hist. (See C. C. P. '81, § 754) R. S. § 4997, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1105: Kerr's C. ib.

N. D. Similar: C. C. P. § 8473.

ARTICLE 4.

WRITS MAY ISSUE AND BE HEARD AT CHAMBERS.

§ 7271. [5000] **Issuance in vacation.** Writs of review, mandate and prohibition may be issued by any of the justices of the supreme court, or by any district judge, in vacation, and may, in the discretion of the justice or judge issuing the writ, be made returnable and a hearing thereon be had in vacation. [R. S. § 5000.]

Hist. (See C. C. P. '81, § 755) R. S. § 5000, reen. R. C. ib., reen. C. L. ib.

Cross ref. Writs may be issued and heard at chambers: § 6493.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1108; different as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8474.

ARTICLE 5.

RULES OF PRACTICE AND APPEALS.

§ 7272. [5005] **Application of general rules of practice.** Except as otherwise provided in this title, the provisions of this code relative to civil actions in the district court are applicable to and constitute the rules of practice in the proceedings mentioned in this title. [R. S. § 5005.]

Hist. (See C. C. P. '81, § 756) R. S. § 5005, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1109: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8475.

§ 7273. [5006] **Same: New trials and appeals.** The provisions of this code relative to new trials in, and appeals from, the district court, except in and so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title. [R. S. § 5006.]

Hist. (See C. C. P. '81, § 757) R. S. § 5006, reen. R. C. ib., reen. C. L. ib.

Cross ref. New trials: §§ 6887-94. Appeals: §§7152-72.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1110: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8476.

CHAPTER 265.

CONTESTING CERTAIN ELECTIONS.

Cross ref. Jurisdiction and proceedings in contest of state, executive and legislative offices: §§ 80-98.

Nature of contest proceedings: An election contest is of purely statutory origin, and is within the direction, control and management of the political power of the state, and the manner of conducting such a contest and of determining the questions arising thereunder is within the authority and control of the political power of the state government as distinguished from the judicial power and authority thereof. Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

§ 7274. [5026] **Grounds of contest.** The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested:

1. For malconduct, fraud, or corruption on the part of the judges of election in any precinct, township or ward, or of any board of canvassers, or any member of either board sufficient to change the result.
2. When the incumbent was not eligible to the office at the time of the election.
3. When the incumbent has been convicted of felony, unless at the time of the election he shall have been restored to civil rights.
4. When the incumbent has given or offered to any elector, or any judge, clerk or canvasser of the election, any bribe or reward in money, property or anything of value for the purpose of procuring his election.
5. When illegal votes have been received or legal votes rejected at the polls sufficient to change the result.
6. For any error in any board of canvassers in counting votes or in declaring the result of the election, if the error would change the result.
7. When the incumbent is in default as a collector and custodian of public money or property.
8. For any cause which shows that another person was legally elected. ['90-91, p. 57, § 132.]

Hist. '90-91, p. 57, § 132, reen. '99, p. 33, § 119, reen. R. C. § 5026, reen. C. L. ib.

Cross ref. Duplicate section limited to legislature and state executive offices: § 80.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5665.

N. D. See Pol. C. § 1046.

Cited: Toncray v. Budge (1908) 14 I. 621, 95 P. 26; (In brief of counsel) McGrane v. Nez Perce Co. (1910) 18 I. 717.

What may be contested: Directors of an irrigation district are public officers whose election may be contested under this section. Hertle v. Ball (1903) 9 I. 193, 72 P. 953.

Sufficiency of complaint: A complaint in an election contest which charges a number of omissions by the judges in permitting certain things to be done, but fails to charge that such acts were done with the knowledge or consent of the judges, is insufficient. Ball v. Campbell (1899) 6 I. 754, 59 P. 559.

A complaint to contest an election under this subdivision must allege and show facts which disqualify the incumbent, or person declared elected, at the time of the election. Bradfield v. Avery (1909) 16 I. 769, 102 P. 687, 23 L. R. A. (N. S.) 1228.

§ 7275. [5027] **Term "incumbent" defined.** The term "incumbent" in this title means the person whom the canvassers declare elected. ['90-91, p. 57, § 133.]

Hist. '90-91, p. 57, § 133, reen. '99, p. 33, § 120, reen. R. C. § 5027, reen. C. L. ib.

Cross ref. Duplicate section: § 81.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5666.

§ 7276. [5028] **Same: Misconduct of judges.** When the misconduct complained of is on the part of the judges of election, it shall not be held sufficient to set aside the election, unless the vote of the precinct, township or ward would change the result as to that office. ['90-91, p. 57, § 134.]

Hist. '90-91, p. 57, § 134, reen. '99, p. 33, § 121, reen. R. C. § 5028, reen. C. L. ib.

Cross ref. Duplicate section: § 82.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5667.

§ 7277. [5029] **Jurisdiction: Contests over judicial offices.** The supreme court shall hear and determine contests of the election of judges of the supreme court and judges of the district courts, and in case they shall disagree, the governor shall act with them in determining the contest, but no judge of the supreme court shall sit upon the hearing of any case in which he is a party. ['99, p. 33, § 124.]

Hist. '90-91, p. 57, § 137; am. '99, p. 33, § 124, reen. R. C. § 5029, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5671.

N. D. See Pol. C. § 1049.

Cited: Hertle v. Ball (1903) 9 I. 193, 72 P. 953.

Jurisdiction of supreme court: Under this section the supreme court has original jurisdiction in the matter of a contest of the election of a district judge. Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

§ 7278. [5030] **Same: Removal of county seats and special questions.** The district courts of the respective counties shall hear and determine contests of election in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county, and the proceedings therein shall be conducted as near as may be hereinafter provided for contesting the election of county officers. ['90-91, p. 57, § 138.]

Hist. '90-91, p. 57, § 138, reen. '99, p. 33, § 125, reen. R. C. § 5030, reen. C. L. ib.

Cross ref. Contests of right to sign petition in removal cases: § 654.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5672.

N. D. See Pol. C. § 1051.

Cited: Hertle v. Ball (1903) 9 I. 193, 72 P. 953.

§ 7279. [5031] **Same: County and precinct officers.** The district courts shall hear and determine contests of all other county, township and precinct officers, and officers of the cities and incorporated villages within the county. ['90-91, p. 57, § 139.]

Hist. '90-91, p. 57, § 139, reen. '99, p. 33, § 126, reen. R. C. § 5031, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5673.

Jurisdiction of district court: The district court has jurisdiction to hear and determine election contests involving the right to directorship in irrigation districts. Hertle v. Ball (1903) 9 I. 193, 72 P. 953.

§ 7280. [5032] **Who may contest elections.** The election of any person declared elected to any office, other than executive state officers and members of the legislature, may be contested by any elector of the state, judicial district, county, township, precinct, city or incorporated village in and for which the person is declared elected. ['90-91, p. 57, § 148.]

Hist. '90-91, p. 57, § 148, reen. '99, p. 33, § 135, reen. R. C. § 5032, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5682.

Cited: Hertle v. Ball (1903) 9 I. 193, 72 P. 953.

§ 7281. [5033] **Complaint and security for costs.** The contestants shall file in the proper court, within 20 days after the votes are canvassed, a complaint, setting forth the name of the contestant, and that he is an elector competent to contest such election; the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which complaint shall be verified by the affidavit of the contestant, that the causes set forth are true as he verily believes. The contestant must also file a bond, with security to be approved by the clerk of the court or district judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail. ['90-91, p. 57, § 149.]

Hist. '90-91, p. 57, § 149, reen. '99, p. 33, § 136, reen. R. C. § 5033, reen. C. L. ib.

N. D. See Pol. C. § 1053.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5683.

§ 7282. [5034] **Same: Specific allegations.** When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, if known, with the precinct, township or ward where they voted or offered to vote, shall be set forth in the complaint. ['90-91, p. 57, § 150.]

Hist. '90-91, p. 57, § 150, reen. '99, p. 33, § 137, reen. R. C. § 5034, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5684.

§ 7283. [5035] **Issuance of summons.** Upon the filing of such complaint summons shall issue against the person whose office is contested, in the same manner as in civil actions, and a copy of the complaint shall in all cases accompany the summons. ['90-91, p. 57, § 151.]

Hist. '90-91, p. 57, § 151, reen. '99, p. 33, § 138, reen. R. C. § 5035, reen. C. L. ib.

Cross ref. Service of summons: § 6676.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5685.

§ 7284. [5036] **Time for trial.** The cause shall stand for trial at the expiration of 30 days from the time of service of the summons and complaint, if the court shall then be in session; otherwise, on the first day of the next term thereafter. ['90-91, p. 57, § 152.]

Hist. '99-91, p. 57, § 152, reen. '99, p. 33, § 139, reen. R. C. § 5036, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5686.

§ 7285. [5037] **Postponement of trial.** The trial shall proceed at the time appointed, unless postponed for good cause shown by affidavit, the terms of which postponement are in the discretion of the court. ['90-91, p. 57, § 153.]

Hist. '90-91, p. 57, § 153, reen. '99, p. 33, § 140, reen. R. C. § 5037, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5687.

§ 7286. [5038] **Procedure in general.** The proceedings shall be similated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter; to compel the attendance of witnesses, swear them and direct their examination; to punish for contempt in its presence or by disobedience to its lawful mandate; to adjourn from day to day; to make any order concerning immediate costs, and to enforce its orders by attachment. It shall be governed by the rules of law and evidence applicable to the case. ['90-91, p. 57, § 154.]

Hist. '90-91, p. 57, § 154, reen. '99, p. 33, § 141, reen. R. C. § 5038, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5688.

§ 7287. [5039] **Same: Testimony.** The testimony may be oral, or by depositions taken as in other actions in the court where the case is

tried. Subpoena for witnesses may be issued as in other cases any time after the filing of the complaint. ['90-91, p. 57, § 155.]

Hist. '90-91, p. 57, § 155, reen. '99, p. 33, § 142, reen. R. C. § 5039, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5689.

§ **7288.** [5040] **Amendments.** The proceedings shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real grounds of contest. If any part of the causes are held insufficient they may be amended, but the incumbent will be entitled to an adjournment if he state on oath that he has a matter to answer to the amended causes, for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court deems reasonable; but if all the causes are held insufficient, and an amendment is asked the adjournment shall be at the cost of the contestant. If no amendment is asked for or made, or in case of entire failure to prosecute, the proceedings may be dismissed. ['90-91, p. 57, § 156.]

Hist. '90-91, p. 57, § 156, reen. '99, p. 33, § 143, reen. R. C. § 5040, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5690.

§ **7289.** [5041] **Form and service of process.** The style, form and manner of service of process and papers, and the fees of officers and witnesses shall be the same as in other cases in the court where the cause is tried. ['90-91, p. 57, § 157.]

Hist. '90-91, p. 57, § 157, reen. '99, p. 33, § 144, reen. R. C. § 5041, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5691.

§ **7290.** [5042] **Voters to testify as to qualifications.** The court may require any person called as a witness, who voted at such election, to answer touching his qualifications as a voter; and if he was not a qualified voter in the county where he voted, then to answer for whom he voted; and if the witness answer such questions no part of his testimony on that trial shall be used against him in any criminal action. ['90-91, p. 57, § 158.]

Hist. '90-91, p. 57, § 158, reen. '99, p. 33, § 145, reen. R. C. § 5042, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5692.

§ **7291.** [5043] **Inspection of ballots and poll books.** If an inspection of the ballots or poll books of any election district in this state shall become necessary for the determination of any election contest before any court, the presiding judge thereof may, by order naming the district or districts, require the proper officer to procure the same from the county auditor, or other person in whose possession or custody the same may be, and such clerk or person shall deliver the same to said officer, who shall deliver them unopened to such presiding judge. ['90-91, p. 57, § 159.]

Hist. '90-91, p. 57, § 159, reen. '99, p. 33, § 146, reen. R. C. § 5043, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5693.

§ **7292.** [5044] **Same: Return to county auditor.** The presiding officer shall open and inspect the same in open court, in the presence of the parties or their attorneys, and immediately after such inspection shall again seal them in an envelope and return them, by mail or otherwise, to the office of the county auditor in which they were at first required to be filed. ['90-91, p. 57, § 160.]

Hist. '90-91, p. 57, § 160, reen. '99, p. 33, § 147, reen. R. C. § 5044, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5694.

§ **7293.** [5045] **Liability for costs.** The contestant and the incumbent are liable to the officers and witnesses for the costs made by them

respectively. But if the election be confirmed, or the complaint be dismissed, or the prosecution fail, judgment shall be rendered against the contestant for costs, and if the judgment be against the incumbent, or the election be set aside, it shall be against him for costs. ['90-91, p. 57, § 161.]

Hist. '90-91, p. 57, § 161, reen. '99, p. 33, § 148, reen. R. C. § 5045, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5695.

§ 7294. [5046] **Form of judgment.** The judgment of the court in cases of contested election shall confirm or annul the election according to the right of the matter; or, in case the contest is in relation to the election of some person to an office, shall declare as elected the person who shall appear to be duly elected. ['90-91, p. 57, § 162.]

Hist. '90-91, p. 57, § 162, reen. '99, p. 33, § 149, reen. R. C. § 5046, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5696.

§ 7295. [5047] **Determination of tie vote.** If it appears that two or more persons have—or would have had if the legal ballots cast or intended to be cast for them had been counted—the highest and an equal number of votes for the same office, the persons receiving such votes shall decide by lot, in such manner as the court shall by written order direct, which of them shall be declared duly elected, and the judgment shall be entered accordingly. ['90-91, p. 57, § 163.]

Hist. '90-91, p. 57, § 163, reen. '99, p. 33, § 150, reen. R. C. § 5047, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5697.

§ 7296. [5048] **Order for possession.** When either the contestant or incumbent shall be in possession of the office by holding over, or otherwise, the court shall, if the judgment be against the party so in possession of the office and in favor of his antagonist, issue an order to carry into effect the judgment of the court, which order shall be under the seal of the court, and shall command the sheriff of the county to put the successful party into possession of the office without delay, and to deliver to him all books and papers belonging to the same; and the sheriff shall execute such order as other writs. ['90-91, p. 57, § 164.]

Hist. '90-91, p. 57, § 164, reen. '99, p. 33, § 151, reen. R. C. § 5048, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5698.

§ 7297. [5049] **Election declared void.** When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void. ['90-91, p. 57, § 165.]

Hist. '90-91, p. 57, § 165, reen. '99, p. 33, § 152, reen. R. C. § 5049, reen. C. L. ib. Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5699.

§ 7298. [5050] **Appeal and supersedeas.** The party against whom judgment is rendered in cases tried in the district court may appeal to the supreme court, and if the appellant be in possession of the office, such appeal shall not supersede the execution of the judgment of the court, as provided in the preceding section, unless he give a bond with security, to be approved by the court, in a sum to be fixed by the court, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that if the judgment appealed from be affirmed he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered, and such bond shall contain the express consent that judgment may be rendered against the sureties

on the appeal as provided in the following section. ['90-91, p. 57, § 166.]

Hist. '90-91, p. 57, § 166, reen. '99, p. 33, § 153, reen. R. C. § 5050, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5700.

N. D. See Pol. C. § 1055.

§ 7299. [5051] Judgment of affirmance. If upon the appeal the judgment be affirmed, the appellate court shall render judgment against the appellant and the sureties on his bond, or either of them, for the amount which the appellee is entitled to recover from the appellant on account of such contest, together with the costs; but in such case the sureties, or either of them, shall be entitled to produce and examine witnesses concerning the amount of such recovery. ['90-91, p. 57, § 167.]

Hist. '90-91, p. 57, § 167, reen. '99, p. 33, § 154, reen. R. C. § 5051, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5701.

§ 7300. [5052] Cost of bond on appeal. If upon appeal the appellant shall not be in possession of the office, he shall give bond, with security to be approved by the court where the judgment is rendered, conditioned to pay all costs that may be adjudged against him upon such appeal. ['90-91, p. 57, § 168.]

Hist. '90-91, p. 57, § 168, reen. '99, p. 33, § 155, reen. R. C. § 5052, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. Stat. vol. 2, § 5702.

CHAPTER 266.

SUMMARY PROCEEDINGS.

ARTICLE 1.

CONFESSION OF JUDGMENT WITHOUT ACTION.

§ 7301. [5060] Judgment by confession. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts. [R. S. § 5060.]

Hist. (See C. C. P. '81, § 776) R. S. § 5060, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1132; Kerr's C. ib.

N. D. Similar: C. C. P. § 8477.

Judgment upon stipulation: The general rule, that where judgment is entered upon the agreement and consent of parties appeal will not lie, does not apply to a case where such agreement and judgment is in contravention of the positive provisions of a statute. Ocobock v. Nixon (1899) 6 I. 552, 57 P. 309.

§ 7302. [5061] Statement to be filed. A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum.
2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due or to become due.
3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same. [R. S. § 5061.]

Hist. (See C. C. P. '81, § 777) R. S. § 5061, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1133; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8478.

Definition: A judgment entered pro forma by consent of the defendant, reserving the right of appeal, given in writing by his attorney, is not a judgment by confession within the meaning of this section. Harvey v. Bunker Hill etc. Co. (1890) 2 I. 765, 24 P. 30.

§ 7303. [5062] **Entry of judgment.** The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it and enter in the judgment book, a judgment of such court for the amount confessed, with $5 costs. The statement and affidavit with the judgment indorsed thereupon becomes the judgment roll. [R. S. § 5062.]

Hist. (See C. C. P. '81, § 778) R. S. § 5062, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "ten" for "five": C. C. P. 1872, § 1134: Kerr's C. ib.

N. D. Analogous: C. C. P. 8479.

§ 7304. [5063] **Same: In probate or justice's court.** In a probate or justice's court, where the court has the authority to enter the judgment, the statement may be filed with the court or justice, who must thereupon enter in his docket a judgment of his court for the amount confessed with $3 costs. If a transcript of such statement be filed with the clerk of the district court, a copy of the statement must be filed with it. [R. S. § 5063.]

Hist. (See C. C. P. '81, § 779) R. S. § 5063, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction of justices' courts to take judgment by confession: § 7110.

Comp. leg.—Cal. Same except "confined to justices'" courts, and "county clerk" for "clerk of district court": C. C. P. 1872, § 1135; Kerr's C. ib.

ARTICLE 2.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

§ 7305. [5068] **Mode of submission.** Parties to a question in difference which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case and render judgment thereon, as if an action were pending. [R. S. § 5068.]

Hist. (See C. C. P. '81, § 780) R. S. § 5068, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1138; Kerr's C. ib.

N. D. Identical: C. C. P. § 8480.

Cited: Platt v. Payette (1911) 19 I. 470, 114 P. 25.

Application of statute: This statute only applies to a controversy that is real, and is brought in good faith to determine the rights of the party; until the rights of the party have been settled by a judgment of the district court the appellate jurisdiction of the supreme court can not be invoked. Potter v. Talkington (1897) 5 I. 317, 49 P. 14.

Bringing in strangers: An order by which a stranger to a suit is made a party to an agreed case without his consent is void. Potter v. Talkington (1899) 6 I. 649, 59 P. 362.

§ 7306. [5069] **Entry of judgment.** Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission and a copy of the judgment constitute the judgment roll. [R. S. § 5069.]

Hist. (See C. C. P. '81, § 781) R. S. § 5069, reen. R. C. ib., reen. C. L. ib.

Cross ref. Entry of judgment: § 6899.

Comp. leg.—Cal. Same: C. C. P. 1372, § 1139; Kerr's C. ib.

N. D. Similar: C. C. P. § 8481.

§ 7307. [5070] **Appeal.** The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal. [R. S. § 5070.]

Hist. (See C. C. P. '81, § 782) R. S. § 5070, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1140; Kerr's C. ib.

N. D. Similar: C. C. P. § 8482.

Cited: Potter v. Talkington (1897) 5 I. 317, 49 P. 14.

ARTICLE 3.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

§ 7308. [5075] **Right to discharge.** Any person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged therefrom upon the conditions in this chapter specified. [R. S. § 5075.]

Hist. (See C. C. P. '81, § 783) R. S. § 5075, reen. R. C. ib., reen. C. L. ib.

Cross ref. Arrest in civil actions: §§ 6729-55; in justice's court: §§ 7082-7.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1143; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8483.

§ 7309. [5076] **Notice of application.** Such person must cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to the judge of the district court of the county in which such person may be confined; or, in case of his absence or inability to act, to the judge of the probate court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment. [R. S. § 5076.]

Hist. (See C. C. P. '81, § 784) R. S. § 5076, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county court" for "probate court": C C. P. 1872, § 1144; similar: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8484.

§ 7310. [5077] **Service of notice.** Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application. [R. S. § 5077.]

Hist. (See C. C. P. '81, § 785) R. S. § 5077, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1145; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8485.

§ 7311. [5078] **Examination of debtor.** At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate, and property, and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed, or any part thereof, and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor. [R. S. § 5078.]

Hist. (See C. C. P. '81, § 786) R. S. § 5078, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or any part thereof" are omitted: C. C. P. 1872, § 1146: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8486.

§ 7312. [5079] **Interrogatories may be propounded.** The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner. [R. S. § 5079.]

Hist. (See C. C. P. '81, § 787) R. S. § 5079, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1147: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8486.

§ 7313. [5080] **Oath prior to discharge.** If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to wit: "I,....., do solemnly swear that I have not any estate, real or personal, to the amount of $50, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay or defraud my creditors, so help me God." [R. S. § 5080.]

Hist. (See C. C. P. '81, § 788) R. S. § 5080, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1148: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8487.

§ 7314. [5081] **Order of discharge.** After administering the oath the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause. [R. S. § 5081.]

Hist. (See C. C. P. '81, § 789) R. S. § 5081, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1149; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8488.

§ 7315. [5082] **Reapplication for discharge.** If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding 30 days, in the same manner as above provided, and the same proceedings must thereupon be had. [R. S. § 5082.]

Hist. (See C. C. P. '81, § 790) R. S. § 5082, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "10" for "30" days: C. C. P. 1872, § 1150: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8494.

§ 7316. [5083] **Discharge is final.** The prisoner after being so discharged is forever exempted from arrest or imprisonment for the same debt, unless he be convicted of having wilfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed. [R. S. § 5083.]

Hist. (See C. C. P. '81, § 791) R. S. § 5083, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1151: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8489.

§ 7317. [5084] **Judgment remains in force.** The judgment against any prisoner who is discharged remains in full force against any estate which may then, or at any time afterward during the life of the judgment, belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner in like manner as if he had never been committed. [R. S. § 5084.]

Hist. (See C. C. P. '81, § 792) R. S. § 5084, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "during the life of judgment" are omitted: C. C. P. 1872, § 1152: Kerr's C. ib.

N. D. Similar: C. C. P. § 8490.

§ 7318. [5085] **Discharge by order of plaintiff.** The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action. [R. S. § 5085.]

Hist. (See C. C. P. '81, § 793) R. S. § 5085, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1153: Kerr's C. ib.

N. D. Similar: C. C. P. § 8492.

§ 7319. [5086] **Advance of board money.** Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer on such commitment, sufficient money for the board of the prisoner, at the rate provided by law, for one week, and must make the like advance for every successive week of his imprisonment; and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor. [R. S. § 5086.]

Hist. (See C. C. P. '81, § 794, R. S. § 5086, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "support" for "board," and words "at the rate provided by law" omitted: C. C. P. 1872, § 1154: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8493.

ARTICLE 4.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY.

§ 7320. [5091] **Forcible entry defined.** Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows or other parts of a house, or by any kind of violence or circumstances of terror, enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out, by force, threats or menacing conduct, the party in possession. [R. S. § 5091.]

Hist. (See C. C. P. '81, § 795) R. S. § 5091, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Jus C. § 9069.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1159: Kerr's C. ib.

§ 7321. [5092] **Forcible detainer defined.** Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps possession of any real property, whether the same was acquired peacefully or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant. The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands. [R. S. § 5092.]

Hist. (See C. C. P. '81, § 796) R. S. § 5092, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Jus. C. § 9069.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1160: Kerr's C. ib.

§ 7322. [5093] **Unlawful detainer defined.** A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the

period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. Where he continues in possession in person, or by subtenants, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture: *Provided,* If the covenants and conditions of the lease, violated by the lessee, can not afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings similar to those prescribed in this chapter, to obtain possession of premises let to an undertenant, in case of his unlawful detention of the premises underlet to him.

4. A tenant or subtenant, assigning or subletting, or committing waste upon, the demised premises contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this chapter. [R. S. § 5093.]

Hist. (See C. C. P. '81, § 797) R. S. § 5093, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Termination of tenancy at will: § 5346.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1161; almost identical as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9069.

Right to serve notice: The fact that a lease reserves to the landlord an option to terminate the same upon service of a 30-day notice after breach of covenant by the tenant does not preclude the landlord from resorting to the remedy prescribed by this section in case the tenant fails to pay rent when due. Hunter v. Porter (1904) 10 I. 72, 77 P. 434.

Sufficiency of notice: A notice directed to a tenant signed by his landlord requiring the tenant to pay rent in the sum specified for a certain term or to deliver up possession of the .premises, .describing them, and stating that the landlord will institute legal proceedings to recover possession with treble rent in case of noncompliance with the notice, is sufficient under this section. Ib.

Effect of notice: The service of notice under this section together with the commencement of action for unlawful detainer, based on the tenant's failure to pay rent when due, does not primarily terminate or forfeit the lease, but the payment of rent due, together with interest, damages and costs at any time within five days after judgment, as provided, in § 7335, keeps the lease alive and saves it from forfeiture. Ib.

§ 7323. [5094] **Same: Service of notice.** The notices required by the preceding section may be served either:

1. By delivering a copy to the tenant personally; or,

2. If he be absent from his place of residence and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or, if such place of residence and business can not be ascertained, or a person of suitable age or discretion can not be found there, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the prop-

erty is situated. Service upon a subtenant may be made in the same manner. [R. S. § 5094.]

Hist. (See C. C. P. '81, § 798) R. S. § 5094, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1162; same as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9070.

Cited: Hunter v. Porter (1904) 10 I. 72, 77 P. 434.

§ **7324.** [5095] **Jurisdiction of district court.** The district court of the county in which the property, or some part of it, is situated, has jurisdiction of proceedings under this chapter. [R. S. § 5095.]

Hist. (See C. C. P. '81, § 799) R. S. § 5095, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" for "district": C. C. P. 1872, § 1163; different as amended: Kerr's C. ib.

§ **7325.** [5096] **Same: Of probate court.** The probate court of the county in which the property, or some part of it, is situated, has jurisdiction of proceedings under this chapter when the whole amount of the rent and damages claimed does not exceed $500. [R. S. § 5096.]

Hist. (See C. C. P. '81, § 800) R. S. § 5096, reen. R. C. ib., reen. C. L. ib.

§ **7326.** [5097] **Same: Of justices' courts.** Justices' courts have jurisdiction of proceedings under this chapter where the whole amount of rent and damages claimed does not exceed $300. [R. S. § 5097.]

Hist. (See C. C. P. '81, § 801) R. S. § 5097, reen. R. C. ib., reen C. L. ib.

§ **7327.** [5098] **Parties defendant.** No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the notice herein provided for was served, need be made parties defendant in the proceeding, nor shall any proceeding abate nor the plaintiff be nonsuited for the nonjoinder of any persons who might have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against them. Any person who shall become a subtenant of the premises or any part thereof after the service of notice as provided in this chapter shall be bound by the judgment. In case a married woman be a tenant or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action. [R. S. § 5098.]

Hist. (See C. C. P. '81, § 802) R. S. § 5098, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1164; as amended: Kerr's C. ib.

§ **7328.** [5099] **Parties generally.** Except as provided in the preceding section, the provisions of this code relating to parties to civil actions are applicable to this proceeding. [R. S. § 5099.]

Hist. (See C. C. P. '81, § 803) R. S. § 5099, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Substantially the same: C. C. P. 1872, § 1165: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9071.

§ **7329.** [5100] **Complaint.** The plaintiff in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover and describe the premises with reasonable certainty and may set forth therein any circumstances of fraud, force or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must

state the amount of such rent. Upon filing the complaint, a summons must be issued thereon returnable as in other cases. [R. S. § 5100.]

Hist. (See C. C. P. '81, § 804) R. S. § 5100, reen. R. C. ib., reen. C. L. ib.

Cross ref. Summons in district courts: § 6672; in probate and justices' courts: § 7065.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1166; similar in part as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9072.

§ 7330. [5101] **Arrest of defendant.** If the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant. [R. S. § 5101.]

Hist. (See C. C. P. '81, § 805) R. S. § 5101, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or justice" omitted: C. C. P. 1872, § 1168; same as amended: Kerr's C. ib.

§ 7331. [5102] **Judgment by default.** If, at any time appointed, the defendant do not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint. [R. S. § 5102.]

Hist. (See C. C. P. '81, § 806) R. S. § 5102, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1169: Kerr's C. ib.

Nature of defense: This section contemplates a simple defense to the charge of forcible or unlawful detainer and does not authorize the defendant to seek affirmative relief by way of cross complaint or counterclaim for unliquidated damages arising out of a breach of covenant by the lessor. Hunter v. Porter (1904) 10 I. 72, 77 P. 434.

§ 7332. [5103] **Trial by jury.** Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending. [R. S. § 5103.]

Hist. (See C. C. P. '81, § 808) R. S. § 5103, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1171; same as amended: Kerr's C. ib.

§ 7333. [5104] **Sufficiency of evidence: Defenses.** On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings. [R. S. § 5104.]

Hist. (See C. C. P. '81, § 809) R. S. § 5104, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1172: Kerr's C. ib.

§ 7334. [5105] **Amendment of complaint.** When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance shall be permitted upon account of such amendment unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor. [R. S. § 5105.]

Hist. (See C. C. P. '81, § 810) R. S. § 5105, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or unlawful" omitted: C. C. P. 1872, § 1173; similar: Kerr's C. ib.

§ 7335. [5106] **Judgment: Treble damages: Restitution.** If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment as here provided be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately. [R. S. § 5106.]

Hist. (See C. C. P. '81, § 811) R. S. § 5106, reen. R. C. ib., reen. C. L. ib.

Cross ref. Treble damages may be recovered in actions for forcible entry or unlawful detainer: § 6960.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1174; same as amended: Kerr's C. ib.

Cited: Hunter v. Porter (1904) 10 I. 72, 77 P. 434; (In brief of counsel) Dwyer v. Libert (1917) 30 I. 576, 167 P. 651.

§ 7336. [5107] **Pleadings must be verified.** The complaint and answer must be verified. [R. S. § 5107.]

Hist. (See C. C. P. '81, § 812) R. S. § 5107, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1175: Kerr's C. ib.

§ 7337. [5108] **Appeal as stay.** An appeal taken by the defendant does not stay proceedings upon the judgment unless the court so directs. [R. S. § 5108.]

Hist. (See C. C. P. '81, § 813) R. S. § 5108, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" inserted before "court"; C. C. P. 1872, § 1176; similar as amended: Kerr's C. ib.

§ 7338. [5109] **Rules of practice in general.** The provisions of this code relative to civil actions, appeals and new trials, so far as they are not inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter. [R. S. § 5109.]

Hist. (See C. C. P. '81, § 814) R. S. § 5109, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar C. C. P. 1872, § 1178: Kerr's C. ib.

Cross ref. New trials: §§ 6887-94. Appeals: §§ 7152-72.

CHAPTER 267.

ENFORCEMENT OF LIENS.

Cross ref. Liens: § 6340 et seq. Enforcement of other liens: Liens for service of sires: § 1906; water contracts on Carey act lands: § 3018 et seq.; transfer tax liens: § 3395; pledges: §§ 6396-6406; agister's liens: § 6412; liens for repair of personal property: § 6413.

ARTICLE 1.

LIENS OF MECHANICS AND MATERIAL MEN.

Cross ref. Employers to post and record statements for protection of mechanics: § 2311 et seq.

§ 7339. [5110] **Right to lien.** Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subconstractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: *Provided,* That the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter. ['93, p. 49, c. 1, § 1.]

Hist. '93, p. 49, c. 1, § 1, reen. '99, p. 147, c. 1, § 1, reen. R. C. § 5110, reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 1183; amended: Kerr's C. ib. Weeter L. Co. v. Fales (1911) 20 I. 255, 118 P. 289, Ann. Cas. 1913A 403.

Mont. Similar: Comp. Stats. § 1374. Weeter L. Co. v. Fales, supra.

N. D. Analogous: Civ. C. § 6614.

Ore. Identical: Hill's Ann. Laws § 3669. Valley L. & Mfg. Co. v. Nickerson (1907) 13 I. 682, 93 P. 24.

Wash. Analogous: Bal. Ann. C. § 5900.

Cited: (Concur op.) Salisbury v. Lane (1900) 7 I. 370, 63 P. 383; Utah Implement Vehicle Co. v. Bowman, 209 F. 942; Anderson v. Great Nor. Ry. Co. (1914) 25 I. 433, 441, 138 P. 127, Ann Cas. 1916C 191; Continental etc. Bank v. Pac. Coast P. Co. (1915) 222 F. 781, 138 C. C. A. 329; Re Bank of Nampa (1916) 29 I. 166, 157 P. 1117.

Nature of lien. The owner of a building can not be personally bound by the act of the contractor under this section. The charge becomes one purely in rem and runs against the buildings or structure only. Valley Lumber Co. Ltd. v. Nickerson (1907) 13 I. 682, 683, 93 P. 24.

This statute is based on the theory that whoever contributes labor or material whereby the real property of another is enhanced in value, shall be entitled to a lien upon the whole property in the sum due. The extent of the lien when he comes to foreclose it must be measured by the amount found due him on his contract at the time of filing his lien. Stoltz v. Armory Co. (1908) 15 I. 551, 99 P. 98, 20 L. R. A. (N. S.) 872.

The material man or laborer is given an absolute lien upon the structure or improvement in which the material was used or the labor done, if he files his claim within the time required by law. Weeter L. Co. v. Fales (1911) 20 I. 255, 118 P. 289, Ann. Cas. 1913A 403.

The intention of the parties with reference to the question of a lien is immaterial and nonessential. The essential fact is: Was the material furnished or the labor performed, and if so, was it furnished or performed in the manner and under the terms and conditions designated by the statute? If so, the party is entitled to a lien as a matter of law. Mine etc. Co. v. Idaho Con. Mines Co. (1911) 20 I. 300, 118 P. 301.

An absolute lien is granted direct upon the property, to the person who performs labor upon or furnishes materials to be used in the building, structure or other improvement, without reference to whether such person is an original contractor, a subcontractor, a laborer or a material man. Hill v. Twin Falls etc. Co. (1912) 22 I. 274, 125 P. 204.

Property subject to lien: A party constructing a branch or section of a new canal or performing labor thereon in its construction under a contract with the owner, is entitled to a lien upon such branch for any balance due him for such labor and need not claim a lien on the whole system of canals of which the branch is a part. Creer v. Cache Valley Canal Co. (1894) 4 I. 280, 38 P. 653.

In order to entitle one to a lien for materials furnished, the same must have

been used on a particular building; there can be no lien for materials furnished under a general sale. Colo. Iron Wks. v. Riekenberg (1896) 4 I. 705, 43 P. 681.

The term "mining claims" as used in this section, includes patented as well as unpatented mining ground. (Dis. op.) Salisbury v. Lane (1900) 7 I. 370, 63 P. 383.

Where a quartz mill is located upon and belongs to a mine and is worked as a part of the same, a laborer who works as an amalgamator in the mill and is employed generally in keeping the machinery in order, is entitled to a lien on the mine for the labor which he performs. Thompson v. Wise Boy Min. etc. Co. (1903) 9 I. 363, 74 P. 958.

Where material is furnished a contractor for work done on a city lot, under this section construed with § 5112, the lien therefor attaches to the lot, as the contractor is the agent of the owner. Shaw v. Johnston (1910) 17 I. 676, 107 P. 399.

Irrigation works constructed under the Carey act are subject to the mechanic's lien law. Continental etc. Bk. v. Corey Bros. Const. Co. (1913) 208 F. 976, 126 C. C. A. 64.

The performance of labor upon irrigation works authorizes a lien thereon. Hill v. Twin Falls etc. Co., supra.

The fact that the labor performed and material furnished for the construction, alteration and repair of any building, structure or other works was carried away by floods and high water without any fault of the man who performed the labor and furnished the material does not deprive the laboring man or material man from preferring his lien under the statute and such lien attaching to the real estate on which the work was done or improvement made. Chamberlain v. Lewiston (1912) 23 I. 154, 129 P. 1069.

Extent of lien: The rights of the lien claimant who is a contractor or subcontractor under the person, company or association which has a Carey act contract from the state will extend to all the rights, interests, claim and title of such company in and to the works and irrigation system and lands thereunder, but the lien claimant can not by foreclosure of his lien acquire any greater right than that possessed by such company or association. Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 I. 5, 93 P. 789.

Lien extends only to such right, title and interest as the owner had in the property at the time the lien attached. Smith v. Faris-Kesl Const. Co. (1915) 27 I. 407, 150 P. 25.

Owners' interest in mining claims is not lienable for work done at the instance of their tenant, unless they made him their agent within the meaning of the provisions of this section. Nicholson v. Smith, 31 I. 544, 174 P. 1008.

Nature of contract as affecting lien: A material man who furnished material for the erection of a building under two separate contracts can not tack one contract to the other by filing his claim of lien within the required time from the date of furnishing material pursuant to one of the contracts. Valley L. & Mfg. Co. v. Driessel (1907) 13 I. 662, 93 P. 765, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63; Mine etc. Co. v. Idaho Con. Mines Co., supra.

Where materials are furnished for the same building or improvement in installments and at intervals, and the parties intend them to be included in one account and settlement, the entire account will be treated as a continuous and connected transaction, and the time in which to file the lien begins to run from the date of the last item of the account. Valley L. & Mfg. Co. v. Driessel, supra.

The contractor being only a special agent of the owner, with limited power, his authority to bind the property benefited for the payment of the value of the material extends only to such material as is reasonably and ordinarily sufficient properly to construct or repair the building in accordance with the plans and specifications thereof, or in pursuance of the agreement and contract entered into between the owner and the builder. Valley Lumber Co. Ltd. v. Nickerson (1907) 13 I. 682, 683, 93 P. 24.

Lienable items: A lien may be filed to secure profits upon a contract when such profits are included in the contract. Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573.

A charge for the use of tools in construction work, for which the employer agrees to pay, is a lienable item. Ib.

Services performed as superintendent in superintending the construction of railroad work constitutes a lienable item. Ib.

A person employed as foreman and watchman of a mine does not perform services of a professional or supervisory character, so as to preclude him from being entitled to a lien for his services under this section. Ida. M. etc. Co. v. Davis (1903) 123 F. 396, 59 C. C. A. 200.

Lien will be allowed for material furnished and actually used and consumed in the construction of the building or other structure, irrespective of the fact that such use and consumption may not be in the main building or structure itself, but was necessarily incident to the carrying on of the principal work and discharging the contract. Chamberlain v. Lewiston (1912) 23 I. 154, 129 P. 1069.

A lien can not be allowed for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein. Ninneman v. Lewiston (1912) 23 I. 169, 129 P. 1073.

Waiver of lien: Where credit is given to a party in possession of a mining claim under an option to purchase and not to the owner, no lien is enforceable against the owner or his property. Steel v. Argen. Min. Co. (1895) 4 I. 505, 42 P. 585.

The intention to waive must clearly appear, and will not be presumed or implied. Smith v. Faris-Kesl Const. Co. (1915) 27 I. 407, 150 P. 25.

Attempted creation by trespasser: One who unlawfully goes into possession of mining property against the consent of the owner, can not create liens against it, un-

der this section. Idaho Gold Min. Co. v. Winchell (1899) 6 I. 729, 59 P. 533.

Parties defendant: Other lienors need not be made parties to a suit to foreclose a mechanic's lien unless the plaintiff claims priority over their liens. Continental etc. Bk. v. Corey Bros. Const. Co. (1913) 208 F. 976, 126 C. C. A. 64.

§ 7340. [5111] Liens on public buildings. Every subcontractor, laborer or other person, who performs labor, or furnishes material for any original contractor or subcontractor, to be used in the construction, alteration or repair of any building, machinery or other structure, for any county, city, town or school district, has a lien upon such building, machinery or structure, and all the provisions of this chapter respecting the securing and enforcing of mechanics' liens shall apply thereto, so far as applicable. ['93, p. 49, c. 1, § 2.]

Hist. '93, p. 49, c. 1, § 2, reen. '99, p. 147, c. 1, § 2, reen. R. C. § 5111, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Civ. C. § 6832.

Not repealed: '09, p. 165, S. B. 68 (§§ 5111a-b) in no way conflicts with this statute, but is merely an additional and cumulative remedy. Chamberlain v. Lewiston (1912) 23 I. 154, 129 P. 1069.

§ 7341. Contracts for public work: Bond for protection of laborers and material men. Any person or persons entering into a formal contract with the state, any county, city, town, school or irrigation district, or any quasi public corporation of the state, for the construction, alteration or repair of any public building, public work, or quasi public work, the contract price of which exceeds the sum of $200, shall be required before commencing such work, to execute the usual penal bond, in a sum equaling 60 per cent at least, of the contract price, to be approved by the officer, board or body authorized to make such contract, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract.

Any person, company or corporation who has furnished labor or material used in the construction, alteration or repair of any public building, public work or quasi public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be.

If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, the remainder shall be distributed pro rata among said interveners.

If no suit should be brought by the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit that labor or materials for the prosecution of such work has been supplied by him or them, and payment for it has not been made, be furnished, without cost to him or them, with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the

state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, for his or their use and benefit, against said contractor and his surety, and to prosecute the same to final judgment and execution.

Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later.

Provided, further, That where a suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later.

If the recovery on the bond should be inadequate to pay the amount found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court for distribution among said claimants and creditors, the full amount of the surety's liability, to-wit: the penalty named in the bond, less any amount which said surety may have had to pay to the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, by reason of the execution of said bond, and upon so doing, the surety will be relieved from further liability.

Provided, further, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto, notice by publication in some newspaper of general circulation, published in the county where the contract is being performed, for at least three successive weeks, the last publication to be at least one month before the time limited therefor. ['09, p. 165, S. B. 68, § 1.]

Hist. '09, p. 165, S. B. 68, § 1, reen. C. L. § 5111a.

Cumulative remedy: The remedy herein provided is cumulative to § 7340. Chamberlain v. Lewiston (1912) 23 I. 154, 129 P. 1069.

§ 7342. Same: Penalty for violation by public officers. Except when the contract price is $200 or less, it shall be unlawful for any officer of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, to allow any claim for money, or to pay out and disburse any money to any person on account of any contract for the construction, alteration or repair of any public building, public work, or quasi public work, until a good and sufficient bond, as provided in the foregoing section is furnished and provided. ['09, p. 165, S. B. 68, § 2.]

Hist. '09, p. 165, S. B. 68, § 2, reen. C. L. § 5111b.

§ 7343. [5112] **Lien for improving lots.** Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street in front of or adjoining the same, has a lien upon such lot for his work done or material furnished. ['93, p. 49, c. 1, § 3.]

Hist. '93, p. 49, c. 1, § 3, reen. '99, p. 147, c. 1, § 3, reen. R. C. § 5112, reen. C. L. ib.

Comp. leg.—Cal. Same except "and materials furnished" for "or material furnished": C. C. P. 1872, § 1184.

Wash. Analogous: Bal. Ann. C. § 5902.

Applied: If a contractor constructs a sidewalk in front of a city lot, on a street, he is, under § 7339, to be deemed the agent of the owner, and under this section a lien for materials furnished the contractor attaches to the lot. Shaw v. Johnston (1910) 17 I. 676, 107 P. 399.

§ 7344. [5113] **Land subject to lien.** The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if, at the commencement of the work or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owns less than a fee simple estate in such land, then only his interest therein is subject to such lien. ['93, p. 49, c. 1, § 4.]

Hist. '93, p. 49, c. 1, § 4, reen. '99, p. 147, c. 1, § 4, reen. R. C. § 5113, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1185; as amended: Kerr's C. ib.

N. D. Analogous: Civ. C. § 6823.

Wash. Analogous: Bal. Ann. C. § 5901.

Cited: Creer v. Cache Valley Canal Co. (1894) 4 I. 280, 38 P. 653; Steel v. Argen. Min. Co. (1895) 4 I. 505, 42 P. 585; Weeter L. Co. v. Fales (1911) 20 I. 255, 118 P. 289, Ann. Cas. 1913A 403; Nicholson v. Smith, 31 I. 544, 174 P. 1008.

Determination of necessary land: It is error for the court in decreeing the foreclosure of a mechanic's lien to fail to find the amount of land necessary for the convenient use of the property to be sold. Robertson v. Moore (1904) 10 I. 115, 77 P. 218.

Extent of lien: A lien may be foreclosed against an interest in real property less than that of a fee simple title, as whatever interest the debtor may have in the property may be foreclosed in an action brought for that purpose. Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 I. 5, 93 P. 789; Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573.

§ 7345. [5114] **Liens preferred claims.** The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or materials were commenced to be furnished. ['93, p. 49, c. 1, § 5.]

Hist. '93, p. 49, c. 1, § 5, reen. '99, p. 147, c. 1, § 5, reen. R. C. § 5114, reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1186; Kerr's C. ib.

N. D. See Civ. C. § 6822.

Wash. Analogous: Bal. Ann. C. § 5903.

Cited: Mine etc. Co. v. Idaho Con. Mines Co. (1911) 20 I. 300, 118 P. 301; Utah Implement Vehicle Co. v. Bowman, 209 F. 942; Continental etc. Bk. v. Pac. Coast P. Co. (1915) 222 F. 781, 138 C. C. A. 329.

Priorities: When mortgages and other liens are involved in the foreclosure of mechanic's and material men's liens, the time or date when the building was commenced, or the laborer began to work, or the material men commenced to furnish the material, must be taken into consideration in determining the priority of such liens over such mortgage lien. All liens for labor commenced, or materials commenced to be furnished prior to recording said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building. (Ailshie, J. dissents) Pacific States etc. Co. v. Dubois (1905) 11 I. 319, 83 P. 513.

Where the owner of property, after entering into a contract for the construction of certain irrigation works thereon, executes a trust deed to the property, securing bonds to raise funds wherewith to meet the obligation of the contract, work upon which had already been commenced, a mechanic's lien claimed by such contractor is superior in rank to the trust deeds securing the bonds, and there is no estoppel from claiming such priority where the construction company has done nothing to lead the bondholders to believe that their lien should be first. Continental etc. Bk. v. Corey Bros. Const. Co. (1913) 208 F. 976, 126 C. C. A. 64.

§ 7346. [5115] **Claim of lien.** Every original contractor claiming the benefit of this chapter must, within 90 days, and every other person must, within 60 days, after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or in case he cease to labor thereon before the completion thereof, then after he so ceases to labor or after he has ceased to labor thereon for any cause, or after he has ceased to furnish materials

therefor, or after the performance of any labor in a mine or mining claim, file for record with the county recorder for the county in which such property or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just. ['95, p. 48, c. 1, § 6.]

Hist. '93, p. 49, c. 1, § 6; am. '95, p. 48, c. 1, § 6, reen. '99, p. 147, c. 1, § 6, reen. R. C. § 5115, reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 1187; additional provisions as amended: Kerr's C. ib.

N. D. Analogous: Civ. C. § 6820.

Wash. Analogous: Bal. Ann. C. § 5904.

Cited: Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573; Steltz v. Armory Co. (1908) 15 I. 551, 99 P. 98, 20 L. R. A. (N. S.) 872; Weeter L. Co. v. Fales (1911) 20 I. 255, 260, 118 P. 289, Ann. Cas. 1913A 403; Utah Implement Vehicle Co. v. Bowman, 209 F. 942; Continental etc. Bk. v. Pac. Coast P. Co. (1915) 222 F. 781, 138 C. C. A. 329.

Time to file lien: A material man who contracts direct with the owner and has no privity of interest or contract with the contractor, is an original contractor and entitled to the time given to such contractors within which to file his lien. Colo. Iron Wks. v. Riekenberg (1894) 4 I. 262, 38 P. 651.

The fact that it was not shown that a claimant had ceased to perform his duties at the time of the filing of his claim for lien did not invalidate his claim. Ida. M. etc. Co. v. Davis (1903) 123 F. 396, 59 C. C. A. 200.

The time for filing a lien can not be extended by furnishing on a new contract or request additional articles and adding them to a completed account and statement of material furnished. Valley L. & Mfg. Co. v. Driesel (1907) 13 I. 662, 93 P. 765, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63.

Sufficiency of notice: The notice of lien must contain a direct and unequivocal allegation of the name of the owner; a notice headed "A and B, subcontractors and claimants, v. C. contractor, and D, owner," is insufficient. White v. Mullins (1892) 3 I. 434, 31 P. 801. A statement in a lien notice that the work was performed and the materials furnished upon a certain mining claim, "the property of the defendant," is not a sufficient compliance with this section. Steel v. Argen. Min. Co. (1895) 4 I. 505, 42 P. 585. A notice of claim of lien for the construction of a canal which states that a certain company is the name of the owner and is the reputed owner of the premises therein described, and caused the said canal to be constructed and excavated, is sufficient. Creer v. Cache Valley Canal Co. (1894) 4 I. 280, 38 P. 653.

A mechanic's lien for the construction of a canal need not charge or claim a lien upon the land or right of way. Ib. Where work is done upon a group of placer mining claims owned by the same person and commonly known under the same name, a description of the claims under such common name, together with a description of the place of location, is sufficient in a notice of lien. Phillips v. Salmon River Min. etc. Co. (1903) 9 I. 149, 72 P. 886.

The notice of lien should contain a statement of the demand, the name of the owner or reputed owner, if known, the name of the person by whom employed, a description of the property and must be verified. Robertson v. Moore (1904) 10 I. 115, 77 P. 218.

Description: The description is sufficient where the property can be identified by it. Shaw v. Martin (1911) 20 I. 168.

§ 7347. [5116] **Claims against two buildings.** In every case in which one claim is filed against two or more buildings, mines, mining claims, or other improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said buildings, mines, mining claims, or other improvement; otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings, or other improvements, or upon the land upon which the same are situated. ['93, p. 49, c. 1, § 7.]

Hist. '93, p. 49, c. 1, § 7, reen. '99, p. 147, c. 1, § 7, reen. § 5116, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1188; Kerr's C. ib.

N. D. Analogous: Civ. C. § 6818.

Wash. Analogous: Bal. Ann. C. § 5907.

Cited: Stelz v. Armory Co. (1908) 15 I. 551, 99 P. 98.

Filing blanket liens: Where a company owns three mining claims and a lien is

filed against all of them without specifying the amount due on each, such lien is postponed to other liens but is not void. Phillips v. Salmon River Min. etc. Co. (1903) 9 I. 149, 72 P. 886.

Where several claims and locations were owned and operated as one mine, as against the parties so uniting them, they would be treated as a single claim, and hence a lien for services was not ineffective for failure to describe the particular claim relative to which the services were rendered. Ida. M. etc. Co. v. Davis (1903) 123 F. 396, 59 C. C. A. 200.

§ 7348. [5117] **Record of lien claims.** The county recorder must record the claims mentioned in this chapter in a book kept by him for that purpose, which record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments. ['93, p. 49, c. 1, § 8.]

Hist. '93, p. 49, c. 1, § 8, reen. '99, p. 147, c. 1, § 8, reen. R. C. § 5117, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1189; Kerr's C. ib.

N. D. Analogous: Civ. C. § 6821.

Wash. Analogous: Bal. Ann. C. § 5905.

§ 7349. [5118] **Duration of lien.** No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced. ['93, p. 49, c. 1, § 9.]

Hist. '93, p. 49, c. 1, § 9, reen. '99, p. 147, c. 1, § 9, reen. R. C. § 5118, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1190; Kerr's C. ib.

N. D. See Civ. C. § 6825.

Wash. Analogous: Bal. Ann. C. § 5908.

Right as affected by limitation: This section and §§ 6670-1 provide the only limitations in the foreclosure of mechanics' liens, which are, first, that the proceedings must be commenced for the foreclosure of liens within six months after the claim of lien is filed, and, second, that a summons may be issued at any time within one year after the commencement of the action. Shaw v. Martin (1911) 20 I. 168, 117 P. 853.

The time limitation prescribed by this section makes the remedy a part of and conditions the right created. Unless suit is brought within the time limited, the lien itself ceases to exist. Continental etc. Bk. v. Pac. Coast P. Co. (1915) 222 F. 781, 138 C. C. A. 329.

Effect on lien holders not joined: Construed to mean that lien shall not continue unless proceedings are commenced in proper court "against the person against whose interest the lien is asserted." A mortgagee not made a party to the foreclosure suit is not bound by the judgment nor is the lien after the expiration of the statutory period of any effect as against the mortgagee's interest. Utah Implement Vehicle Co. v. Bowman, 209 F. 942.

The statute does not prescribe in terms who shall be made parties to the suit, but it necessarily means suit must be brought against all whose rights, estates or interests are claimed to be adverse and subordinate; otherwise they are not affected by it, and as to them the lien ceases to be effective after the expiration of the six months' limitation period. Continental etc. Bk. v. Pac. Coast P. Co., supra; D. W. Standrod & Co. v. Utah Implement-Vehicle Co. (1915) 223 F. 517, 139 C. C. A. 65.

§ 7350. [5119] **Recovery by contractor: Deduction of debts to subcontractors.** The original or subcontractor shall be entitled to recover, upon the claim filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished to him as aforesaid, of which claim of lien shall have been filed as required by this chapter, and in all cases where a claim shall be filed under this chapter for work done or materials furnished to any subcontractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the person indebted to the contractor may withhold from such contractor the amount of money for which claim is filed; and in case of judgment upon the lien, the person indebted in

the contract shall be entitled to deduct from any amount due or to become due by him to such contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due from him to such contractor, if the person indebted in the contract shall have settled with such contractor in full, he shall be entitled to recover back from such contractor any amount so paid by him in excess of the contract price, and for which such contractor was originally the party liable. ['93, p. 49, c. 1, § 10.]

Hist. '93, p. 49, c. 1, § 10, reen. '99, p. 147, c. 1, § 10, reen. R. C. § 5119, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5909.

Cited: Colo. Iron Wks. v. Riekenberg (1894) 4 I. 262, 38 P. 651; Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 789, 96 P. 573.

§ 7351. [5120] **Judgment to declare priority.** In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order:

1. All laborers, other than contractors or subcontractors.
2. All material men, other than contractors or subcontractors.
3. Subcontractors.
4. The original contractor.

And in case the proceeds of sale under this chapter shall be insufficient to pay all lienholders under it:

1. The liens of all laborers, other than the original contractor and subcontractor, shall first be paid in full, or pro rata if the proceeds be insufficient to pay them in full.

2. The lien of material men, other than the original contractor or subcontractor, shall be paid in full, or pro rata if the proceeds be insufficient to pay them in full.

3. Out of the remainder, if any, the subcontractors shall be paid in full, or pro rata if the remainder be insufficient to pay them in full, and the remainder, if any, shall be paid to the original contractor; and each claimant shall be entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court upon demand, at the return of the sheriff or other officer making the sale, showing such balance due. ['93, p. 49, c. 1, § 11.]

Hist. '93, p. 49, c. 1, § 11, reen. '99, p. 147, c. 1, § 11, reen. R. C. § 5120, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Civ. C. § 6822.

Wash: Analogous: Bal. Ann. C. § 5911.

Cited: Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 722, 95 P. 827.

Determination of priorities: This section applies to cases in which there are no intervening mortgage liens; where mortgage liens are involved the time or date when the building was commenced or the laborer began to work, or the material man commenced to furnish material, must be taken into consideration in determining the priority of such liens over the mortgage liens. (Ailshie, J. dissents) Pac. States etc. Co. v. Dubois (1905) 11 I. 319, 83 P. 513.

§ 7352. [5121] **Joinder of actions: Attorney's fees.** Any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's fees. ['93, p. 49, c. 1, § 12.]

Hist. '93, p. 49, c. 1, § 12, reen. '99, p. 147, c. 1, § 12, reen. R. C. § 5121, reen. C. L. ib.

Comp. leg.—Cal. Similar in part: C. C. P. 1872, § 1195; as amended, similar with additional provisions: Kerr's C. ib. Shaw v. Johnston (1910) 17 I. 676, 107 P. 399.

Cited: (Dis. op.) Pacific States etc. Co. v. Dubois (1905) 11 I. 319, 83 P. 513.

Constitutionality: The provision of this section which authorizes the recovery of attorney's fees is not class legislation and does not violate Const. I, 18, providing that justice shall be administered without

sale, etc. Thompson v. Wise Boy M. etc. Co. (1903) 9 I. 363, 74 P. 958.

Parties: Though parties are joined under this section, if the actions are individual, the parties will be recognized as separate in their respective rights. Hill v. Twin Falls etc. Co. (1912) 22 I. 274, 125 P. 204; Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 I. 5, 93 P. 789; Shaw v. Martin (1911) 20 I. 168, 117 P. 853.

Allowance of fees: Attorneys' fees are allowed in the foreclosure of mechanics' and laborers' liens. Robertson v. Moore (1904) 10 I. 115, 77 P. 218. But the lien can not be extended beyond the items specified by statute so as to include damages for protesting an acceptance of the balance due. Bradbury v. Idaho & Ore. L. I. Co. (1886) 2 I. 239, 10 P. 620.

Attorney's fees are not a part of the costs, and therefore recoverable, even though the amount of the judgment is less than $100. Shaw v. Johnston, supra.

Attorney's fees are an incident of the judgment and defendant is liable therefor. Smith v. Faris-Kesl Const. Co. (1915) 27 I. 407, 150 P. 25.

§ 7353. [5122] **Exemption of materials from execution.** Whenever materials shall have been furnished for use in the construction, alteration or repair of any buildings, or other improvement, such materials shall not be subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as, in good faith, the same are being applied to the construction, alteration or repair of such building, mining claim or other improvement. ['93, p. 49, c. 1, § 13.]

Hist. '93, p. 49, c. 1, § 13, reen. '99, p. 147, c. 1, § 13, reen. R. C. § 5122, reen. C. L. ib.

Comp. leg.—Cal. Similar: Kerr's C. § 1196.

Wash. Analogous: Bal. Ann. C. § 5914.

§ 7354. [5123] **Action to recover debt.** Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor. ['93, p. 49, c. 1, § 14.]

Hist. '93, p. 49, c. 1, § 14, reen. '99, p. 147, c. 1, § 14, reen. R. C. § 5123, reen. C. L. ib.

Comp. leg.—Cal. Same with additional provisions: C. C. P. 1872, § 1197; same as amended: Kerr's C. ib.

Wash. Analogous: Bal. Ann. C. § 5912.

Nature of judgment: Judgment foreclosing mechanic's lien is not a money judgment within § 7155. Naylor v. Lewiston etc. Ry. Co. (1908) 14 I. 722, 95 P. 827.

§ 7355. [5124] **Rules of practice and appeals.** Except as otherwise provided in this chapter, the provisions of this code relating to civil actions, new trials and appeals are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter: *Provided,* That the district courts shall have jurisdiction of all actions brought under this chapter. ['93, p. 49, c. 1, § 15.]

Hist. '93, p. 49, c. 1, § 15, reen. '99, p. 147, c. 1, § 15, reen. R. C. § 5124, reen. C. L. ib.

Cross ref. New trials: §§ 6887-94. Appeals: §§ 7152-72.

Comp. leg.—Cal. Similar to proviso, rest omitted: C. C. P. 1872, § 1198; Kerr's C. ib.

Cited: Utah Imp. Vehicle Co. v. Bowman, 209 F. 942; Shaw v. Martin (1911) 20 I. 168, 117 P. 853.

Nature of action: An action to foreclose a mechanic's lien is equitable in its nature and the court is not bound to submit any issue of fact to the jury; if it does so, it may disregard the verdict and findings and may enter a decree according to its own view of the evidence in the case. Idaho & Ore. L. I. Co. v. Bradbury (1889) 10 S. C. R. 177, 132 U. S. 509, 33 L. ed. 433, aff. 2 I. 239; Jensen v. Bumgarner (1913) 25 I. 355, 137 P. 529.

Sufficiency of complaint: A complaint for the foreclosure of a laborer's lien that sufficiently describes the property, fixes the time and manner of labor, the amount due, and that the lien was filed within the statutory time, together with the necessary requirements in ordinary suits in equity, is sufficient. Robertson v. Moore (1904) 10 I. 115, 77 P. 218.

ARTICLE 2.

LOGGERS' LIENS.

Note: Liens secondary to those in this article provided, were authorized for the benefit of those furnishing food supplies to logging camps by '11, c. 226, p. 727. The act was held unconstitutional. (Stewart, J. dissenting) Anderson v. G. N. Ry. Co. (1914) 25 I. 433, 138 P. 127, Ann. Cas. 1916C 191; Donovan etc. Co. v. Tri-State Cedar Co. (1914) 25 I. 462, 138 P. 339.

Cross ref. Express reference to this article: Action for debt not impaired thereby: § 7374.

§ 7356. [5125] **Liens upon saw logs.** Every person performing labor upon, or who shall assist in obtaining or securing, saw logs, spars, piles, cord wood, or other timber, has a lien upon the same for the work or labor done upon, or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook shall be regarded as a person who assists in obtaining or securing the timber herein mentioned. ['93, p. 49, c. 2, § 1.]

Hist. '93, p. 49, c. 2, § 1, reen. '99, p. 147, c. 2, § 1, reen. R. C. § 5125, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5930.

Cited: Shultz v. Rose Lake L. Co. (1915) 27 I. 528, 149 P. 726.

Constitutionality: This section is not unconstitutional in that it imposes a hardship upon the owner of the property. Anderson v. G. N. Ry. Co. (1914) 25 I. 433, 138 P. 127, Ann. Cas. 1916C 191.

Construed: By this provision a person "performing work upon" any of the property herein enumerated is given the same lien as is given to a person who "assists in obtaining or securing" any such property. Ib.

This section confers a lien upon laborers who work in the employ of a contractor in moving a large quantity of railroad ties a distance of a couple of hundred feet from the place where they were piled upon the railroad company's right of way and loading them upon cars for transportation. (Sullivan, J. dissents.) Ib.

§ 7357. [5126] **Same: Lumber made from saw logs.** Every person performing labor upon, or who shall assist in manufacturing, saw logs into lumber, has a lien upon such lumber while the same remains at the mill where manufactured, whether such work or labor was done at the instance of the owner of such logs or of his agents. ['93, p. 49, c. 2, § 2.]

Hist. '93, p. 49, c. 2, § 2, reen. '99, p. 147, c. 2, § 2, reen. R. C. § 5126, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5931.

§ 7358. [5127] **Same: For purchase price upon logs.** Any person who shall permit another to go upon his timber land and cut thereon saw logs, spars, piles, cord wood or other timber, has a lien upon such logs, spars, piles, cord wood and timber, for the price agreed to be paid for such privilege, or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price. ['93, p. 49, c. 2, § 3.]

Hist. '93, p. 49, c. 2, § 3, reen. '99, p. 147, c. 2, § 3, reen. R. C. § 5127, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5932.

Cited: Schultz v. Rose Lake L. Co. (1915) 27 I. 528, 149 P. 726.

§ 7359. [5128] **Liens preferred to other liens.** The liens provided for in this article are prior to any other liens, and no sale or transfer of any saw logs, spars, piles, cord wood or other timber or manufactured lumber shall divest the lien thereon as herein provided, and such lien shall follow such property into any county in this state into which the same may be removed: *Provided,* Notice of such lien shall have been filed in such county. ['93, p. 49, c. 2, § 4.]

Hist. '93, p. 49, c. 2, § 4, reen. '99, p. 147, c. 2, § 4, reen. R. C. § 5128, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5933.

§ 7360. [5129] **Time for filing lien.** The person rendering the service or doing the work or labor named in sections 7356 and 7357 is only entitled to the liens as provided herein for services, work or labor, for the period of eight calendar months next preceding the filing of the claim, as provided in section 7362. ['93, p. 49, c. 2, § 5.]

Hist. '93, p. 49, c. 2, § 5, reen. '99, p. 147, c. 2, § 5, reen. R. C. § 5129, reen. C. L. ib. **Comp. leg.—Wash.** See Bal. Ann. C. § 5934.

§ 7361. [5130] **Same: Liens for purchase price.** The person granting the privilege mentioned in section 7358 is entitled to the lien as provided therein for saw logs, spars, piles, cord wood and other timber, cut during the eight months next preceding the filing of the claim, as provided in the next succeeding section. ['93, p. 49, c. 2, § 6.]

Hist. '93, p. 49, c. 2, § 6, reen. '99, p. 147, c. 2, § 6, reen. R. C. § 5130, reen. C. L. ib. **Comp. leg.—Wash.** See Bal. Ann. C. § 5935.

§ 7362. [5131] **Claim of lien.** Every person, within 60 days after the close of the rendition of the services, or after the close of the work or labor mentioned in sections 7356 and 7357, claiming the benefit hereof, must file for record with the county recorder of the county in which such saw logs, spars, piles, cord wood or other timber was cut, or in which such lumber was manufactured, or, if removed to another county, then in such county, a notice of claim containing a statement of his demand, and the amount thereof, after deducting, as near as possible, all just credits and offsets, with the name of the person by whom he was employed. The notice of claim shall state what such service, work or labor is reasonably worth; and it shall also contain a description of the property to be charged with the lien, sufficient for identification, with reasonable certainty, which notice of claim must be verified by the oath of himself, his agent or attorney, to the effect that the affiant believes the same to be true. Such notice of claim shall be substantially in the following form:

.....Claimant, vs.....

Notice is hereby given that.....of..... county, state of Idaho, claims a lien upon a.....of..... being about.....in quantity, which were cut in .....county, state of Idaho, are marked thus....., and are now lying in.....for labor performed upon and assistance rendered in.....said.....; that the name of the owner or reputed owner is.....; that .....employed said.....to perform such labor and render such assistance upon the following terms, to wit: The said.....agreed to pay the said..... for such labor and assistance.....; that said contract has been faithfully performed and fully complied with on the part of said....., who performed labor upon and assisted in.....said.....for the period of..... that said labor and assistance were so performed and rendered upon said.....between the.....day of..... and the.....day of....., and the rendition of said services was closed on the.....day of.....and .....days have not elapsed since that time; that the amount of claimant's demand for said services is.....; that no part thereof has been paid except....., and there is now due and unpaid thereon, after deducting all just credits

and offsets, the sum of....., in which amount he claims a lien upon said.....

State of Idaho,.....county, ss.:

....., being first duly sworn, on oath says that he is .....named in the foregoing claim, has heard the same read and knows the contents thereof, and believes the same to be true.....

Subscribed and sworn to before me this.....day of....., 19....

['93, p. 49, c. 2, § 7.]

Hist. '93, p. 49, c. 2, § 7, reen. '99, p. 147, c. 2, § 7, reen. R. C. § 5131, reen. C. L. ib.

Cross ref. Express reference to this section: Made applicable to farm laborers' claims of lien: § 7373. Lien on logs to be recorded in office of lumber inspector: § 2350.

Comp. leg.—Wash. See Bal. Ann. C. § 5936.

Filing with lumber inspector: Claim of lien not void as against parties thereto by reason of not being recorded by lumber inspector under § 2350. Schultz v. Rose Lake L. Co. (1915) 27 I. 528, 149 P. 726.

§ 7363. [5132] **Same: For purchase price.** Every person mentioned in section 7358 claiming the benefit hereof, must, within 90 days after such cutting, file for record with the county recorder of the county in which such saw logs, spars, piles, cord wood or other timber was cut, a claim in substance the same as provided in the next preceding section, and verified as therein provided. ['93, p. 49, c. 2, § 8.]

Hist. '93, p. 49, c. 2, § 8, reen. '99, p. 147, c. 2, § 8, reen. R. C. § 5132, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5937.

§ 7364. [5133] **Record of claims.** The county recorder must record any claim filed under this article in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments. ['93, p. 49, c. 2, § 9.]

Hist. '93, p. 49, c. 2, § 9, reen. '99, p. 147, c. 2, § 9, reen. R. C. § 5133, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5938.

§ 7365. [5134] **Duration of lien.** No lien provided for in this article binds any saw logs, spars, piles, cord wood or other timber, or any lumber, for a longer period than six calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court within that time to enforce the same. ['93, p. 49, c. 2, § 10.]

Hist. '93, p. 49, c. 2, § 10, reen. '99, p. 147, c. 2, § 10, reen. R. C. § 5134, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5439.

§ 7366. [5135] **Rules of practice and appeals.** Except as otherwise provided in this article the provisions of this code relating to civil actions, new trials and appeals are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter. ['93, p. 49, c. 2, § 11.]

Hist. '93, p. 49, c. 2, § 11, reen. '99, p. 147, c. 2, § 11, reen. R. C. § 5135, reen. C. L. ib.

Cross ref. Express reference to this section: Applicable to farm laborers' liens: § 7373. New trials: §§ 6887-94. Appeals: §§ 7152-72.

§ 7367. [5136] **Enforcement against whole or part of property.** Any person who shall bring a civil action to enforce the lien as herein provided for, or any person having a lien as herein provided for, who shall be made a party to any such civil action, has a right to demand that such lien be enforced against the whole or any part of the saw logs,

spars, piles, cord wood or other timber or manufactured lumber, upon which he has performed labor or which he has assisted in obtaining or securing, or which has been cut on his timber land during the eight months mentioned in sections 7360 and 7361, for all his labor upon, or for all his assistance in obtaining or securing, said logs, spars, piles, cord wood or other timber, or in manufacturing said lumber during the whole or any part of the eight months mentioned in section 7360, or for timber cut during the whole or any part of the eight months mentioned in section 7361 of this chapter. ['93, p. 49, c. 2, § 12.]

Hist. '93, p. 49, c. 2, § 12, reen. '99, p. 147, c. 2, § 12, reen. R. C. § 5136, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5943.

§ 7368. [5137] **Joinder of actions: Attorney's fees.** Any number of persons claiming liens against the same property under this article may join in the same action, and when separate actions are commenced, the court may consolidate them. The court shall also, as part of the cost, allow the moneys paid for filing and recording the claim, and a reasonable attorney's fee for each person claiming a lien. ['93, p. 49, c. 2, § 13.]

Hist. '93, p. 49, c. 2, § 13, reen. '99, p. 147, c. 2, § 13, reen. R. C. § 5137, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5946.

§ 7369. [5138] **Enforcement of judgments: Apportionment of proceeds.** In such civil action judgments must be rendered in favor of each person having a lien for the amount due to him, and the court or judge thereof shall order any property subject to the lien herein provided for, to be sold by the sheriff of the proper county in the same manner that personal property is sold on execution, and the court or judge shall apportion the proceeds of such sale for the payment of each judgment pro rata, according to the amount of such judgment. ['93, p. 49, c. 2, § 14.]

Hist. '93, p. 49, c. 2, § 14, reen. '99, p. 147, c. 2, § 14 reen. R. C. § 5138 reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5947.

§ 7370. [5139] **Property may be sold as personalty.** The court or judge may order any property subject to a lien as in this article provided, to be sold by the sheriff as personal property is sold on execution, either before or at the time judgment is rendered as provided in the section next preceding, and the proceeds of such sale must be paid into court to be applied as in such section directed. ['93, p. 49, c. 2, § 15.]

Hist. '93, p. 49, c. 2, § 15, reen. '99, p. 147, c. 2, § 15, reen. R. C. § 5139, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5948.

Cross ref. Sales on execution: §§ 6922-29.

§ 7371. [5140] **Interference with property subject to lien.** Any person who shall injure, impair or destroy, or who shall render difficult, uncertain or impossible of identification, any saw logs, spars, piles, cord wood or other timber, upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the amount secured by his lien, which may be recovered by civil action against such person. ['93, p. 49, c. 2, § 16.]

Hist. '93, p. 49, c. 2, § 16, reen. '99, p. 147, c. 2, § 16, reen. R. C. § 5140, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Civ. C. § 6857.

Wash. Analogous: Bal. Ann. C. § 5949.

Constitutionality: This section is not obnoxious to the 14th amendment to the federal constitution as depriving any one of his property without due process of law or denying him the equal protection of the laws. Anderson v. G. N. Ry. Co. (1914) 25 I. 433, 138 P. 127, Ann. Cas. 1916C 191.

Purpose of section: The purpose and intent of this section is to render every person who injures, destroys or removes any of the property therein described on which a lien exists liable for the amount of the claim held against the property, or if the property be of less value than the lien claimed, then it allows the claimant the damages which he has sustained by reason of the removal or destruction of the particular property. Ib.

ARTICLE 3.

FARM LABORERS' LIENS.

§ 7372. [5141] Right to lien. Any person who does any labor on a farm or land in tilling the same, or in cultivating, harvesting, threshing, or housing any crop or crops raised thereon, has a lien on such crop or crops for such labor. Such lien shall be a preferred and prior lien thereon to any crop or chattel mortgage placed thereon, and any mortgagee taking a chattel or crop mortgage on any crop or crops, upon which any person shall perform labor in cultivating, harvesting, threshing or housing said crop, shall take such mortgage subject to, and such mortgage shall be a subsequent lien to, the lien of the person or persons performing such labor as to a reasonable compensation for such labor: *Provided,* That the interest in any crop of any lessor or lessors of land where the premises are leased in consideration of a share in the crop raised thereon is not subject to such lien. ['03, p. 93, § 1.]

Hist. '93, p. 49, c. 3, § 1; am. '95, p. 137, § 1, reen. '99, p. 147, c. 3, § 1; am. '03, p. 93, § 1, reen. R. C. § 5141, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann. C. § 5957.

Definitions: The word "all" as used in this section means the entire quantity, and the section, in stating that the laborer shall have a lien on all the crop produced does not require him to file his lien on any particular or specified portion of the crop, or to designate any particular stack or stacks of hay or on what particular portion of the land the crop was produced or in what month it was harvested. Beckstead v. Griffith (1906) 11 I. 738, 83 P. 764.

The term "reasonable compensation" means: That which will fairly compensate the laborer when the character of the work and the effectiveness and ability entering into the service are considered. It can make no difference whether the service has been performed under an agreement for payment by the day, or the ton, or the acre, or any other standard of measurement. Chapman v. A. H. Averill Mach. Co. (1915) 28 I. 121, 152 P. 573.

Nature of work: One who performs labor in producing an agricultural crop is entitled to a lien, no matter what the work, labor or service may have been, so long as it is shown that such work is for a useful purpose, that the charges were reasonable and that he has not been paid, and such lien takes precedence over all other liens of whatever nature or description. Ib.

One employing his teams and machinery in harvesting and threshing a crop is entitled to a lien for the reasonable compensation for their use, as well as for his own labor. Ib.

§ 7373. Claim of lien: Enforcement. Any person claiming the benefit of this article must, within 60 days after the close of said work or labor, file for record with the county recorder of the county in which said work and labor was performed, a claim which shall be in substance in accordance with the provisions of section 7362, so far as the same may be applicable, which said claim shall be verified as in the said section provided, and said liens may be enforced in civil actions, in the same manner, as near as may be, as provided in section 7366: *Provided,* That where farm products are removed from the premises upon which the same were grown, and sold to shippers, wholesale dealers or manufacturers upon the open market in the ordinary course of trade before the filing of any such lien, such shippers, wholesale dealers or manufacturers shall not be liable for any farm laborer's lien, unless notice has been given them of persons holding claims described in this article; and said vendee shall be required to demand and receive a sworn, writ-

ten statement from the vendor giving the names and the amounts due to laborers entitled to liens, as provided in this article. Any such vendor who shall fail to make such statement when demanded or who shall make any false or misleading statement therein, shall be guilty of a misdemeanor, and shall, moreover, be liable to any laborer thus deprived of his lien for double the full value thereof, and to reasonable attorney's fees in case suit is instituted to recover the amount his due. ['15, c. 79, p. 192.]

Hist. '93, p. 49, c. 3, § 3, reen. '99, p. 147, c. 3, § 2, reen. R. C. § 5142; am. '15, c. 79, p. 192, reen. C. L. § 5142.

Comp. leg.—N. D. Analogous: Civ. C. § 6858.

Wash. Analogous: Bal. Ann. C. § 5959.

Sufficiency of description: A description in a farm laborer's lien notice which states that it is intended to cover the entire crop of hay produced for the year is sufficient and is not void for uncertainty. Beckstead v. Griffith (1906) 11 I. 738, 83 P. 764.

§ 7374. [5143] **Action to recover debt not impaired.** Nothing contained in this article or in article 2 shall be construed to impair or affect the right of any person to whom any debt may be due for work done, or for the price of any saw logs, spars, piles, cord wood or other timber to maintain a personal action to recover such debt against the person liable therefor. ['93, p. 49, c. 3, § 3.]

Hist. '93, p. 49, c. 3, § 3, reen. '99, p. 147, c. 3, § 3, reen. R. C. § 5143, reen. C. L. ib.

§ 7375. [5144] **Interference with property subject to lien.** Any person or persons who shall, after the filing for record in the county recorder's office in the county in which said labor was performed of a claim of lien as in this article provided, remove, dispose of, secrete or destroy, or who shall cause to be removed, disposed of, secreted or destroyed, or any person or persons who shall aid or assist in removing, disposing of, secreting or destroying, any or all of the crop or crops covered by such lien, without the written consent of the lien claimant first obtained, until the enforcement of said lien or the payment of such lien claimant for his labor, shall be guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the county jail for not less than one nor more than six months, or shall be fined not less than $25 nor more than $500, or shall suffer both such fine and imprisonment. [R. C. § 5144.]

Hist. '95, p. 137, § 2, reen. '99, p. 147, c. 3, § 4; am. R. C. § 5144, reen. C. L. ib.

ARTICLE 4.

CLAIMS FOR WAGES.

Cross ref. Employers to post and record statements for protection of laborers: § 2311 et seq.

§ 7376. [5145] **Wages of servants and laborers preferred.** In all assignments of property made by any person to trustees or assignees, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers for services rendered within 60 days next preceding such assignment, not exceeding $150, are preferred claims, and must be paid by such trustees or assignees before any creditor or creditors of the assignor or insolvent debtor: *Provided,* That whenever any such miner, mechanic, salesman, servant, clerk or laborer has filed a notice of lien against any property of the assignor, he may elect between the provisions of this section and his lien. ['93, p. 49, c. 4, § 1.]

Hist. '93, p. 49, c. 4, § 1, reen. '99, p. 147, c. 4, § 1, reen. R. C. § 5145, reen. C. L. ib.

Comp. leg.—Cal. Similar to "provided," rest omitted: C. C. P. 1872, § 1204; further amended: Kerr's C. ib.

Wash. Analogous: Bal. Ann. C. § 5981.

§ 7377. [5146] **Same: Death of employer.** In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant and laborer, for services rendered within the 60 days next preceding the death of the employer, not exceeding $150, rank in priority next after the funeral expenses; expenses of the last sickness; the charges and expenses of administering upon the estate, and the allowance of the widow and infant children, and must be paid before any other claims against the estate of the deceased person. ['93, p. 49, c. 4, § 2.]

Hist. '93, p. 49, c. 4, § 2, reen. '99, p. 147, c. 4, § 2, reen. R. C. § 5146, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1205; as amended: Kerr's C. ib.
Wash. Analogous: Bal. Ann. C. § 5982.

§ 7378. [5147] **Same: On execution and attachment.** In cases of executions, attachments and writs of similar nature, issued against any person or his property, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks or laborers, who have claims against the defendant for labor done upon the property levied on, may give notice of their claim and the amount thereof, sworn to by the person making the claim, to the creditor or his agent or attorney and to the officer executing any of such writs, at any time before the actual sale of the property levied upon; and, unless such claim is disputed by the debtor or creditor, such officer must pay to such person out of the proceeds of the sale of any property on which such person has bestowed labor, the amount he is entitled to receive for his services rendered within the 60 days next preceding the levy of the writ. If any or all other claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within 10 days for the recovery thereof, and must prosecute his action with due diligence or be forever barred from any claim of priority of payment thereof, and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action, and in case judgment be had for the claim or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim. ['93, p. 49, c. 4, § 3.]

Hist. '93, p. 49, c. 4, § 3, reen. '99, p. 147, c. 4, § 3, reen. R. C. § 5147, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1206; as amended: Kerr's C. ib.
Wash. Analogous: Bal Ann. C. § 5983.

§ 7379. [5148] **Debtor or creditor may dispute claim.** The debtor or creditor intending to dispute a claim presented under the provisions of the last section, shall, within 10 days after receiving notice of such claim, serve upon the claimant and the officer executing the writ, a statement in writing, verified by the oath of the debtor or the person disputing such claim, or his agent or attorney, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the 60 days next preceding the levy of the writ. If the claimant brings suit on a claim which is disputed in part only, and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him. ['93, p. 49, c. 4, § 4.]

Hist. '93, p. 49, c. 4, § 4, reen. '99, p. 147, c. 4, § 4, reen. R. C. § 5148, reen. C. L. ib.

Comp. leg.—Cal. Same except "or his agent or attorney" omitted: Kerr's C. § 1207.

§ 7380. Attorneys' fees in suits for wages. Whenever a mechanic, artisan, miner, laborer, servant or employee shall have cause to bring suit for wages earned and due according to the terms of his employ-

ment, and shall establish, by decision of the court or verdict of the jury, that the amount for which he has brought suit is justly due, and that a demand has been made, in writing, at least five days before suit was brought, for a sum not to exceed the amount so found due, it shall be the duty of the court before which the case shall be tried to allow to the plaintiff a reasonable attorney's fee, in addition to the amount found due for wages, to be taxed as costs of suit. ['15, c. 70, § 1, p. 180.]

Hist. '99, p. 394, § 1, reen. R. C. § 4919; am. '15, c. 70, § 1, p. 180, reen. C. L. § 5148a.

Cross ref. Attorney's fees a lien: § 6576.

§ 7381. Discharge of laborer without payment of wages: Penalty. Whenever any employer of labor shall hereafter discharge or lay off his or its employees without first paying them the amount of any wages or salary then due them, in cash, lawful money of the United States, or its equivalent, or shall fail or refuse on demand to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of his or its employees may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default until he is paid in full, without rendering any service therefor: *Provided, however,* He shall cease to draw such wages or salary 30 days after such default. ['11, c. 170, § 1, p. 565.]

Hist. '11, c. 170, § 1, p. 565, reen. C. L. § 5148b.

Constitutionality: This law is a legitimate exercise of the police power of the state, and is not an infringement upon the liberty of contract in respect of labor, and does not deprive the employer or the employee of the liberty or right to enter into any contract, nor take property from the employer without due process of law, nor single out any particular class of debtors or individuals, and is not unconstitutional as being in contravention of art. 1, § 10 of the constitution of the United States, or of § 1 of the 14th amendment to the constitution of the United States, or of art. 1, §§ 13 and 16 of the constitution of this state. Olson v. Idora Hill M. Co. (1916) 28 I. 504, 155 P. 291.

Construed: This and the following section must be reasonably construed. It was not the intention of the legislature to penalize the employer for failing to pay an unjust debt, nor for the failure to pay when the discharged laborer, after demanding payment, prevents compliance with the demand by his own conduct, nor to deny or preclude the right of the employer to interpose any valid counterclaim or defense to the claim of such laborer. Ib.

Applied: This law applies to employer of labor and not owner of property on which work was done. Fenn. v. Latour Creek Ry. Co. (1916) 29 I. 521, 160 P. 941.

It does not create a lien in favor of boardinghouse keeper, or person furnishing feed to horses, or for horse hire, to contractor, on property of railroad. Ib.

§ 7382. Same: Penalty a lienable item. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages as he would have been entitled to had he rendered services therefor in manner as last employed. ['11, c. 170, § 2, p. 565.]

Hist. '11, c. 170, § 2, p. 565, reen. C. L. § 5148c.

Cited: Olson v. Idora Hill M. Co. (1916) 28 I. 504, 155 P. 291.

CHAPTER 268.

CONTEMPTS.

Cross ref. Limitations on proceedings in civil actions: § 7204.

Construction: Since these provisions of the statute were copied from the California code, and had been construed by the highest court of that state at the time of their adoption by the legislature of this state, our supreme court is constrained to accept the construction placed upon them by the courts of the state from which they were taken. Re Niday (1908) 15 I. 559, 98 P. 845.

§ 7383. [5155] **Contempts defined.** The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceedings.

2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceedings.

3. Misbehavior in office or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service.

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

5. Disobedience of any lawful judgment, order or process of the court.

6. Assuming to be an officer, attorney, counsel of a court, and acting as such without authority.

7. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court.

8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience, by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer. [R. S. § 5155.]

Hist. (See C. C. P. '81, § 830) R. S. § 5155, reen. R. C. ib., reen. C. L. ib.

Cross ref. Contempt in disobedience of subpoena to appear before legislature: § 101. Contempt in disobedience of award of arbitrators in labor disputes: § 2289. Contempt in police courts in cities punished in same manner as in district courts: § 3896. Contempts in refusing to obey subpoenas issued by county commissioners in fixing water rates: § 5644. Judicial officers may punish for contempt: § 6504. Successive applications for orders after the same have been once refused: § 6507. Attorney practicing without license: § 6571. Violation of injunction and order of abatement: § 7049. Contempt in disobeying an order for the deposit of money in court: § 6825. Contempt in refusal to obey orders of a referee in supplementary

proceedings: § 6948. Contempts in justice's court: § 7127. Contempt in disobeying writ of mandate: § 7266. Disobedience to a subpoena and refusal to be sworn or answer a contempt: § 7987. Certain contempts a misdemeanor: § 8197. Contempt also punishable as crime: § 8603. Grand juror participating in deliberation after challenge sustained against him is guilty of contempt: § 8777. Disobedience to subpoena in criminal cases a contempt: § 9137.

Comp. leg.—Cal. Almost identical: C. C. P. 1872, § 1209; addition to subd. 12, as amended: Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. §§ 8178-80.

Cited: Harkness v. Hyde, 31 I. 784, 176 P. 885.

Liberty of the press: The free criticism of all decisions of the court is allowed and invited, but criticism ceases and contempt begins when malicious slander, vilification and defamation bring the courts and the administration of the law into dishonor and disrepute among the people. McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954.

Disobedience of void order: Disobedience of a void order is not punishable as contempt of court. MacWatters v. Stockslager (1917) 29 I. 803, 162 P. 671.

§ 7384. [5156] **Same: Reentry on real property.** Every person dispossessed or ejected from or out of any real property by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, reenters into or upon, or takes possession of, any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt the court or justice of the peace must immediately issue an alias process directed to the proper officer, and requiring him to restore the party entitled to the possession of such property under the original judgment or process, to such possession. [R. S. § 5156.]

Hist. (See C. C. P. '81, § 831) R. S. § 5156, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1210; similar in part as amended: Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

§ 7385. [5157] **Contempt in presence of court: Punishment.** When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer. [R. S. § 5157.]

Hist. (See C. C. P. '81, § 832) R. S. § 5157, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1211; Kerr's C. ib.

N. D. Similar: C. C. P. § 8181. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

Jurisdiction: Probate courts have jurisdiction in matters of contempt, as provided by the code, but where any alleged contempt is not committed in the immediate view and presence of the court or judge, no jurisdiction of the contempt is acquired until an affidavit has been presented to such court or judge as provided by this section. Harkness v. Hyde, 31 I. 784, 176 P. 885.

§ 7386. [5158] **Same: Out of court: Attachment.** When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause. [R. S. § 5158.]

Hist. (See C. C. P. '81, § 833) R. S. § 5158, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1212; Kerr's C ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. §§ 8182-3.

§ 7387. [5159] **Same: Provision for bail.** Whenever a warrant of attachment is issued, pursuant to this title, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement. [R. S. § 5159.]

Hist. (See C. C. P. '81, § 834) R. S. § 5159, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1213; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8185.

§ 7388. [5160] **Custody of defendant.** Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section. [R. S. § 5160.]

Hist. (See C. C. P. '81, § 835) R. S. § 5160, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1214; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8186.

§ 7389. [5161] **Manner of putting in bail.** When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon, or they will pay as may be directed the sum specified in the warrant. [R. S. § 5161.]

Hist. (See C. C. P. '81, § 836) R. S. § 5161, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1215; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8187.

§ 7390. [5162] **Return of warrant.** The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein. [R. S. § 5162.]

Hist. (See C. C. P. '81, § 837) R. S. § 5162, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1216; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8188.

§ 7391. [5163] **Hearing.** When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary. [R. S. § 5163.]

Hist. (See C. C. P. '81, § 838) R. S. § 5163, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1217; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8188.

Procedure: The legislature may prescribe any reasonable procedure to be followed in contempt prosecutions; but it has failed to provide any procedure, and under § 6511, when the procedure is not provided by the legislature any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code. McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954.

A proceeding to punish summarily for contempt is not a criminal action. A person charged with contempt is not entitled to a jury trial, and the statutes regarding informations, indictments and the trial of criminal cases are not applicable to contempt proceedings. Ib.

§ 7392. [5164] **Judgment: Penalty.** Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding $500, or he may be imprisoned not exceeding five days, or both. [R. S. § 5164.]

Hist. (See C. C. P. '81, § 839) R. S. § 5164, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1218; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8189.

Limitation on punishment: This section limits the punishment that may be imposed in contempt proceedings and the court can not assess damages in the form of a pecuniary indemnity to the party injured. Levan v. Richards (1896) 4 I. 667, 43 P. 574.

Power of punishment inherent in court: The power of a court to punish summarily for contempt is essential to its very existence. This power is not derived from the legislature. The legislature has no authority to restrict such power, so far as courts of record are concerned. McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954.

§ 7393. [5165] **Contempt consisting in omission.** When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he has performed it, and in that case the act must be specified in the warrant of commitment. [R. S. § 5165.]

Hist. (See C. C. P. '81, § 840) R. S. § 5165, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1219; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8191.

Applied to probate court: This statute is applicable to the probate court in a case where a witness refuses to appear or testify or to produce letters and documents ordered by the court. Re Niday (1908) 15 I. 559, 98 P. 845 .

§ 7394. [5166] **Nonappearance of defendant.** When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceeding. [R. S. § 5166.]

Hist. (See C. C. P. '81, § 841) R. S. § 5166, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1220; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. Analogous: C. C. P. § 8193.

§ 7395. [5167] **Same: Excuse for nonattendance.** Whenever, by the provisions of this title, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, is a sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance. [R. S. § 5167.]

Hist. (See C. C. P. '81, § 842) R. S. § 5167, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1221; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

N. D. See C. C. P. § 8201.

§ 7396. [5168] **Judgment is final.** The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive. [R. S. § 5168.]

Hist. (See C. C. P. '81, § 843) R. S. § 5168, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1222; Kerr's C. ib. Re Niday (1908) 15 I. 559, 567, 98 P. 845.

No appeal: Where the district court keeps within its jurisdiction in contempt proceedings and does not abuse its discretion, no appeal lies from its judgment. Levan v. Richards (1896) 4 I. 667, 43 P. 574.

Power to punish inherent in court: The inherent power of the court to punish can not be interfered with or abridged by the legislature, so far as courts of record are concerned. McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954.

CHAPTER 269.

VOLUNTARY DISSOLUTION OF CORPORATIONS.

§ 7397. [5185] **Dissolution on application.** A corporation may be dissolved by the district court of the county where its office or principal place of business is situated, upon its voluntary application for that purpose. [R. S. § 5185.]

Hist. (See C. C. P. '81, § 844) R. S. § 5185, reen. R. C. ib., reen. C. L. ib.

Cross ref. Appointment of receiver: § 6818.

Comp. leg.—Cal. Same except "county judge" for "district court": C. C. P. 1872, § 1227; as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

Cited: Security Savings etc. Co. v. Piper (1895) 4 I. 463, 40 P. 144; Stoltz v. Scott (1912) 23 I. 104, 129 P. 340.

§ 7398. [5186] **Contents of application.** The application must be in writing and set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members.

2. That all claims and demands against the corporation have been satisfied and discharged. [R. S. § 5186.]

Hist. (See C. C. P. '81, § 845) R. S. § 5186, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1228; Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

Cited: Security Savings etc. Co. v. Piper (1895) 4 I. 463, 40 P. 144; Stoltz v. Scott (1913) 23 I. 104, 129 P. 340.

§ 7399. [5187] **Same: Signature and verification.** The application must be signed by a majority of the board of trustees, directors or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action. [R. S. § 5187.]

Hist. (See C. C. P. '81, § 846) R. S. § 5187, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1229; Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

Cited: Security Savings etc. Co. v. Piper (1895) 4 I. 463, 40 P. 144.

§ 7400. [5188] **Same: Filing and notice.** If the judge is satisfied that the application is in conformity with this title, he must order it to be filed with the clerk, and that the clerk give not less than 30 days' notice of the application, by publication in some newspaper published in the county, and if there are none such, then by advertisements posted up in three of the principal public places in the county. [R. S. § 5188.]

Hist. (See C. C. P. '81, § 847) R. S. § 5188, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1230; similar as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

Notice essential to dissolution: No order of dissolution of a corporation can be entered until the notice required by this section is given. Security Savings etc. Co. v. Piper (1895) 4 I. 463, 40 P. 144.

§ 7401. [5189] **Objections to applications.** At any time before the expiration of the time of publication, any person may file his objections to the application. [R. S. § 5189.]

Hist. (See C. C. P. '81, § 848) R. S. § 5189, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1231; Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

§ 7402. [5190] **Hearing.** After the time of publication has expired the court may, upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application; and if all the statements herein made are shown to be true, he must declare the corporation dissolved. [R. S. § 5190.]

Hist. (See C. C. P. '81, § 849) R. S. § 5190, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "judge" for "court": C. C. P. 1872, § 1232; same as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

§ 7403. [5191] Judgment roll: Appeal. The application, notices and proofs of publication, objections (if any), and declaration of dissolution, constitute the judgment roll, and from the judgment an appeal may be taken as from judgments of the district courts. [R. S. § 5191.]

Hist. (See C. C. P. '81, § 850) R. S. § 5191, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal Same except "county" for "district courts": C C. P. 1872, § 1233; as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 4565.

CHAPTER 270.

EMINENT DOMAIN.

§ 7404. [5210] Uses for which authorized. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.

2. Public buildings and grounds for the use of any county, incorporated city, village, town or school district; canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city, village or town or for draining any county, incorporated city, village or town, raising the banks of streams, removing obstructions therefrom and widening, deepening or straightening their channels, roads, streets, alleys, and all other public uses for the benefit of any county, incorporated city, village or town or the inhabitants thereof.

3. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, steam, electric and horse railroads, reservoirs, canals, ditches, flumes, aqueducts and pipes, for public transportation supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for storing and floating logs and lumber on streams not navigable.

4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also, an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

5. Byroads leading from highways to residences and farms.

6. Telephones, telegraph and telephone lines, and lines used in transmitting electric current for power, lighting, heating or other purposes.

7. Sewerage of any incorporated city. ['03, p. 203, § 1.]

Hist. (See C. C. P. '81, § 851) R. S. § 5210; am. '03, p. 203, § 1, reen. R. C. § 5210, reen. C. L. ib.

Cross ref. Express references to this section: Actions by county for road overseers: § 1352. Municipalities given enlarged powers comparable to those herein enumerated:§ 7423.

Right of eminent domain: Const. I. 14. Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 155 P. 680.

Condemnation of right of way for highway: § 1352. Condemnation of land for ferries: § 1453. Right of way on state lands for ditches and reservoirs: § 2952. Right of way on state lands for railroad, telegraph, telephone and electric lines: § 2954. Right of way on state lands for ditches, tunnels, telephone and transmission lines constructed by the authority of the United States: § 2955. Power of eminent domain for sewerage works by municipalities: § 4121. Twin Falls v. Stubbs (1908) 15 I. 68, 96 P. 195.

Irrigation districts may exercise right of eminent domain: § 4410. Same: Joint districts: § 4441. Assessment of damages for property taken or injured by drainage

districts: § 4517. Corporations may acquire property as herein provided for the uses above mentioned: § 4757. Foreign corporations entitled to exercise the right of eminent domain: § 4779. Power of railroads to condemn property: § 4796. Railroad may condemn right of way to cross other lines of railroad: § 4806. Railroads may condemn lands for roads and highways when a change of route is made necessary by the construction of the road: § 4808. Right of way for mining purposes: § 5537. Condemnation proceedings to condemn right of way for mining purposes: §§ 5537-49. For mining railroads, tramways, ditches, flumes, etc.: § 5538. Right of way to cross mining claim with tunnels, cross cuts, etc.: § 5550. Right of way for drains: § 5652. Right of way for irrigation: §§ 5646-53.

Comp. leg.—Cal. Similar through subd. 5, with additional provision, rest omitted: C. C. P. 1872, § 1238; additional provisions as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8203. See also C. C. P. § 8202.

Cited: Postal Tel. Cable Co. of Ida. v. O. S. L. Co. (1900) 104 F. 623; Coeur d'Alene Min. Co. v. Woods (1908) 15 I. 26, 96 P. 210; Waters v. Dunn (1910) 18 I. 450, 110 P. 258; Thomas v. Boise City (1914) 25 I. 522, 138 P. 1110; Marsh M. Co. v. Inland Empire M. & M. Co. (1916) 30 I. 1, 165 P. 1128; Pac. Postal etc. Co. v. O. & C. R. Co. (Ore. 1908) 163 F. 972; Washington etc. R. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 S. C. R. 219.

Constitutionality: This section is not subject to the constitutional objection of depriving persons of property without due process of law. Baillie v. Larson (1905) 138 F. 177.

Purpose of condemnation and character of improvement: The condemnor must disclose the purpose for which he is seeking to condemn the property and the general nature and character of the improvement or structure he expects to erect to entitle him to maintain his condemnation proceedings. Idaho etc. Ry. v. Columbia etc. Synod (1911) 20 I. 568, 119 P. 60, 38 L. R. A. (N. S.) 497.

Public Uses.

Additional uses defined in constitution: This section, which limits the exercise of the right of eminent domain to the public uses therein enumerated, was an act of the territorial legislature, which did not specifically mention all the necessary uses of lands declared to be such by the constitution. The uses defined in the constitution can be enforced regardless of whether the legislature repeats the provisions of the constitution in defining for what public uses the right of eminent domain may be exercised. (Morgan, J. dissents) Blackwell Lbr. Co. v. Empire Mill Co. (1916) 28 I. 556, 155 P. 680.

Electric lines: The furnishing of electricity for lighting, transportation, power and other purposes is a public use for which land may be taken. Hollister v. State (1903) 9 I. 8, 71 P. 541.

A corporation organized to generate and furnish electric energy is a public service corporation authorized to exercise the right of eminent domain, though it does not render a service directly to the public, but furnishes electricity for distribution to the consumers by other persons and corporations. Wash. W. P. Co. v. Waters (1910) 186 F. 572.

This section recognizes that somewhere exists the power of condemning lands for power sites and power stations, for generating electrical current and electrical energy, and with it runs the implied power to do those things necessary to generate the electrical current that is to be transmitted over the lines. W. W. P. Co. v. Waters (1911) 19 I. 595, 115 P. 682.

Electric railroad: Electric railroad has power of eminent domain to acquire right of way. Boise Valley etc. Co. v. Kroeger (1909) 17 I. 384, 105 P. 1070, 28 L. R. A. (N. S.) 968.

Logging road: Where a temporary logging road is necessary to the complete development of the material resources of the state, the necessary use of land for a right of way is a public use and may be acquired as provided by the statute. Blackwell L. Co. v. Empire Mill Co., supra.

Reservoir: The construction of a dam to reservoir the waters for storage to be used for power purposes is a public use. Wash. W. P. Co. v. Waters, supra.

Sewerage system: A sewerage system is a public use within the meaning of this section. Twin Falls v. Stubbs (1908) 15 I. 68, 96 P. 195.

Stream floatability: The necessary use of lands for storage basins and the improvement of the floatability of nonnavigable streams may be obtained by the exercise of the power of eminent domain. Potlatch Lbr. Co. v. Peterson (1906) 12 I. 769, 88 P. 426. The phrase "streams not navigable" means all streams not navigable in fact, and the legislature can not impress the character of navigability on a stream that is not navigable. Ib.

This section supplements a special act authorizing clearing and straightening of channels of navigable stream without specific provision for compensation. St. Joe Imp. Co. v. Laumierster (1910) 19 I. 66, 112 P. 683.

Telegraph right of way: This provision, standing alone, unaffected by other statutory enactments, confers upon a telegraph company the authority to condemn a right of way upon a right of way of a railway company, provided that it does not in any way interfere with the use to which the right of way is already dedicated. O. S. L. R. R. Co. v. Postal Tel. Cable Co. of Ida. (1900) 111 F. 842, 49 C. C. A. 663.

Use in another state: Condemnation can not be had in this state for the purpose alone of serving a public use in another state, but where the use for which the condemnation is sought is a public use in this state, and will serve the citizens of this state, the fact that it may incidentally also benefit the citizens and industries of a neighboring state will not defeat the right of condemnation. Wash. W. P. Co. v. Waters, supra.

Right acquired: One who exercises the right of eminent domain in the improve-

ment of nonnavigable streams in the state for the purpose of floating logs and timber products, does not thereby secure the exclusive use and control of such streams but they are open to the use of any one who may have occasion to use them for any purpose. Potlatch Lbr. Co. v. Peterson (1906) 12 I. 769, 88 P. 426.

A person or corporation who exercises the power of eminent domain assumes certain obligations to the public, and the granting of that right carries with it the right of public supervision and reasonable control. Ib.

§ 7405. [5211] **What may be taken.** The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use. [R. S. § 5211.]

Hist. (See C. C. P. '81, § 852) R. S. § 5211, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1239; same as amended: Kerr's C. ib.

N. D. Identical: C. C. P. § 8204.

Cited: Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210; Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674; Tobey v. Bridgewood (1912) 22 I. 566, 585, 127 P. 172; Wash. W. P. Co. v. Waters (1910) 186 F. 572.

Fee Simple: When taken: Since a dam is a permanent structure a fee simple title must be taken in condemnation proceedings against the land on which the dam is to be located. (Dis. op.) Hollister v. State (1904) 9 I. 651, 77 P. 339.

In condemnation of state school lands for reservoir, condemnor may take a fee simple title, but he is not compelled to. (Morgan, J., in con. op. holds only easement may be taken; Budge, J., dissents.) Idaho-Iowa etc. Co. v. Fisher (1915) 27 I. 695, 151 P. 998.

Limitation of time of use: Where condemnor will not use logging road more than year, court will limit the use of property taken. Blackwell L. Co. v. Empire Mill Co. (1916) 29 I. 421, 160 P. 265.

§ 7406. Private property defined. The private property which may be taken under this title includes:

1. All real property belonging to any person.

2. Lands belonging to the government of the United States, to this state, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section 7404, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owners thereof, when necessary, but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law. ['11, c. 75, § 1, p. 229.]

Hist. (See C. C. P. '81, § 853) R. S. § 5212, reen. R. C. ib.; am. '11, c. 75, § 1, p. 229, reen. C. L. § 5212.

Cross ref. Express reference to this section: Court to regulate common use mentioned in subd. 5: § 7413.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1240; am. Kerr's C. ib.,

N. D. Similar: C. C. P. § 8205.

Cited: (In dis. op.) Blackwell Lbr. Co. v. Empire Mill Co. (1916) 28 I. 556, 587, 155 P. 680; Marsh M. Co. v. Inland Empire M. & M. Co. (1916) 30 I. 1, 165 P. 1128; Wash. W. P. Co. v. Waters (1910) 186 F. 572.

Condemnation of state lands: This section taken in conjunction with '99, p. 381, § 13, authorizes an action in the district court to condemn state lands for a public use. Hollister v. State (1903) 9 I. 8, 71 P. 541; Tobey v. Bridgewood (1912) 22 I. 566, 127 P. 172.

Condemnation of another right of way: The use of that portion of a railway right of way which is idle or vacant ground by a telegraph company for the erection of a telegraph line is of greater public utility than the use to which such portion of the right of way is put by the railroad company, and authorizes the condemnation thereof by the telegraph company. Postal Tel. Cable Co. of Ida. v. O. S. L. Co. (1900) 104 F. 623.

Where the effort is to condemn that part of a right of way not being actually used as a canal for carrying water, so that a larger canal may be constructed the question as to the proposed work being a more necessary public work does not arise. Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674.

Proceedings in equity: In a suit in equity to compel the joint use of a right of way already condemned by another, and to obtain the benefits thereof, on the theory that the condemnation was made for a public use, and that appellants are members of the public for whom such condemnation has been adjudged, there being no allegation showing the necessity for such common use, and nothing to show that appellants can not proceed and condemn a right of way, the relief prayed for will be denied. Headrick et al v. Larson et al (1907) 152 F. 93, 81 C. C. A. 317.

§ 7407. [5213] **What must appear to authorize condemnation.** Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. [R. S. § 5213.]

Hist. (See C. C. P. '81, § 854) R. S. § 5213, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1241: Kerr's C. ib.

N. D. Identical: C. C. P. § 8206.

Cited: Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210; Pyle v. Woods (1910) 18 I. 674, 111 P. 746; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; Wash. W. P. Co. v. Waters (1910) 186 F. 572.

Necessity: The use, necessity and other requirements of this section should be tried and found by the court before the commissioners are appointed. Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674.

Question of necessity is one of fact, and findings based on substantial conflict in the evidence will not be disturbed. Blackwell L. Co. v. Empire Mill Co. (1916) 29 I. 421, 160 P. 265.

Necessity is not measured by extent to which use is applied. Property devoted to or held for a public use is subject to power of eminent domain if right is given by constitutional provision or legislative enactment but it can not be taken to be used in same manner and for same purpose to which it is already applied or held if by so doing that purpose will be defeated. Marsh M. Co. v. Inland Empire M. & M. Co. (1916) 30 I. 1, 165 P. 1128.

Subsequent condemnations: This section by implication authorizes a second condemnation, and under it a telegraph company may condemn a right of way for its line over the right of way of a railroad, where the court finds that it is necessary and that it will not interfere with the use of the property for the purpose of the railroad, and that the second use is more necessary than the first. O. S. L. R. Co. v. Postal Tel. Cable Co. of Idaho (1901) 111 F. 842, 49 C. C. A. 663; Pac. Postal etc. Co. v. O. & C. R. Co. (Ore. 1908) 163 F. 972.

Necessity: If a reasonable although not an absolute necessity exists to take property for public use, it is sufficient. Marsh M. Co. v. Inland Empire M. & M. Co., supra.

§ 7408. [5214] **Survey and location of land required.** In all cases where land is required for public use the state or its agents in charge of such use may survey and locate the same, but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this title. The state or its agents in charge of such public use, may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause for action in favor of the owners of the land, except for injuries resulting from negligence, wantonness or malice. [R. S. § 5214.]

Hist. (See C. C. P. '81, § 855) R. S. § 5214, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1242; Kerr's C. ib.

N. D. Analogous: C. C. P. § 8207.

Cited: Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210; Wash. W. P. Co. v. Waters (1910) 186 F. 572.

§ 7409. [5215] Jurisdiction in district court. All proceedings under this title must be brought in the district court for the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon. [R. S. § 5215.]

Hist. (See C. C. P. '81, § 856) R. S. § 5215, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1243; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8208.

Cited: Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674; (In brief of counsel) Pyle v. Woods (1910) 18 I. 674; (In brief of counsel) C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; Wash. W. P. Co. v. Waters (1910) 186 F. 572; Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 111 C. C. A. 221.

§ 7410. [5216] Complaint. The complaint must contain:

1. The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route and termini, and must be accompanied with maps thereof.

5. A description of each piece of land sought to be taken, and whether the same includes the whole, or only a part, of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties.

6. In all cases where the owner of the lands sought to be taken resides in the county in which said lands are situated, a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefor, or settlement of such damages; but in all other cases these facts need not be alleged in the complaint, or proved. ['07, p. 322, § 1.]

Hist. (See C. C. P. '81, § 857) R. S. § 5216; am. '07, p. 322, § 1, reen. R. C. § 5216, reen. C. L. ib.

Comp. leg.—Cal. Substantially same through subd. 5, subd. 6 omitted: C. C. P. 1872, § 1244; as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 8220.

Cited: Canyon Co. v. Toole (1902) 8 I. 501, 69 P. 320; Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210; Pyle v. Woods (1910) 18 I. 674, 111 P. 746; Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 111 C. C. A. 221.

Nature of condemnation action: The action in condemnation is purely an action to determine the value of the property sought to be taken. No title can pass to the condemner until after the payment of the value of the property has been made. Ryan v. Weiser Valley Land etc. Co. (1911) 20 I. 288, 118 P. 769.

Sufficiency of complaint: In general: The complaint in condemnation proceedings must substantially comply with the requirements of this section, but in ascertaining whether or not there is such a compliance the same rule will be applied as in the consideration of the sufficiency of other pleadings. Hollister v. S. (1904) 9 I. 651, 77 P. 339. Unless the complaint in condemnation proceedings contains substantially every fact required by this section, the court acquires no jurisdiction over a defaulting defendant. (Dis. op.) Ib.

Same: Description of land: The description of the land sought to be taken for a public use must be such that from it the number of square feet, yards or rods or the number of acres sought to be taken may be ascertained. (Dis. op.) Ib.

In an action brought to condemn a right of way through a farm or a legal subdivision, such right of way should be described in the complaint by such subdivision, but in an action to condemn a

right of way on an established railroad right of way, the locus of which is accurately fixed by survey of which there are accessible records, a complaint is sufficiently specific when it describes the railroad right of way in general terms, giving the termini and the counties through which it runs. Postal Tel. Cable Co. of Idaho v. O. S. L. Rr. Co. (1900) 104 F. 623.

Same: Designation of owners: A complaint in condemnation proceedings which fails to allege that the defendants are the owners of the land sought to be taken, or that the names of the owners are unknown, is fatally defective. (Dis. op.) Hollister v. S. (1904) 9 I. 651, 77 P. 339.

Same: Purpose of condemnation: The condemnor must disclose the purpose for which he is seeking to condemn the property and the general nature and character of the improvement or structure he expects to erect to entitle him to maintain his condemnation proceedings. Idaho etc. Ry. v. Columbia etc. Synod (1911) 20 I. 568, 581, 582, 119 P. 60, 38 L. R. A. (N. S.) 497.

§ 7411. [5217] **Summons.** The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner. [R. S. § 5217.]

Hist. (See C. C. P. '81, § 858) R. S. § 5217, reen. R. C. ib., reen. C. L. ib.

Cross ref. Form and service of summons: §§ 6672, 6676.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1245: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8209.

Cited: Pyle v. Woods (1910) 18 I. 674, 111 P. 746; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 111 C. C. A. 221.

§ 7412. [5218] **Who may defend.** All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint. [R. S. § 5218.]

Hist. (See C. C. P. '81, § 859) R. S. § 5218, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1246: Kerr's C. ib.

N. D. Similar: C. C. P. § 8221.

Cited: Blackwell L. Co. v. Empire Mill Co. (1916) 28 I 556, 569, 155 P. 680.

§ 7413. [5219] **Powers of court.** The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section 7406.
2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.
3. To determine the respective rights of different parties seeking condemnation of the same property. [R. S. § 5219.]

Hist. (See C. C. P. '81, § 860) R. S. § 5219, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1247: Kerr's C. ib.

N. D. Similar: C. C. P. § 8222.

Cited: (In brief of counsel) C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

§ 7414. [5220] **Assessment of damages.** The court, jury or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.
2. If the property sought to be condemned constitutes only a part

of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be specially and directly benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad.

5. As far as practicable, compensation must be assessed for each source of damages separately. [R. S. § 5220.]

Hist. (See C. C. P. '81, § 861) R. S. § 5220, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "specially and directly," subd. 3, omitted: C. C. P. 1872, § 1248; as amended: Kerr's C. ib.

Mass. Similar: 1894 statute c. 548, § 8. Idaho etc. Ry. v. Columbia etc. Synod (1911) 20 I. 568, 586, 119 P. 60, 38 L. R. A. (N. S.) 497.

N. D. Similar: C. C. P. § 8223.

Cited: Spokane etc. Ry. Co. v. Lieuallen (1892) 3 I. 381, 29 P. 854; Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674; Pyle v. Woods (1910) 18 I. 674, 111 P. 746; (In brief of counsel) C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687; Idaho etc. Ry. Co. v. Columbia etc. Synod (1911) 20 I. 568, 119 P. 60, 38 L. R. A. (N. S.) 497; Thomas v. Boise City (1914) 25 I. 522, 138 P. 1110; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

Nature of condemnation action: The action in condemnation is purely an action to determine the value of the property sought to be taken. Ryan v. Weiser Valley Land etc. Co. (1911) 20 I. 288, 118 P. 769.

It is the duty of the court, jury or referee, before whom a hearing is had, to ascertain and assess the damages under the provisions of this section, and to make findings upon each of the elements of damages as described herein; in assessing such damages, if the benefits shall be less than the damages so assessed, the benefits should be deducted from the damages. Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88.

Separate parcels: It is not necessary that the jury find the value of each legal subdivision of the tract sought to be condemned. If, however, there is more than one parcel of land, or several separate parcels of tracts, each separated from the other, then it is necessary for the jury to determine the value of each separate tract or parcel. But where the tract is a single or consolidated tract, the value may be fixed as a single parcel or tract. Big Lost River Irr. Co. v. Davidson, supra.

Value: This section contemplates assessment of damages upon the basis of the market value of the property sought to be condemned. Portneuf-Marsh etc. Co. v. Portneuf Irr. Co. (1911) 19 I. 483, 114 P. 19; Tyson Creek R. Co. v. Empire Mill Co., 31 I. 580, 174 P. 1004.

"Value" is not what any one person would give for the land for his own particular use, but what could probably be obtained for it if a sale was desirable and a purchaser sought, applying the ordinary business methods to find him and to dispose of the property. Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 111 C. C. O. 221.

While evidence of the value for a specific purpose as an independent fact is inadmissible, a witness may in arriving at an estimate of the value take into consideration the most advantageous use to which the land may be applied, including the purpose for which it is sought. Ib.

Judgment: Upon damages being assessed by the court, jury or referee, under the provisions of this section, a judgment should be rendered by the court in the common, ordinary form for the recovery of money in favor of the defendant against the plaintiff, where damages are allowed. Such judgment is the final judgment mentioned in § 5223 and is a judgment in personam against the plaintiff for such damages. Big Lost River Irr. Co. v. Davidson, supra.

Compensatory benefits: Under this section increased transportation facilities are not special and direct benefits to the land not taken. Benefits which may be set off against lands not sought to be condemned must be such as relate to the land and not to the owner. Tyson Creek R. Co. v. Empire Mill Co., 31 I. 580, 174 P. 1004.

§ 7415. [5221] **Same: Date of accrual.** For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages. [R. S. § 5221.]

Hist. (See C. C. P. '81, § 862) R. S. § 5221, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 1249: Kerr's C. ib.

N. D. Similar: C. C. P. § 8224.

Cited: Pyle v. Woods (1910) 18 I. 674, 682, 111 P. 746; Portneuf-Marsh etc. Co. v. Portneuf Irr. Co. (1911) 19 I. 483, 114 P. 19; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

Measure of damages: The value of the land at the time it is taken, and not its value at the time of the trial, is the measure of damages, and it is error to admit evidence as to its value at the latter date. Spokane etc. Ry. Co. v. Lieuallen (1892) 3 I. 381, 29 P. 854.

Evidence of the discovery of mineral deposits upon lands sought to be condemned for railroad right of way after the issuance of summons is admissible for the purpose of enabling the jury to determine whether the market value of the land was affected thereby at the time of the issuance of the summons. In such cases it is not permissible to draw a distinction between actual value and market value. Tyson Creek R. Co. v. Empire Mill Co., 31 I. 580, 174 P. 1004.

Improvements: The improvements appertaining to the land sought to be condemned are assessed as a part of the realty, and the finding of the value of the realty includes the improvements. Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88.

A prospect hole on a placer claim is not an improvement in the sense in which the word is used in this section. Tyson Creek R. Co. v. Empire Mill Co., supra.

Interest. Under this section the owner is entitled to interest on the damages awarded for land taken from the date of the summons. Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 111 C. C. A. 221.

Subsequent damage: If the damages sustained are fixed as of the date of the issuance of the summons and the landowner receives that compensation it can make no difference to him how much damage or waste may thereafter be committed upon the property. Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046.

§ 7416. [5222] **Curing defective title.** If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as in this title prescribed. [R. S. § 5222.]

Hist. (See C. C. P. '81, § 863) R. S. § 5222, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1250: Kerr's C. ib.

N. D. Similar: C. C. P. § 8225.

Cited: Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

§ 7417. [5223] **Payment of damages.** The plaintiff must, within 30 days after final judgment, pay the sum of money assessed, but may, at the time of or before payment, elect to build the fences and cattle guards, and, if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court, in double the assessed cost of the same, to build such fences and cattle guards within eight months from the time the railroad is built on the land taken, and, if such bond is given, need not pay the cost of such fences and cattle guards. In an action on such bond the plaintiff may recover reasonable attorney's fees. [R. S. § 5223.]

Hist. (See C. C. P. '81, § 864) R. S. § 5223, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "eighteen" for "eight" months: C. C. P. 1872, § 1251: Kerr's C. ib. Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88.

N. D. Similar: C. C. P. § 8226.

Cited: (In brief of counsel) Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26; Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674; (In brief of counsel) C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687; (In brief of counsel) Pyle v. Woods (1910) 18 I. 674; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 425, 111 C. C. A. 221, 229.

Judgments in condemnation proceedings: In eminent domain proceedings the court enters two judgments; one in favor of the defendant for the damages assessed under § 7414, the other in favor of the plaintiff for condemnation of the property after the first judgment is paid, as provided in § 7419. Big Lost River Irr. Co. v. Davidson, supra.

§ 7418. [5224] **Same: Failure to make payment.** Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereo. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money can not be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff. [R. S. § 5224.]

Hist. (See C. C. P. '81, § 865) R. S. § 5224, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1252: Kerr's C. ib. Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88.

N. D. Similar: C. C. P. § 8227.

Cited: Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 128, 100 P. 1046, 18 Ann. Cas. 674; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

Personal judgment: Under this section a personal judgment is properly rendered against the plaintiff. Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 417, 111 C. C. A. 221; 190 F. 425, 111 C. C. A. 229.

The plaintiff is not left to his own discretion as to whether or not he will pay the judgment and leave the defendant's property charged with a liability to be taken, and the judgment paid at the will or convenience of the plaintiff, and to guard against such possible condition the legislature provided for a personal judgment and for means by which the same could be enforced. Big Lost River Irr. Co. v. Davidson, supra.

§ 7419. [5225] **Final order of condemnation.** When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified. [R. S. § 5225.]

Hist. (See C. C. P. '81, § 866) R. S. § 5225, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1253; Kerr's C. ib. Big Lost River Irr. Co. v. Davidson (1912) 21 I. 160, 121 P. 88.

N. D. Analogous: C. C. P. § 8228.

Cited: Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 128, 100 P. 1046, 18 Ann. Cas. 674; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

Judgments in condemnation proceedings: Under the provisions of this section and §§ 7417 and 7418 there are two judgments to be entered by the trial court; the first in favor of defendant for damages as assessed under the provisions of § 7414, and the second in favor of plaintiff for condemnation, describing the property and the purpose of condemnation, entered after the payment of the first judgment, as prescribed under this section. Big Lost River Irr. Co. v. Davidson, supra.

It is improper to render judgment of condemnation until the award of compensation has been paid. Weiser Valley L. & W. Co. v. Ryan (1911) 190 F, 425. 111 C. C. A. 229.

Title passes when: No title can pass the condemnor until after the payment of the value of the property has been made. Ryan v. Weiser Valley Land etc. Co. (1911) 20 I. 288, 118 P. 769.

§ 7420. [5226] **Possession by plaintiff: Payment of damages: Appointment of commissioners.** At any time after trial and judgment entered, or pending an appeal from the judgment to the supreme court, whenever the plaintiffs shall have paid into the court for the defendant the full amount of the judgment, and such further sum as shall be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less than 10 days, authorize the plaintiff, if already in possession, to continue therein, and if not,

to take possession of and use the property during the conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof.

The defendant who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter, upon obtaining an order therefor from the court. It shall be the duty of the court, or the judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him, be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. The court may order the money to be deposited in the county treasury, and in such case it shall be the duty of the treasurer to receive all such moneys, duly receipt for, and safely keep the same, and to pay out such moneys in such manner, and at such times, as the court or judge thereof may direct, and for such duty he shall be liable to the plaintiff upon his official bond: *Provided further,* That at any time after the commencement of proceedings in the district court, as provided for in this title, to condemn property, and upon 10 days' notice to the adverse party, the district court or the judge thereof may appoint three disinterested persons, who shall be residents of the county in which the land is situated, as commissioners to assess and determine the damages that the defendant will sustain by reason of the condemnation and appropriation of the property described in the complaint, and the said commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath to faithfully and impartially discharge their duties as such commissioners. Such commissioners shall give at least five days' notice in writing of the time and place where they will meet for the purpose aforesaid, which place, unless agreed upon between the two parties, shall be within five miles of the premises aforesaid. At the time and place mentioned in such notice they may administer oaths to witnesses, and hear the evidence offered by the parties, and, after viewing the premises, shall report in writing their proceedings and the damages which they find the defendant will sustain by reason of the condemnation and appropriation of said property, which report shall be signed by said commissioners, or a majority thereof, and be filed in the office of the clerk of the district court in which such action shall be pending; and at any time after payment to the defendant of the amount so assessed and found by said commissioner as damages, or in case the defendant shall refuse to receive the same, then at any time after such amount shall be deposited with the clerk of the said court to abide the result of said action, the plaintiff may enter upon, and take possession of and use, the property mentioned in the complaint, until the final conclusion of the litigation concerning the same: *Provided further,* That at the time of making such payment to the defendant of the amount so assessed and found by said commissioners as damages, or in case the defendant shall refuse to receive the same, then at any time after such amount shall be deposited with the clerk of the said court to abide the result of said action, the plaintiff may elect to build the fences, cattle guards and other structures by said commissioners found to be necessary, and may execute to the defendant a bond as provided in section 7417. ['88-89, p. 16.]

Hist. (See C. C. P. '81, § 867) R. S. § 5226; am. '88-89, p. 16, reen. R. C. § 5226, reen. C. L. ib.

Cross. ref. Appraisers may be appointed at chambers: § 6493.

Comp. leg.—Cal. See C. C. P. 1872, § 1254; further amended: Kerr's C. ib. Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

N. D. Analogous: C. C. P. § 8229.

Cited: Ryan v. Weiser Valley Land etc. Co. (1911) 20 I. 288, 118 P. 769; Tobey v. Bridgewood (1912) 22 I. 566, 583, 127 P. 172; McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542; Thomas v. Boise City (1914) 25 I. 522, 138 P. 1110; Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; 29 I. 421, 437, 160 P. 265.

Constitutionality: This section is not in violation of either Const. I. 14, or Const. 1, 7. Under the constitution, private property can not be taken for a public use without payment, in advance of the taking, of a just compensation therefor; but a tender of the amount assessed, in the manner prescribed by law; or, in case of his refusal to accept the same, a payment thereof into court to await the determination of the action is a sufficient compliance with the constitutional requirement as to payment to authorize the court in letting a party into possession of the property that he seeks to condemn. Portneuf Irr. Co. v. Budge (1909) 16 I. 116, 100 P. 1046, 18 Ann. Cas. 674.

Jurisdiction: Under our statute granting the power of eminent domain, the district court, or judge thereof, has jurisdiction to determine the right or necessity for the exercise of that right. It may pass on the competency of the testimony offered and order the appointment of commissioners; and its action may be reviewed on an appeal, but can not be reviewed on certiorari. Coeur d'Alene M. Co. v. Woods (1908) 15 I. 26, 96 P. 210.

This section confers all the jurisdiction necessary to a hearing and assessment of damages; and the means necessary to carry the proceedings into effect are given by § 6511. Pyle v. Woods (1910) 18 I. 674, 111 P. 746.

Same: Condition precedent: The use, necessity and all the requirements of § 7407, should be tried and found by the court before commissioners are appointed. Pyle v. Woods, supra; Portneuf Irr. Co. v. Budge, supra.

Service of notice: Where defendants reside outside jurisdiction of district court, service of notice by mail as provided in § 7200, was under § 7422 sufficient. Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 149 P. 499; 27 I. 400, 149 P. 505.

Service on March 31 for hearing April 10 was sufficient. Ib.

Right to jury: Primarily the right of trial by jury is accorded equally to both parties to the action. As a substitute therefor there is accorded to the plaintiff the right of having commissioners appointed to assess the damages that will be sustained by the defendant, and if the plaintiff pays such award and the defendant accepts the same, the right of trial by jury is ended. If, on the other hand, the plaintiff pays the award and the defendant refuses to accept it, the plaintiff may no longer demand a jury, but the defendant may still demand a jury to assess the damages that he will sustain. Pyle v. Woods, supra.

Judgment: Upon an award of commissioners in condemnation proceedings, if the amount awarded is paid by the plaintiff and accepted by the defendant, a decree confirming such action of the parties will be in substance a decree by consent or confession, and will come as fully within the purview of the statute as if the case had gone to trial before a jury and judgment and decree had been entered on the verdict. Ib.

Injunction: A condemnor, proceeding under this statute, may be enjoined from possession upon refusal to pay the award. Weiser Valley L. & W. Co. v. Ryan (1911) 190 F. 425, 111 C. C. A. 229, and in other cases where the ends of justice require it. (Budge, J. dissenting) Blackwell L. Co. v. Empire Mill Co. (1916) 29 I. 236, 158 P. 792.

§ 7421. [5227] **Costs.** Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides in the discretion of the court. [R. S. § 5227.]

Hist. (See C. C. P. '81, § 868) R. S. § 5227, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1255: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8229.

Cited: Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680.

Applied: It would clearly be an abuse of the discretion of the trial court, under this statute, to refuse to allow a defendant costs where the plaintiff had procured the appointment of commissioners and had a hearing, entailed all the costs incident to the production of witnesses and attendance on the meeting of the commissioners, and then had dismissed the action. C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687, 112 P. 210.

In a suit in condemnation, under the constitution and statutes of this state, the costs of the proceeding and cost of appeal should be taxed against the condemnor where the appeal has been prosecuted by the party seeking condemnation. (On rehearing) Rawson-Works L. Co. v. Richardson (1914) 26 I. 45, 141 P. 74.

§ 7422. [5228] **Rules of practice and appeals.** Except as otherwise provided in this title, the provisions of this code relative to civil actions

and new trials and appeals are applicable to, and constitute, the rules of practice in the proceedings in this title. [R. S. § 5228.]

Hist. (See C. C. P. '81, § 869) R. S. § 5228, reen. R. C. ib., reen. C. L. ib.

Cross ref. New trials: §§ 6887-94. Appeals: §§ 7152-72.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1256: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8231.

Cited: Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 155 P. 680; (In dis. op.) 29 I. 236, 158 P. 792.

Right to dismiss: In civil actions, under § 6830, the plaintiff may dismiss, upon payment of costs, at any time before trial, provided a counterclaim has not been made or affirmative relief sought. This provision is applicable to proceedings in eminent domain. C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687, 112 P. 210.

Service of notice: Where defendants resided outside jurisdiction of district court, service of notice provided for in § 7420, by mail in accordance with § 7200 was sufficient. Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 400, 149 P. 499, 500.

Appealable orders: An order or judgment in a condemnation proceeding allowing commissioners to be appointed and authorizing the taking of land is an appealable order. McLean v. Dist. Ct. (1913) 24 I. 441, 134 P. 536, Ann. Cas. 1915D 542.

§ 7423. Application to municipalities. Nothing in this code must be construed to abrogate or repeal any statute provided for the taking of property in any municipality for street purposes. Any municipality at its option may exercise the right of eminent domain under the provisions of this chapter for any of the uses and purposes mentioned in sections 3963 and 3964, in like manner and to the same extent as for any of the purposes mentioned in section 7404. [C. L. § 5229.]

Hist. (See C. C. P. '81, § 870) R. S. § 5229, reen. R. C. ib.; am. '13, c. 108, § 1, p. 429; compiled and reen. C. L. § 5229.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1263: Kerr's C. ib. Thomas v. Boise City (1914) 25 I. 522, 138 P. 1110; (In dis. op. Blackwell L. Co. v. Empire Mill Co. (1916) 28 I. 556, 569, 586, 155 P. 680.

CHAPTER 271.

CHANGE OF NAMES.

§ 7424. [5245] **Jurisdiction in district court.** Application for change of names must be heard and determined by the district courts. [R. S. § 5245.]

Hist. (See C. C. P. '81, § 871) R. S. § 5245, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1275; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8496.

§ 7425. [5246] **Petition for change.** All applications for change of names must be made to the district court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under 21 years of age, if a male, and under the age of 18 years, if a female, by one of the parents, if living; or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and reason for such change of name, and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary or scientific corporation, or any corporation bearing or having for its name, or using or being known by the name of any benevolent or charitable order or society, may, by petition, apply to the district court of the county in which the property of said corporation is situated, for a change of its corporate name. Such petition must be signed by the trustees of the corporation, or by a majority of them, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for

such change of name. Upon filing such petition on behalf of such corporation, the same proceedings must be had as upon applications for changes of names of natural persons. [R. S. § 5246.]

Hist. (See C. C. P. '81, § 872) R. S. § 5246, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county court" for "district court" to third sentence, rest omitted: C. C. P. 1872, § 1276; similar as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8497.

§ 7426. [5247] **Publication of petition.** A copy of such petition must be published for four successive weeks in some newspaper printed in the county, if a newspaper be printed therein, but if no newspaper be printed in the county a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered. [R. S. § 5247.]

Hist. (See C. C. P. '81, § 873) R. S. § 5247, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1277; different as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8497.

§ 7427. [5248] **Hearing.** Such application must be heard at such time during term as the court may appoint, and objections may be filed by any person who can, in such objections, show to the court good reason against such change of name. On the hearing the court may examine, upon oath, any of the petitioners, remonstrants or other persons touching the application, and may make an order changing the name or dismissing the application, as to the court may seem right and proper. [R. S. § 5248.]

Hist. (See C. C. P. '81, § 874) R. S. § 5248, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1278; additional provision as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8497.

CHAPTER 272.

ARBITRATIONS.

Cross ref. Arbitration in labor disputes: §§ 2280-96.

§ 7428. [5260] **Controversies which may be submitted.** Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property. [R. S. § 5260.]

Hist. (See C. C. P. '81, § 875) R. S. § 5260, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1281: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8327.

§ 7429. [5261] **Submission to be in writing.** The submission to arbitration must be in writing and may be to one or more persons. [R. S. § 5261.]

Hist. (See C. C. P. '81, § 876) R. S. § 5261, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1282: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8238.

§ 7430. [5262] **Entry of submission.** It may be stipulated in the submission that it be entered as an order of the district court, for which purpose it must be filed with the clerk of said court for a county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when

filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission can not be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made. [R. S. § 5262.]

Hist. (See C. C. P. '81, § 877) R. S. § 5262, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1283; as amended: Kerr's C. ib.

§ **7431.** [5263] **Powers of arbitrators.** Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon. [R. S. § 5263.]

Hist. (See C. C. P. '81, § 878) R. S. § 5263, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1284: Kerr's C. ib.

N. D. Similar: C. C. P. § 8329.

§ **7432.** [5264] **Same: Majority may decide.** All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding. [R. S. § 5264.]

Hist. (See C. C. P. '81, § 879) R. S. § 5264, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1285: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8329. See also C. C. P. § 8330.

§ **7433.** [5265] **Award.** The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party and on filing of an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment. [R. S. § 5265.]

Hist. (See C. C. P. '81, § 880) R. S. § 5265, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1286: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8332.

§ **7434.** [5266] **Vacation of award.** The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud.

2. That the arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted to consider a part of the matters submitted to them; or that the award is indefinite or can not be performed. [R. S. § 5266.]

Hist. (See C. C. P. '81, § 881) R. S. § 5266, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1287: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8334.

§ 7435. [5267] Same: Modification or correction. The court may, on motion, modify or correct the award where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein.

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted.

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded. [R. S. § 5267.]

Hist. (See C. C. P. '81, § 882) R. S. § 5267, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1288: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8335.

§ 7436. [5268] Appeal. The decision upon either motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment, if entered before a motion made, can not be subject to appeal. [R. S. § 5268.]

Hist. (See C. C. P. '81, § 883) R. S. § 5268, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "the" for "either": C. C. P. 1872, § 1289: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8339.

§ 7437. [5269] Revocation: Costs and damages. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration. [R. S. § 5269.]

Hist. (See C. C. P. '81, § 884) R. S. § 5269, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1290: Kerr's C. ib.

N. D. Analogous: C. C. P. § 8346.

TITLE LVII. PROCEEDINGS IN PROBATE COURT.

Hist. The following title is based generally on the probate practice act of the first territorial session, to which reference is made in the historical notes. The Revised Statutes, however, made many changes by addition and by rearrangement of sections, and many of the sections appeared for the first time in that revision. Few changes have been made since.

Cross ref. Transfer taxes on successions, legacies and devises: §§ 3371-95; appeal from probate to district court in probate matters: §§ 7173-78.

CHAPTER 273.

JURISDICTION.

Cross ref. Jurisdiction of probate court: § 6466.

§ 7438. [5290] **County in which proceedings must be had.** Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which decedent was a resident at the time of his death, in whatever place he may have died.
2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state.
3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death.
4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died.
5. In all other cases in the county where application for letters is first made. [R. S. § 5290.]

Hist. Prob. Prac. '64, § 1; R. S. § 5290, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1294: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8525. See also Prob. C. § 8524.

Cited: Chandler v. Prob. Court (1914) 26 I. 173, 141 P. 635.

§ 7439. [5291] **Same: Property in more than one county.** When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such nonresident and dying within the state, and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate. [R. S. § 5291.]

Hist. Prob. Prac. '64, § 2; R. S. § 5291, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "superior" for "probate": C. C. P. 1872, § 1295: Kerr's C. ib.

CHAPTER 274.

PROBATE OF WILLS.

Cross ref. Wills: § 7808 et seq.

§ 7440. [5296] **Custodian to deliver will.** Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the probate court having jurisdiction of the estate, or to the executor named therein. A failure to comply with

the provisions of this section makes the person failing responsible for all damages sustained by anyone injured thereby. [R. S. § 5296.]

Hist. R. S. § 5296, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "superior" for "probate": C. C. P. 1872, § 1298: Kerr's C. ib.

N. D. Analogous: Prob. C. §§ 8628-9.

Cited: Head v. Nixon (1912) 22 I. 765, 128 P. 557.

§ **7441.** [5297] **Petition for probate of will.** Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost, or destroyed, or beyond the jurisdiction of the state, or a nuncupative will. [R. S. § 5297.]

Hist. R. S. § 5297, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8639.

Comp. leg.—Cal. Same: C. C. P. 1872. § 1299: Kerr's C. ib.

§ **7442.** [5298] **Same: Contents.** A petition for the probate of a will must show:

1. The jurisdictional facts.
2. Whether the person named as executor consents to act, or renounces his rights to letters testamentary.
3. The names, ages and residence of the heirs and devisees of the decedent, so far as known to the petitioner.
4. The probable value and character of the property of the estate.
5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing shall make void the probate of a will. [R. S. § 5298.]

Hist. R. S. § 5298, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. §§ 8569, 8635.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1300; same as amended: Kerr's C. ib.

§ **7443.** [5299] **Forfeiture of right as executor.** If the person named in a will as executor, for 30 days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown. [R. S. § 5299.]

Hist. R. S. § 5299, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1301: Kerr's C. ib.

§ **7444.** [5300] **Will in possession of third person.** If it is alleged in any petition that any will is in possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order.

If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may, by warrant from the court, be committed to the jail of the county and be kept in close confinement until he produces it. [R. S. § 5300.]

Hist. R. S. § 5300, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1302: Kerr's C. ib.

§ **7445.** [5301] **Notice of hearing.** When the petition is filed and the will produced, the probate judge must fix a day for hearing the petition, not less than 10, nor more than 30, days from the production of

the will. Notice of the hearing shall be given by the clerk of the court by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication, and if in a newspaper published oftener than once a week, it shall be so published that there must be at least 10 days from the first to the last day of publication, both the first and last day being included. If the notice is by posting it must be given at least 10 days before the hearing. [R. S. § 5301.]

Hist. R. S. § 5301, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8636.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1303; similar as amended: Kerr's C. ib.

§ 7446. [5302] **Same: Copies to be mailed.** Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the state, at their places of residence, if known to the petitioner, and deposited in the post office, with the postage thereon paid, at least 10 days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them and deposited in the post office at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least 10 days before the day of hearing is equivalent to mailing. [R. S. § 5302.]

Hist. R. S. § 5302, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1304; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8637.

§ 7447. [5303] **Orders may be made at chambers.** The probate judge may, out of term time or at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses, and may appoint special terms of his court for hearing the petitions, trials of issues and admitting to probate. [R. S. § 5303.]

Hist. R. S. § 5303, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "wills" inserted after "admitting": C. C. P. 1872, § 1305; now remainder after "witnesses" omitted: Kerr's C. ib.

§ 7448. [5304] **Proof of service of notice.** At the time appointed for, or to which the hearing may have been postponed, the court must require proof, by affidavit, that the notices hereinbefore required have been personally served or mailed and published, which being made, the court must hear testimony in proof of the will. If such notice is not proved to have been given, or if, from any other cause, it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof, as original notice is required to be given. The appearance in court of parties interested is a waiver of notice. [R. S. § 5304.]

Hist. R. S. § 5304, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1306; similar as amended: Kerr's C. ib.

§ 7449. [5305] **Who may contest wills.** Any person interested may appear and contest the will. Devisees, legatees, heirs or creditors of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a con-

test made by an attorney appointed by the court does not bar a contest after probate, by the party so represented, if commenced within the time provided in this chapter; nor does the nonappointment of an attorney by the court of itself invalidate the probate of a will. [R. S. § 5305.]

Hist. R. S. § 5305, reen. R. C. ib. reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1307: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8641.

Cited: Head v. Nixon (1912) 22 I. 765, 128 P. 557.

§ 7450. [5306] **Admission to probate without contest.** If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in particulars as required by law, and that the testator was of sound mind at the time of its execution. [R. S. § 5306.]

Hist. Prob. Prac. '64, § 18; R. S. § 5306, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1308; same as amended with two additional clauses: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8640.

§ 7451. [5307] **Proof of olographic wills.** An olographic will may be proved in the same manner that other private writings are proved. [R. S. § 5307.]

Hist. R. S. § 5307, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1309: Kerr's C. ib.

§ 7452. [5308] **Procedure in contests.** If any one appears to contest the will he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer to a complaint in civil actions. If the demurrer is sustained the court must allow the contestant a reasonable time, not exceeding 10 days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing, or otherwise obviating or avoiding the objections. Any issues of fact thus raised involving:

1. The competency of the decedent to make a last will and testament.
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence.
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will,

Must, on request of either party, in writing filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial the contestant is plaintiff, and the petitioner is defendant. [R. S. § 5308.]

Hist. R. S. § 5308, reen. R. C. ib., reen. C. L. ib.

Cross ref. Demurrer to complaint: § 6689 et seq.

Comp. leg.—Cal. Same except "provided for in part 2, title 6, chapter 3, of this code" for "to a complaint in civil actions": C. C. P. 1872, § 1312: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8641.

Jury trial on appeal: Where a written demand for a jury trial is made in the probate court and filed with the other papers in the district court on appeal, either party may enforce the demand for a jury in the district court without renewing the same by another writing and without giving notice of his intention to do so. Pine v. Callahan (1902) 8 I. 684, 71 P. 473.

Evidence: There is no provision in this statute which prescribes the evidence required upon a hearing of a contest of a will except the general rule, which applies to all

actions brought in a court having jurisdiction, that the facts alleged in the pleadings are true. Head v. Nixon (1912) 22 I. 765, 128 P. 557.

Where a petition for probation of a will and a contest are tried at the same time, the proponent should first present his preliminary proof in support of his petition, on which he has the burden of proof: and when other evidence is also introduced in favor of the contestant, the burden of proof then shifts to the contestant. Ib.

§ 7453. [5309] **Jury trial.** When a jury is demanded, the probate court must summon and impanel a jury to try the case, in the manner provided for summoning and impaneling trial juries in civil actions, and the trial must be conducted in the same manner as the trial of civil actions in the district court. [R. S. § 5309.]

Hist. R. S. § 5309, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1313; similar as amended: Kerr's C. ib.

§ 7454. [5310] **Verdict and judgment.** The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will and proofs must be recorded. [R. S. § 5310.]

Hist. R. S. § 5310, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8645.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1314: Kerr's C. ib.

§ 7455. [5311] **Subscribing witnesses to be produced.** If the will is contested, all the subscribing witnesses who are present in the county and who are of sound mind, must be produced and examined; and the death, absence or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them. [R. S. § 5311.]

Hist. R. S. § 5311, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8642.

Cited: (Erroneously for R. C. § 7640) U. S. v. Wells (1908) 163 F. 313, 326.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1315: Kerr's C. ib.

§ 7456. [5312] **Testimony in future contests.** The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state. [R. S. § 5312.]

Hist. Prob. Prac. '64, § 22; R. S. § 5312, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1316: Kerr's C. ib.

§ 7457. [5313] **Certificate of proof.** If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, a certificate of the proof and the facts found, signed by the probate judge and attested by the seal of the court, must be attached to the will. [R. S. § 5313.]

Hist. Prob. Prac. '64, § 23: R. S. § 5313, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8645.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1317; same as amended: Kerr's C. ib.

§ 7458. [5314] **Will, certificate and testimony to be filed.** The will and a certificate of the proof thereof must be filed by the clerk, and

recorded by him in a book to be provided for the purpose. All testimony shall be filed by the clerk. [R. S. § 5314.]

Hist. Prob. Prac. '64, § 24; R. S. § 5314, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1318; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8648.

§ 7459. [5315] **Proof of foreign wills.** Every will duly proved and allowed in any part of the United States, or in any foreign country or state, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate. [R. S. § 5315.]

Hist. R. S. § 5315, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1322; as amended "superior" for "probate" court: Kerr's C. ib.

N. D. Similar: Prob. C. § 8672.

§ 7460. [5316] **Same: Notice of hearing.** When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will. [R. S. § 5316.]

Hist. Prob. Prac. '64, § 27; R. S. § 5316, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1323: Kerr's C. ib.

N. D. Similar: Prob. C. § 8672.

§ 7461. [5317] **Same: Proof and admission to probate.** If, on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon. [R. S. § 5317.]

Hist. R. S. § 5317, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1324: Kerr's C. ib.

N. D. Similar: Prob. C. § 8672.

§ 7462. [5318] **Contest after probate.** When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file, in the court in which the will was proved, a petition in writing containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked. [R. S. § 5318.]

Hist. Prob. Prac. '64, § 30; R. S. § 5318, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1327: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8649.

Cited: Hagan v. Sullivan (1913) 24 I. 19, 132 P. 106.

§ 7463. [5319] **Citation to interested parties.** Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and to heirs residing in the state so far as known to the petitioners; or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court on some day of a regular

term therein specified, to show cause why the probate of the will should not be revoked. [R. S. § 5319.]

Hist. Prob. Prac. '64, § 31; R. S. § 5319, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C C. P. 1872, § 1328; same as amended: Kerr's C. ib.

§ 7464. [5320] **Hearing.** At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must proceed to try the issues of fact joined in the same manner as in an original contest of a will. [R. S. § 5320.]

Hist. R. S. § 5320, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1329: Kerr's C. ib.

§ 7465. [5321] **Jury trial: Revocation of probate.** In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had, as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court shall decide, that the will is for any reason invalid; or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked. [R. S. § 5321.]

Hist. R. S. § 5321, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1330: Kerr's C. ib.

§ 7466. [5322] **Executor's powers cease on revocation.** Upon the revocation being made, the powers of the executor or administrator with the will annexed, must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation. [R. S. § 5322.]

Hist. Prob. Prac. '64, § 34; R. S. § 5322, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1331; Kerr's C. ib.

§ 7467. [5323] **Costs of contest.** The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs. [R. S. § 5323.]

Hist. Prob. Prac. '64, § 35; R. S. § 5323, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1332: Kerr's C. ib.

§ 7468. [5324] **Probate conclusive after one year.** If no person, within one year after the probate of a will, contests the same, or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed. [R. S. § 5324.]

Hist. Prob. Prac. '64, § 36; R. S. § 5324, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "married women" inserted after "infants": C. C. P. 1872, § 1333; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8650.

§ 7469. [5325] **Proof of lost will.** Whenever any will is lost or destroyed, the probate court must take proof of the execution and validity thereof, and establish the same, notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing and signed by the witnesses. [R. S. § 5325.]

Hist. Prob. Prac. '64, § 37; R. S. § 5325, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1338; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8643.

§ 7470. [5326] **Same: Evidence necessary to establish.** No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. [R. S. § 5326.]

Hist. Prob. Prac. '64, § 38; R. S. § 5326, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8643. See also Prob. C. § 8644.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1339: Kerr's C. ib.

§ 7471. [5327] **Same: Certificate and testimony to be filed.** When a lost will is established the provisions thereof must be distinctly stated and certified by the probate judge under his hand and seal of his court, and the certificate, together with the testimony upon which it is founded, must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon, in the same manner as upon wills produced and duly proved. [R. S. § 5327.]

Hist. (Similar: Prob. Prac. '64, § 39) R. S. § 5327, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8643.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1340; analogous: Kerr's C. ib.

§ 7472. [5328] **Same: Restraint pending proceedings.** If before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will. [R. S. § 5328.]

Hist. Prob. Prac. '64, § 40; R. S. § 5328, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8643.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1341: Kerr's C. ib.

§ 7473. [5329] **Probate of nuncupative wills.** Nuncupative wills may, at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate on petition and notice as provided for the probate of written wills. The petition, in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within 30 days after they were spoken, which writing must accompany the petition. [R. S. § 5329.]

Hist. R. S. § 5329, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8634.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1344: Kerr's C. ib.

§ 7474. [5330] **Same: Prerequisites to probate.** The probate court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of 14 days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons resident in the state, interested in the estate, are notified as hereinbefore provided. [R. S. § 5330.]

Hist. R. S. § 5330, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1345; amended: Kerr's C. ib.

§ 7475. [5331] **Same: Contests.** Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby must be had, conducted and made as hereinbefore provided in cases of the probate of written wills. [R. S. § 5331.]

Hist. R. S. § 5331, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1346: Kerr's C. ib.

CHAPTER 275.

EXECUTORS AND ADMINISTRATORS.

§ 7476. [5340] **Appointment of executors.** The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who must appear and qualify, unless objection is made, as hereinafter provided. [R. S. § 5340.]

Hist. (See Prob. Prac. '64, § 41) R. S. § 5340, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8651.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1349: Kerr's C. ib.

§ 7477. [5341] **Qualifications of executors.** No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued. [R. S. § 5341.]

Hist. (Similar: Prob. Prac. '64, § 42) R. S. § 5341, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1350; same as amended with a clause added: Kerr's C. ib.

N. D. Similar: Prob. C. § 8651.

§ 7478. [5342] **Objections to appointment.** Any person interested in a will may file objections, in writing, to granting letters testamentary to the persons named as executors, or any of them; and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration, with the will annexed. [R. S. § 5342.]

Hist. Prob. Prac. '64, § 43; R. S. § 5342, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8651.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1351: Kerr's C. ib.

§ 7479. [5343] **Married woman as executrix.** When an unmarried woman, appointed as executrix, marries, her authority is extinguished. When a married woman is named as executrix she may be appointed and serve in every respect as a feme sole. [R. S. § 5343.]

Hist. Prob. Prac. '64, § 44; R. S. § 5343, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1352; different as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8651.

§ 7480. [5344] **Executor of executor not to administer.** No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued. [R. S. § 5344.]

Hist. Prob. Prac. '64, § 45; R. S. § 5344, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8651.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1353: Kerr's C. ib.

§ 7481. [5345] **Administration during absence or minority of executor.** Where a person absent from the state, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority. [R. S. § 5345.]

Hist. R. S. § 5345, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8651.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1354: Kerr's C. ib .

§ 7482. [5346] **Acts of a portion of executors.** When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state or laboring under any legal disability from serving, or if he has given his coexecutor or coadministrator authority, in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid. [R. S. § 5346.]

Hist. Prob. Prac. '64, § 47; R. S. § 5346, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8651.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1355: Kerr's C. ib.

§ 7483. [5347] **Letters of administration with will annexed.** Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court and bear the seal thereof. [R. S. § 5347.]

Hist. (See Prob. Prac. '64, §§ 48-9) R. S. § 5347, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Same: C. C. P. 1872, § 1356: Kerr's C. ib.

§ 7484. [5348] **Form of letters testamentary.** Letters testamentary must be substantially in the following form:

> State of Idaho, county of.....The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of....., C. D., who is named therein, is hereby appointed executor. Witness, G. H., clerk of the probate court of the county of....., with the seal of the court affixed, the.....day of....., A. D. 19.....
>
> (Seal)
>
> By order of the court. G. H., clerk.

[R. S. § 5348.]

Hist. Prob. Prac. '64, § 50; R. S. § 5348, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Prob. C. § 8689.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1360: Kerr's C. ib.

§ 7485. [5349] **Form of letters with will annexed.** Letters of administration, with the will annexed must be substantially in the following form:

State of Idaho, county of..... The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of....., and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the probate court of the county of....., with the seal of the court affixed, the.....day of....., A. D. 19.....

(Seal)

By order of the court. G. H., clerk.

[R. S. § 5349]

Hist. Prob. Prac. '64, § 51; R. S. § 5349, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872. § 1361; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8690.

§ 7486. [5350] **Form of letters of administration.** Letters of administration must be signed by the clerk under the seal of the court, and substantially in the following form:

State of Idaho, county of..... C. D. is hereby appointed administrator of the estate of A. B., deceased.

(Seal) Witness, G. H., clerk of the probate court of the county of....., with the seal thereof affixed, the.....day of....., A. D. 19.....

By order of the court. G. H., clerk.

[R. S. § 5350.]

Hist. Prob. Prac. '64, § 71; R. S. § 5350, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1362; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8691.

§ 7487. [5351] **Priorities in right of administration.** Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. Any of the kindred.
9. The public administrator.
10. The creditors.
11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. [R. S. § 5351.]

Hist. (See Prob. Prac. '64, § 52) R. S. § 5351, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but subd. 8 omitted: C. C. P. 1872, § 1365: Kerr's C. ib.

N. D. Similar: Prob. C. § 8657.

Cited: Re Rice (1906) 12 I. 305, 85 P. 1109; Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901; Chandler v. Prob. Ct. (1914) 26 I. 180, 141 P. 635.

Persons entitled to nominate: Only persons designated in subdivision 1 of this section are entitled to nominate some other person for appointment, and thereby have such person advanced to the rank and class of the one making the request or nomination. Persons falling under subdivisions

4 and 5 are not so entitled. Est. of Daggett (1908) 15 I. 504, 98 P. 849.

The application of a nonresident brother and other heirs does not give the person recommended by them a preference right over any other entitled to the appointment but further removed in priority. Wright v. Merrill (1914) 26 I. 8, 140 P. 1101.

Administration by creditor: Where the widow, next of kin and public administrator neglect to take out letters, a creditor desiring to do so must exercise reasonable diligence, and can not without good cause defer making application until the statute of limitations has run, and then enforce his claim on the theory that the statute was suspended on account of the nonappointment of the administrator. Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961.

Partner: Under the provisions of this section a member of a partnership is not entitled to appointment as administrator of the estate of the deceased partner. Miller v. Mitcham (1912) 21 I. 741, 123 P. 141.

Other person: Any person legally competent may be appointed administrator of an estate, if no one falling in the other 10 classes desires appointment. McCormick v. Brownell (1913) 25 I. 11, 136 P. 613.

§ 7488. [5352] **Same: Preferences.** Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood. [R. S. § 5352.]

Hist. Prob. Prac. '64, § 53; R. S. § 5352, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1366; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8663.

Cited: Miller v. Mitcham (1912) 21 I. 741, 123 P. 141.

§ 7489. [5353] **Same: Persons equally entitled.** When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent. [R. S. § 5353.]

Hist. (See Prob. Prac. '64, § 54) R. S. § 5353, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1367; Kerr's C. ib.

§ 7490. [5354] **Same: When minor is entitled.** If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court. [R. S. § 5354.]

Hist. R. S. § 5354, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1368; same as amended except the words "or an incompetent person" inserted after "minor": Kerr's C. ib.

N. D. Analogous: Prob. C. § 8663.

§ 7491. [5355] **Disqualifications.** No person is competent to serve as administrator or administratrix who is:

1. Not a bona fide resident of the state.
2. Under the age of majority.
3. Convicted of an infamous crime.
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity. [R. S. § 5355.]

Hist. (See Prob. Prac. '64, § 55) R. S. § 5355, reen. R. C. ib., reen. C. L. ib.

Cross ref. Mining property in estates: § 7611. Power of foreign executors to satisfy mortgages: § 7667.

Comp. leg.—Cal. Same except that subd. 1 is omitted: C. C. P. 1872, § 1369; same: Kerr's C. ib. Wright v. Merrill (1914) 26 I. 8, 140 P. 1101.

N. D. Analogous: Prob. C. § 8657.

Construed with § 7501: This section modifies § 7501 so that a nonresident does not have the power of nomination. Wright v. Merrill, supra.

§ 7492. [5356] **Same: Married women.** A married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is extinguished. [R. S. § 5356.]

Hist. R. S. § 5356, reen. R. C. ib., reen. C. L. ib.

Cross ref. Married woman as executrix: § 7479.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1370; different as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8657.

§ 7493. [5357] **Application for letters.** Petitions for letters of administration must be in writing, signed by the applicant or his counsel,

and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments. [R. S. § 5357.]

Hist. Prob. Prac. '64, § 58; R. S. § 5357, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "and are afterward proved in the course of administration" are inserted after "petition": C. C. P. 1872, § 1371; Kerr's C. ib.

N. D. Similar: Prob. C. § 8659.

§ 7494. [5358] **Same: When granted.** Letters of administration may be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application. [R. S. § 5358.]

Hist. Prob. Prac. '64, § 59; R. S. § 5358, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1372; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8659.

§ 7495. [5359] Posting of notices. When a petition praying for letters of administration is filed the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least 10 days before the hearing. [R. S. § 5359.]

Hist. Prob. Prac. '64, § 60; R. S. § 5359, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "the term of the court" for "the time": C. C. P. 1872, § 1373; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8659.

§ 7496. [5360] **Contest of application.** Any person interested may contest the petition by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together. [R. S. § 5360.]

Hist. (See Prob. Prac. '64, § 61) R. S. § 5360, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1374; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8660.

§ 7497. [5361] **Hearing of application.** On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto. [R. S. § 5361.]

Hist. Prob. Prac. '64, § 62; R. S. § 5361, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1375; Kerr's C. ib.

§ 7498. [5362] **Finding as to notice.** An entry in the minutes of the court that the required proof was made and notice given shall be conclusive evidence of the fact of such notice. [R. S. § 5362.]

Hist. Prob. Prac. '64, § 63; R. S. § 5362, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1376; Kerr's C. ib.

§ 7499. [5363] **Applicant entitled to letters.** Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves. [R. S. § 5363.]

Hist. Prob. Prac. '64, § 64; R. S. § 5363, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1377; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8661.

Rights of applicant: Letters of administration must be granted to the applicant unless the person who has a better right thereto appears and asks for letters or nominates someone under the provisions of § 7502. Est. of Daggett (Petition for rehearing, 1908) 15 I. 512, 98 P. 849.

The provisions of this section require persons entitled to administration to make application within a reasonable time, and if they fail to make such application, letters should be granted to any qualified prior applicant. Wright v. Merrill (1914) 26 I. 8, 140 P. 1101.

§ 7500. [5364] **Proof required on hearing.** Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose. [R. S. § 5364.]

Hist. Prob. Prac. '64, § 65; R. S. § 5364, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1378; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8662.

Proof: This requirement is complied with where two separate applications are made and filed for the appointment of two different persons as administrator, and both petitions allege the death of the testator and the evidence supports the allegations. McCormick v. Brownell (1913) 25 I. 11, 136 P. 613.

§ 7501. Grant to person not entitled. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. [C. L. § 5365.]

Hist. Prob. Prac. '64, § 66; R. S. § 5365, reen. R. C. ib. Second sentence commencing "When the person entitled is a nonresident," omitted on the authority of Wright v. Merrill (1914) 26 I. 8, 140 P. 1101, where it is pointed out that a nonresident is never entitled to administer, under § 7491; compiled and reen. C. L. § 5365.

Comp. leg.—Cal. Same except "or depositions" inserted after "affidavits": C. C. P. 1872, § 1379; same except "prima facie" for "primary" evidence: Kerr's C. ib. Est. of Daggett (1908) 15 I. 504, 98 P. 849; Wright v. Merrill (1914) 26 I. 8, 140 P. 1101.

N. D. Analogous: Prob. C. § 8663.

Discretion of court: This section means to provide for the appointment of any competent person upon the request of some one entitled thereto, where no application has been made by some person entitled to administer under the statute. It is a matter addressed to the sound discretion of the court and is not an arbitrary or mandatory provision or requirement. Est. of Daggett, supra.

But when the conditions provided for in § 7502 are presented to the court at the original hearing and it appears that the appointment if made under this section would immediately be subject to revocation the discretion vested in the court under this statute ceases to be a discretion, and the duty becomes absolute to appoint the person belonging to the class, or the nominee of such person, mentioned in § 7502. Est. of Daggett (On petition for rehearing, 1908) supra.

Request necessary: One who is not within the line of succession can be appointed to administer upon the estate of an intestate only on application of the person entitled; and, by revoking the application, this person may prevent the appointment, if not actually made at the time. McCormick v. Brownell (1913) 25 I. 11, 136 P. 613.

Nonresident: This section does not authorize a nonresident to nominate since he is himself not entitled to administer. Wright v. Merrill, supra.

§ 7502. [5366] **Revocation of letters.** When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent, or any competent person at the written request of any of them, may obtain the revocation of the letters and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him. [R. S. § 5366.]

Hist. (See Prob. Prac. '64, § 67) R. S. § 5366, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1383; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8665.

Applied to original application: While this section has no direct application to petition for letters in the first instance,

its effect is such that if several petitions for letters are presented, and one is by a preferred person under §§ 7487 and 7501, who could under this section cause the revocation of the letters granted to any of the others, such preferred person is entitled to nominate and it is the court's duty to appoint the person so nominated. Est. of Daggett (1908) 15 I. 504, 512, 98 P. 849.

Revocation by other person: A person entitled to administration other than those specifically named in this section may revoke a nomination made by him before the same has been acted upon by the probate judge. McCormick v. Brownell (1913) 25 I. 11, 136 P. 613.

§ 7503. [5367] **Same: Citation to administrator.** When such petition is filed the clerk must, in addition to the notice required on application for letters, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing. [R. S. § 5367.]

Hist. (See Prob. Prac. '64, § 68) R. S. § 5367, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1384; same as amended except the words "provided in section 1373" for "required on application for letters": Kerr's C. ib.

N. D. Analogous: Prob. C. § 8699.

§ 7504. [5368] **Same: Hearing.** At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties, and if the right of the applicant is established and he is competent, letters of administration must be granted to him and the letters of the former administrator revoked. [R. S. § 5368.]

Hist. Prob. Prac. '64, § 69; R. S. § 5368, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1385; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8700.

§ 7505. [5369] **Same: Prior rights of surviving spouse.** The surviving husband or wife, when letters of administration have been granted to a child, father, brother or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections. [R. S. § 5369.]

Hist. Prob. Prac. '64, § 70; R. S. § 5369, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1386; Kerr's C. ib.

§ 7506. [5370] **Oath and record of oath and bond.** Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose. [R. S. § 5370.]

Hist. (See Prob. Prac. '64, § 72) R. S. § 5370, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1387; Kerr's C. ib.

N. D. Similar: Prob. C. § 8683. Analogous: Prob. C. §§ 8664, 8684.

Failure to take oath: Effect: An administrator who fails to take the oath and file the bond required by law, but nevertheless administers the estate, is an administrator de facto and may close up the estate if no objection is made, and is liable for his acts as administrator. Harris v. Coates (1902) 8 I. 491, 69 P. 475.

§ 7507. Bond. Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Idaho, with two or more sufficient sureties, to be approved by the probate judge. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the

personal property, and twice the probable value of the annual rents, profits and issues of the real property, belonging to the estate, which values must be ascertained by the probate judge, by examining on oath the party applying, and any other persons: *Provided, however,* When a surety company bond is given, the penalty of said bond must not be less than the value of the personal property and the probable value of the annual rents, profits and issues of the real property, belonging to the estate. ['13, c. 28, p. 127.]

Hist. (See Prob. Prac. '64, § 73, for first part) R. S. § 5371, reen. R. C. ib.; am. '13, c. 28, p. 127, reen. C. L. § 5371.

Cross ref. Provisions of c. 22 apply to bonds of executors and administrators: § 448. Allowance to executor or administrator of premium paid for company bond: § 5106-13.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1388; amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8685.

§ 7508. [5372] **Additional bond.** The probate judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor or administrator, including the annual rents, profits and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold. [R. S. § 5372.]

Hist. (See Prob. Prac. '64, § 73, for first clause) R. S. § 5372, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1389; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8686.

§ 7509. [5373] **Conditions of bond.** The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. [R. S. § 5373.]

Hist. (See Prob. Prac. '64, § 73) R. S. § 5373, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1390; Kerr's C. ib

§ 7510. [5374] **Separate bonds.** When two or more persons are appointed executors or administrators, the probate judge must require and take a separate bond from each of them. [R. S. § 5374.]

Hist Prob. Prac. '64, § 74; R. S. § 5374, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1391; same as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8688.

§ 7511. [5375] **Successive recoveries on bond.** The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted. [R. S. § 5375.]

Hist. Prob. Prac. '64, § 75; R. S. § 5375, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1392; Kerr's C. ib.

§ 7512. [5376] **Justification of sureties.** In all cases where bonds or undertakings are required to be given under this title, the sureties must justify thereon as required by this code, and the certificate thereof must be attached to, and filed and recorded with, the bond or undertaking. All such bonds and undertakings must be approved by the probate judge before being filed or recorded. [R. S. § 5376.]

Hist. R. S. § 5376, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1393; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8685.

§ 7513. [5377] **Same: Examination as to qualifications.** Before the probate judge approves any bond required under this title he may, of his

own motion, or at any time after the approval of such bond, upon the motion of any person interested in the estate supported by affidavit that any one or all of such sureties are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him, at a certain time and place, to testify touching their property and its value; and the judge must, at the time such citation is issued, cause a notice to be issued to the executor or administrator, requiring his appearance at the return of the citation. Upon the return of the citation, the judge may swear and examine the sureties, and such witnesses as may be produced, touching the property of such sureties and its value; and if, upon such investigation, the judge is satisfied that the bond is insufficient, he may require sufficient additional security, within such time as may be reasonable, not less than five days. [R. S. § 5377.]

Hist. Prob. Prac. '64, § 77; R. S. § 5377, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "and examine," last sentence, omitted: C. C. P. 1872, § 1394; similar as amended: Kerr's C. ib.

§ 7514. [5378] **Same: Failure to give sufficient security.** If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration. [R. S. § 5378.]

Hist. Prob. Prac. '64, § 78; R. S. § 5378, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1395; Kerr's C. ib.

§ 7515. [5379] **Bond dispensed with.** When it is expressly provided in the will of a testator that no bond is required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed, without any bond being given; but an executor to whom letters are issued without bond, may at any time afterward, when it appears from any cause necessary or proper, be required to file a bond as in other cases. [R. S. § 5379.]

Hist. Prob. Prac. '64, § 79; R. S. § 5379, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1396; same in part as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8687.

§ 7516. [5380] **Additional security may be required.** Any person interested in an estate may, by verified petition, represent to the probate judge that the sureties of the executor or administrator thereof have become, or are becoming insolvent, or that they have removed or are about to remove from the state, or that from any other cause the bond is insufficient, and ask that further security be required. [R. S. § 5380.]

Hist. (See Prob. Prac. '64, § 80) R. S. § 5380, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8693.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1397; same as amended: Kerr's C. ib.

§ 7517. [5381] **Same: Citation.** If the probate judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded or can not be found, it may be served by leaving a copy of it at his last place of residence or by such publication as the court or judge may order. [R. S. § 5381.]

Hist. (See Prob. Prac. '64, § 81) R. S. § 5381, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8694.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1398; Kerr's C. ib.

§ 7518. [5382] **Same: Hearing and order.** On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security or to file a new bond in the usual form, within a reasonable time, not less than five days. [R. S. § 5382.]

Hist. Prob. Prac. '64, § 82; R. S. § 5382, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1399; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8695.

§ 7519. [5383] **Same: Disregard of order.** If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease. [R. S. § 5383.]

Hist. Prob. Prac. '64, § 83; R. S. § 5383, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1400; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8695.

§ 7520. [5384] **Same: Suspension of executor's powers.** When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged on oath that the executor or administrator is wasting the property of the estate, the judge may by order suspend his powers until the matter can be heard and determined. [R. S. § 5384.]

Hist. (See Prob. Prac. '64, § 84) R. S. § 5384, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1401; Kerr's C. ib.

§ 7521. [5385] **Same: Proceedings on motion of judge.** When it comes to his knowledge that the bond of any executor or administrator is, from any cause, insufficient, the probate judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested. [R. S. § 5385.]

Hist. Prob. Prac. '64, § 85; R. S. § 5385, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1402; same as amended except "probate" judge omitted: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8696.

§ 7522. [5386] **Release of sureties.** When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the probate court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place to be therein specified, and to give other security. If he has absconded, left or removed from the state, or if he can not be found after due diligence and inquiry, service may be made as provided in section 7517. [R. S. § 5386.]

Hist. (See Prob. Prac. '64, § 86) R. S. § 5386, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1403; same as amended: Kerr's C. ib.

§ 7523. [5387] **Same: Order of exoneration.** If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default or misconduct of the executor or administrator. [R. S. § 5387.]

Hist. Prob. Prac. '64, § 87; R. S. § 5387, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1404; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8696.

§ 7524. [5388] **Same: Neglect to give new sureties.** If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters. [R. S. § 5388.]

Hist. (See Prob. Prac. '64, § 88) R. S. § 5388, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1405; Kerr's C. ib.

§ 7525. [5389] **Hearing of applications.** The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court. [R. S. § 5389.]

Hist (See Prob. Prac. '64, § 89) R. S. § 5389, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "out of term time" for "at any time": C. C. P. 1872, § 1406; same as amended: Kerr's C. ib.

§ 7526. [5390] **Appointment of special administrator.** When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies, or is suspended or removed, the probate judge must appoint a special administrator, to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate. [R. S. § 5390.]

Hist. (See Prob. Prac. '64, § 90) R. S. § 5390, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1411; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8667.

§ 7527. [5391] **Same: Issuance of letters.** The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator; upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order. [R. S. § 5391.]

Hist. Prob. Prac. '64, § 91; R. S. § 5391, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "out of term time" for "at any time": C. C. P. 1872, § 1412; same as amended: Kerr's C. ib.

§ 7528. [5392] **Same: Preferences.** In making the appointment of a special administrator, the probate judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment. [R. S. § 5392.]

Hist. Prob. Prac. '64, § 92; R. S. § 5392, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1413; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8669.

§ 7529. [5393] **Same: Bond and oath.** Before any letters issue to any special administrator he must give bond in such sum as the probate judge may direct, with sureties to the satisfaction of the judge, conditioned for the faithful performance of his duties; and he must take the usual oath and have the same indorsed on his letters. [R. S. § 5393.]

Hist. (See Prob. Prac. '64, § 93) R. S. § 5393, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1414; same as amended: Kerr's C. ib.

§ 7530. [5394] **Same: Duties.** The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits,

claims and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste and injury, the real estate, and for any such and all necessary purposes, may commence and maintain, or defend, suits and other legal proceedings, as an administrator; he may sell such perishable property as the probate court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent. [R. S. § 5394.]

Hist. (See Prob. Prac. '64, § 94) R. S. § 5394, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1415; same except "probate" court omitted: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8670.

§ 7531. [5395] **Same: When powers cease.** When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator, all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator. [R. S. § 5395.]

Hist. Prob. Prac. '64, § 95; R. S. § 5395, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1416; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8671.

§ 7532. [5396] **Same: Account.** The special administrator must render an account on oath, of his proceedings, in like manner as other administrators are required to do. [R. S. § 5396.]

Hist. Prob. Prac. '64, § 96; R. S. § 5396, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1417; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8670.

§ 7533. [5397] **Revocation of letters on proof of will.** If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct. [R. S. § 5397.]

Hist. Prob. Prac. '64, § 100; R. S. § 5397, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1423; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8697.

§ 7534. [5398] **Same: Rights of executor.** In such case the executor or the administrator with the will annexed is entitled to demand, sue for, recover and collect all the rights, goods, chattels, debts and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration. [R. S. § 5398.]

Hist. Prob. Prac. '64, § 101; R. S. § 5398, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1424; Kerr's C. ib.

§ 7535. [5399] **Disqualification of one executor or administrator.** In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration. [R. S. § 5399.]

Hist. (See Prob. Prac. '64, § 98) R. S. § 5399, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1425; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8706.

§ 7536. [5400] **Incompetency of all executors or administrators.** If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the probate court must issue letters of administration with the will annexed, or otherwise, to the widow, or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions as hereinbefore required of administrators, and shall have the like power and authority. [R. S. § 5400.]

Hist. Prob. Prac. '64, § 99; R. S. § 5400; reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1426; same as amended except "probate" omitted: Kerr's C. ib.

§ 7537. [5401] **Resignation of executor or administrator.** Any executor or administrator may, at any time, by writing filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator or of the sureties on his bond, shall not be in any manner discharged, released or affected by such appointment or resignation. [R. S. § 5401.]

Hist. (See Prob. Prac. '64, § 102, for first sentence) R. S. § 5401, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1427; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8703.

Cited: (In brief of counsel) Miller v. Lewiston Nat. Bk. (1910) 18 I. 124.

§ 7538. [5402] **Acts before revocation valid.** All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid to all intents and purposes as if such executor or administrator had continued lawfully to execute the duties of his trust. [R. S. § 5402.]

Hist. Prob. Prac. '64, § 103; R. S. § 5402, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1428; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8705.

§ 7539. [5403] **Transcript of minutes as evidence.** A transcript from the minutes of the court showing the appointment of any person as executor or administrator, together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves. [R. S. § 5403.]

Hist. Prob. Prac. '64, § 104; R. S. § 5403, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1429; Kerr's C. ib.

§ 7540. [5404] **Disqualification of judge.** No probate court shall admit to probate any will, or grant letters testamentary or of admin-

istration, in any case where the judge thereof is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting. [R. S. § 5404.]

Hist. (See Prob. Prac. '64, § 105, which omits last clause) R. S. § 5404, reen. R. C. ib., reen. C. L. ib.

Cross ref. Claim of probate judge against estate: § 7583.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1430; similar as amended: Kerr's C. ib.

§7541. [5405] **Same: Change of venue.** When a petition is filed in the probate court praying for admission to the probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the probate court for the settlement of an estate, and the presiding judge of the court is disqualified to act from any cause, upon his own or the motion of any person interested in the estate, he must make an order transferring the proceeding to the probate court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred, a certified copy of the order and all the papers on file in his office in the proceeding; and thereafter the probate court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate. [R. S. § 5405.]

Hist. R. S. § 5405, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1431; additional provision as amended: Kerr's C. ib.

§ 7542. [5406] **Same: Retransfer of proceedings.** The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate in the order hereinbefore provided. If, before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed and qualified as probate judge of the county wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts and moving the court therefor. [R. S. § 5406.]

Hist. R. S. § 5406, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1432; same as amended: Kerr's C. ib.

§ 7543. [5407] **Same: Order for transfer.** On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the probate court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all

necessary orders and decrees to close up the administration of the estate. [R. S. § 5407.]

Hist. R. S. § 5407, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1433; same as amended except "probate" court omitted: Kerr's C. ib.

§ 7544. [5408] **Suspension of powers of executor.** Whenever the probate judge has reason to believe, from his own knowledge or from credible information that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated. [R. S. § 5408.]

Hist. R. S. § 5408, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8702.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1436; Kerr's C. ib.

§ 7545. [5409] **Same: Citation.** When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked and letters of administration granted anew as the case may require. [R. S. § 5409.]

Hist. R. S. § 5409, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1437; Kerr's C. ib.

§ 7546. [5410] **Same: Hearing.** At the hearing any person interested in the estate may appear and file his allegation in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court. [R. S. § 5410.]

Hist. R. S. § 5410, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1438; Kerr's C. ib.

§ 7547. [5411] **Same: Publication of notice.** If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served. [R. S. § 5411.]

Hist. R. S. § 5411, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1439; Kerr's C. ib.

§ 7548. [5412] **Same: Attachment against executor.** In the proceedings authorized by the preceding sections for the removal of an executor or administrator, the court may compel his attendance by attachment and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both. [R. S. § 5412.]

Hist. R. S. § 5412, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "of this article" inserted after "preceding sections": C. C. P. 1872, § 1440; Kerr's C. ib.

CHAPTER 276.

INVENTORY AND COLLECTION OF EFFECTS.

§ 7549. [5420] **Executor to make inventory.** Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge. [R. S. § 5420.]

Hist. (See Prob. Prac. '64, § 107) R. S. § 5420, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1443; same as amended except "within three months" for "at its first term": Kerr's C. ib.

N. D. Analogous: Prob. C. § 8714. See also Prob. C. § 8707.

Cited: (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

§ 7550. [5421] **Appointment of appraisers.** To make the appraisement, the probate judge or court must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed $4 per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the probate judge having jurisdiction of the estate or by the probate judge of such other county on request of the judge having jurisdiction. [R. S. § 5421.]

Hist. (See Prob. Prac. '64, § 108) R. S. § 5421, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "five" for "four" dollars: C. C. P. 1872, § 1444; similar: Kerr's C. ib.

N. D. Similar: Prob. C. § 8720.

§ 7551. [5422] **Oath and appraisement.** Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly and impartially appraise the property exhibited to them, or which shall come to their knowledge, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon (if any), with their dates, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest or security; the inventory must show so far as the same can be ascertained by the executor or administrator, what portion of the property is community property and what portion is the separate property of the decedent. [R. S. § 5422.]

Hist. Prob. Prac. '64, § 109; R. S. § 5422, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "or which shall come to their knowledge" omitted: C. C. P. 1872, § 1445; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8721.

Cited: (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

§ 7552. [5423] **Money to be inventoried.** The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases. [R. S. § 5423.]

Hist. (See Prob. Prac. '64, § 110, for first sentence) R. S. § 5423, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1446; Kerr's C. ib.

§ 7553. [5424] **Debt of executor not discharged.** The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claims must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due. [R. S. § 5424.]

Hist. Prob. Prac. '64, § 111; R. S. § 5424 reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1447; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8716.

§ 7554. [5425] **Discharge of debt by will.** The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the demand or debt. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies. [R. S. § 5425.]

Hist. Prob. Prac. '64, § 112; R. S. § 5425, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1448; Kerr's C. ib.

N. D. Prob. C. § 8718.

§ 7555. [5426] **Signature and verification of inventory.** The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge or possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon, or annexed to, the inventory. [R. S. § 5426.]

Hist. (See Prob. Prac. '64, § 113) R. S. § 5426, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1449; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8715.

§ 7556. [5427] **Revocation of letters for failure to return.** If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure. [R. S. § 5427.]

Hist. (See Prob. Prac. '64, § 114) R. S. § 5427, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1450; Kerr's C. ib.

§ 7557. [5428] **Inventory of after discovered property.** Whenever property of more than $250 in value, not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this chapter, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office. [R. S. § 5428.]

Hist. (See Prob. Prac. '64, § 115) R. S. § 5428, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "of more than $250 in value" omitted: C. C. P. 1872, § 1451; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8722.

§ 7558. [5429] **Right of executor to real estate.** The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings and fixtures thereon, which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be construed as requiring them so to do. [R. S. § 5429.]

Hist. (See Prob. Prac. '64, § 116, for first sentence) R. S. § 5429, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except last clause beginning " but this section" omitted: C. C. P. 1872, § 1452; now same except "probate" court omitted; "forfeits" for "profits" (probably an error): Kerr's C. ib.

N. D. Analogous: Prob. C. § 8707.

§ 7559. [5430] **Same: Delivery to heirs or devisees.** Unless it satisfactorily appears to the probate court that the rents, issues and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, at the end of the time limited for the presentation of claims against the estate, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees. [R. S. § 5430.]

Hist. R. S. § 5430, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "at the end of 10 months from the first publication of the notice to creditors" for "at the end of the time limited for the presentation of claims against the estate": C. C. P. 1872, § 1453; similar as amended: Kerr's C. ib.

§ 7560. [5431] **Embezzlement of property of estate.** If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate. [R. S. § 5431.]

Hist. Prob. Prac. '64, § 118; R. S. § 5431, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1458; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8709.

§ 7561. [5432] **Same: Citation to suspected person.** If any executor, administrator or other person interested in the estate of a decedent, complains to the probate judge on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge, any deeds, conveyances, bonds, contracts or other writings which contain evidences of, or tend to disclose the right, title, interest or claim of the decedent to, any real or personal estate, or any claim or demand, or any last will, the judge may cite such person to appear before the probate court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where letters have been granted, he may be cited and examined, either before the probate court of the county where he is found, or before the court issuing the citation. But if in the latter case he appears and is found innocent, his necessary expenses must be allowed him out of the estate. [R. S. § 5432.]

Hist. Prob. Prac. '64, § 119; R. S. § 5432, reen. R. C. ib., reen. C. L. ib. N. D. Analogous: Prob. C. § 8712.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1459; similar as amended: Kerr's C. ib.

§ 7562. [5433] **Same: Hearing.** If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If upon such examination it appears that he has concealed, embezzled, smuggled, conveyed away or disposed of, any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any last will of the decedent, the probate court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and be filed in the probate court. The order for such disclosure made upon such examination is primary evidence of the right of such administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side. [R. S. § 5433.]

Hist. Prob. Prac. '64, § 120; R. S. § 5433, reen. R. C. ib., reen. C. L. ib. N. D. Analogous: Prob. C. § 8713.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1460; similar as amended: Kerr's C. ib.

§ 7563. [5434] **Citation to account.** The probate judge, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any money, goods, chattels, bonds, accounts or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section. [R. S. § 5434.]

Hist. Prob. Prac. '64, § 121; R. S. § 5434, reen. R. C. ib., reen. C. L. ib. N. D. Analogous: Prob. C. § 8708.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1461; Kerr's C. ib.

CHAPTER 277.

HOMESTEAD AND SUPPORT OF THE FAMILY.

§ 7564. [5440] **Widow and children entitled to homestead.** When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are

also entitled to a reasonable provision for their support, to be allowed by the probate judge. [R. S. § 5440.]

Hist. Prob. Prac. '64, § 122, R. S. § 5440, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1464; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8723.

Cited: (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

§ 7565. [5441] **Setting apart exempt property and homestead.** Upon the return of the inventory, or at any subsequent time during the administration, the court or the probate judge may, on his own motion or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead selected, designated and recorded. If none has been selected, designated and recorded, the judge or the court must select, designate, set apart and cause to be recorded, a homestead for the use of the persons hereinbefore named in the manner provided in this chapter, out of the real estate belonging to the decedent. [R. S. § 5441.]

Hist. (See Prob. Prac. '64, § 123, last sentence omitted) R. S. § 5441, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1465; similar in part as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. §§ 8724-5.

Sufficiency of petition: A petition to set aside a homestead under this section which sets forth the making and return of the inventory of the decedent, the description and ownership of the real property returned in the inventory, that such property was the property of the deceased and that its face value did not exceed $5000, and that no homestead had ever been designated or selected by deceased or his widow during his lifetime, is sufficient to entitle the widow to have the property therein described set off as a probate homestead. (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

Out of what property: Under the provisions of §§ 7564 and 7565 a probate homestead is one to be created by the probate court out of real property belonging to the decedent which was subject to a homestead at the time of the death of the decedent, and its value is less than $5000, and was of such property as might have been occupied as a home at the time of the decedent's death. Ib.

§ 7566. [5442] **Additional allowance to family.** If the amount set apart be insufficient for the support of the widow and children, or either, the probate court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration. [R. S. § 5442.]

Hist. (See Prob. Prac. '64, § 124) R. S. § 5442, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1466; Kerr's C. ib.

N. D. Similar: Prob. C. § 8727.

§ 7567. [5443] **Same: Allowance a preferred claim.** Any allowance made by the court or judge, in accordance with the provisions of this chapter, must be paid in preference to all other charges except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent. [R. S. § 5443.]

Hist. Prob. Prac. '64, § 125, last clause omitted; R. S. § 5443, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1467; Kerr's C. ib.

N. D. Similar: Prob. C. § 8728.

§ 7568. [5444] **Apportionment of allowance.** When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband and

the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. [R. S. § 5444.]

Hist. (See Prob. Prac. '64, § 127) R. S. § 5444, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar to last sentence, but the words "or surviving husband" omitted throughout: C. C. P. 1872, § 1468; now same as amended: Kerr's C. ib.

§ 7569. [5445] **Estate of less than $1500.** If, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole estate does not exceed the sum of $1500, and if there be a widow or minor children of the deceased, the court or a judge thereof shall, by order, require all persons interested to appear on a day fixed, to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as upon the settlement of accounts of executors and administrators. If, upon the hearing, the court finds that the value of the estate does not exceed the sum of $1500, it shall, by a decree for that purpose, assign for the use and support of the widow and minor children, if there be a widow and minor children, and if no widow, then for the children, if there be any, and if no children, then for the widow, the whole of the estate, after the payment of the expenses of the last illness of the deceased, funeral charges and expenses of administration, and there must be no further proceedings in the administration, unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of $1500, it is in the discretion of the probate court to dispense with the regular proceedings, or any part thereof, prescribed in this title, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases. [R. S. § 5445.]

Hist. R. S. § 5445, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1469; analogous: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8729.

Nature of widow's estate: Where property has been set aside by a decree of the probate court for the use of the widow and her minor children in compliance with this section the widow can do no act that would relieve the property of its burden or free it from the obligation and purposes to which it was set aside until the children reach their majority. Booth Merc. Co. v. Murphy (1908) 14 I. 212, 93 P. 777. If the widow mortgages all her interest in and to such estate the mortgage covers only her interest in the property as an heir of her husband's estate, but does not cover her interest acquired by virtue of the probate court decree. Ib.

§ 7570. [5446] **Property to go to children: When.** If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this chapter the whole property so set apart, other than her half of the homestead, must go to the minor children. [R. S. § 5446.]

Hist. (See Prob. Prac. '64, § 129) R. S. § 5446, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1470; now same except words "her half of" omitted: Kerr's C. ib.

§ 7571. [5447] **Devolution of homestead: Exemption.** If the homestead selected by the husband and wife or either of them, during their

coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the probate court to assign it for a limited period, to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by, or existing against, the husband and wife, or either of them previous to or at the time of the death of such husband or wife, except in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record and which constitute liens upon the premises.

2. On debts secured by mechanics', laborers' or vendors' liens upon the premises.

3. On debts secured by mortgages on the premises, executed and acknowledged for any portion of the purchase price thereof, or by the husband and wife, or by an unmarried claimant;

4. On debts secured by mortgages on the premises executed and recorded before the declaration of homestead was filed for record. [R. S. § 5447.]

Hist. R. S. § 5447, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1474; same in part: Kerr's C. ib.

§ 7572. [5448] **Same: Order setting apart homestead.** If the homestead selected and recorded prior to the death of the decedent is returned in the inventory, appraised at not exceeding $5000 in value, the probate court must, by order, set it off to the persons in whom title is vested by the preceding section. If there are subsisting liens or incumbrances on the homestead they must be paid out of the funds of the estate, if there remain sufficient for that purpose, after the payment of all claims allowed against the estate. [R. S. § 5448.]

Hist. R. S. § 5448, reen. R. C. ib., reen. C. L. ib.

Cited: (On rehearing) Est. of McVay (1908) 14 I. 64, 93 P. 31.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1475; similar as amended: Kerr's C. ib.

§ 7573. [5449] **Appraisement of homestead.** If the homestead, as selected and recorded, be appraised at more than $5000, the appraisers must, before they make their return, determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling house, as will amount in value to the sum of $5000, and make a report thereof, giving the metes, bounds and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of $5000, and that they can not be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. [R. S. § 5449.]

Hist. R. S. § 5449, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8724.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1476; as amended: Kerr's C. ib.

§ 7574. [5450] **Report of appraisers.** Any two of the appraisers concurring may discharge the duties imposed upon the three, and make

the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed. [R. S. § 5450.]

Hist. R. S. § 5450, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Same: C. C. P. 1872, § 1477: Kerr's C. ib.

§ 7575. [5451] **Same: Hearing and confirmation.** When the report of the appraisers is filed the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time and in such manner as the court may direct. If the court be satisfied that the report is correct it must be confirmed, otherwise rejected. In case the report is rejected the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report. [R. S. § 5451.]

Hist. R. S. § 5451, reen. R. C. ib., reen. C. L. ib. §§ 1478 and 1479; same as amended: Kerr's C. ib.

Comp. leg.—Cal. See C. C. P. 1872, **N. D.** Analogous: Prob. C. § 8726.

§ 7576. [5452] **Costs of proceedings.** The costs of all proceedings in the probate court provided for in this chapter must be paid by the estate as expenses of administration. Persons succeeding by purchase, or otherwise, to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire. [R. S. § 5452.]

Hist. R. S. § 5452, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Same: C. C. P. 1872, § 1485: Kerr's C. ib.

§ 7577. [5453] **Certified copies to be recorded.** A certified copy of every final order made in pursuance of this chapter, by which a report is confirmed, property assigned or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated. [R. S. § 5453.]

Hist. R. S. § 5453, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Same: C. C. P. 1872, § 1486: Kerr's C. ib.

CHAPTER 278.

CLAIMS AGAINST THE ESTATE.

§ 7578. [5460]. Publication of notice to creditors. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them with the necessary vouchers, to the executor or administrator, at the place of his residence or business to be specified in the notice. Such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation: *Provided*, That when no newspaper is published in the county, the notice shall be posted in not less than three public places in the county, one of which

shall be at the courthouse door, for such time, not less than four weeks, as the court may order. [R. S. § 5460.]

Hist. (See Prob. Prac. '64, § 130) R. S. § 5460, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same to proviso, rest omitted: C. C. P. 1872, § 1490; Kerr's C. ib.

N. D. Similar: Prob. C. § 8734.

Cited: Dern v. Olsen (1910) 18 I. 358, 110 P. 624, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016; Lundy v. Lemp, 32 I. —, 179 P. 738.

§ 7579. Same: Time for presenting claims. The time expressed in the notice must be 10 months after its first publication, when the estate exceeds in value the sum of $5000, and four months when it does not. ['17, c. 113, p. 393.]

Hist. R. S. § 5461, reen. R. C. ib.; am. '17, c. 113, p. 393, reen. C. L. § 5461.

Comp. leg.—Cal. Same except "$10,000" for "$5000": C. C. P. 1872, § 1491: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8734.

Cited: Dern v. Olsen (1910) 18 I. 358, 110 P. 624, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016; Lundy v. Lemp, 32 I. —, 179 P. 738.

§ 7580. [5462] **Copy and proof of notice.** After the notice is given, as required in the preceding section, a copy thereof, with the affidavit of due publication or of publication and posting must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court. [R. S. § 5462.]

Hist. R. S. § 5462, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same except "by" for "in": C. C. P. 1872, § 1492: Kerr's C. ib.

N. D. Similar: Prob. C. § 8735.

§ 7581. [5463] **Claims must be presented within time limited.** All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: *Provided,* That when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered. [R. S. § 5463.]

Hist. R. S. § 5463, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Somewhat similar: C. C. P. 1872, § 1493; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8736.

Cited: Dern v. Olsen (1910) 18 I. 358, 110 P. 624, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016.

Applied: Blake v. Lemp, 32 I. —, 179 P. 737; Lundy v. Lemp, 32 I. —, 179 P. 738.

§ 7582. [5464] **Verification of claims.** Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the district court. [R. S. § 5464.]

Hist. (See Prob. Prac. '64, § 132) R. S. § 5464, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1494; same as amended except "superior court" for "district court": Kerr's C. ib.

N. D. Similar: Prob. C. § 8737.

§ 7583. [5465] Claim of probate judge. Any probate judge may present a claim against the estate of a decedent, for allowance, to the executor or administrator thereof; and if the executor or administrator allows the claim, he must, in writing, designate some probate judge of an adjoining county, who, upon the presentation of such claim to him, is vested with the same power to allow or reject it as he would have if the will had been proved or administration granted in his own county; and the probate judge presenting such claim, in case of its rejection by the executor or administrator, or by such probate judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. [R. S. § 5465.]

Hist. (See Prob. Prac. '64, § 133) R. S. § 5465, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1495; similar but superior court system as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8739.

§ 7584. Allowance or rejection of claims. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator he must indorse thereon his allowance or rejection, with the day and date thereof. If he allows the claim, it must be presented to the probate judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor, administrator, or judge reject the claim, or disallow any part thereof, he shall within 10 days thereafter notify the claimant, his agent or attorney, by mail or personal notice of such rejection or disallowance. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. ['19, c. 111, § 1, p. 395.]

Hist. (See Prob. Prac. '64, § 134) R. S. § 5466, reen. R. C. ib., reen. C. L. ib.; am. '19, c. 111, § 1, p. 395.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1496; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8740.

Cited: (Before '19 amendment) Idaho Trust Co. v. Miller (1909) 16 I. 308, 102 P. 360; Chandler v. Probate Court (1914) 26 I. 173, 131 P. 635.

Purpose of indorsement: The indorsement of the time of presentation and the allowance or rejection of a claim is a requirement for the purpose of fixing the time from which the statute of limitations begins to run, but is not a requirement which in any way affects the validity of the claim. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

Judgments ex parte: The action of both the administrator and the probate judge is ex parte. The judgment allowing such claim is an ex parte judgment. Est. of Coryell (1909) 16 I. 201, 212, 101 P. 723.

Vacation of allowance: Where a claim against an estate has been allowed by the probate judge, and thereafter objections and exceptions are filed by an heir of such estate, the probate judge has power and jurisdiction to set aside his former allowance of such claim and to hear and determine the objections and exceptions filed. Until the issue thus presented is heard the matter is pending in such court. Ib.

Where claims are pending against an estate before the probate court, upon an order setting aside their former allowance by the administrator and the probate judge upon objections by the heirs, the probate judge is not required to indorse upon said claims his allowance or rejection of the same within 10 days after such order, nor does his failure to do so amount to a rejection of said claims and defeat his jurisdiction to set said claims for hearing upon the objections made by the heirs. Miller v. Lewiston Nat. Bk., supra.

Extension of time: "Refuse" implies an attitude toward some demand. "Neglect" means nothing but a failure to perform, due to negligence. The reasonable definitions of "refuse" and "neglect" can not apply where a necessary extension of time is agreed upon by parties or where a promise to hold open must be necessarily inferred from facts of case. Powell-Sanders Co. v. Carssow (1915) 28 I. 201, 152 P. 1067.

§ 7585. [5467] **Same: Filing and exhibits.** Every claim allowed by the executor or administrator and approved by the probate judge, or a copy thereof, as hereinafter provided, must, within 30 days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim or any part thereof is secured by a mortgage or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it is sufficient to describe the mortgage or lien, and refer to the date, volume and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest and date of allowance. [R. S. § 5467.]

Hist. (See Prob. Prac. '64, § 135) R. S. § 5467, reen. R. C. ib., reen. C. L. ib.

Cross ref. Contingent and disputed claims: § 7715.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1497; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8741.

Effect of allowance of claim: Where a claim is presented to the administrator and by him allowed, and afterward to the probate judge and by him allowed, the effect of such allowance is merely to rank the claim among the acknowledged debts of the estate to be paid in due course of administration. Est. of Coryell (1909) 16 I. 201, 101 P. 723.

Filing of claims: A claim that has been rejected by the administrator need not be reported by him to, or filed by him in, the probate court; it is only claims that have been allowed that must be filed in the probate court. Chandler v. Probate Court (1914) 26 I. 173, 141 P. 635.

Gives no right of action: The filing of a claim, secured or unsecured, with the administrator, gives to the claimant no right of action, but leaves the selling of the property and the payment of the debt in the discretion of the administrator, in the manner prescribed by law. Kendrick State Bank v. Barnum, 31 I. 562, 173 P. 1144.

Mortgage claim: Mistake in filing: The fact that a mortgagee files his claim against a decedent's estate in probate as an unsecured claim does not, ipso facto, operate as a waiver of his mortgage lien. Kendrick State Bank v. Barnum, supra.

§ 7586. Suit on rejected claim. When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after notice of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred. ['19, c. 111, § 2, p. 396.]

Hist. (See Prob. Prac. '64, § 136) R. S. § 5468, reen. R. C. ib., reen. C. L. ib.; am. '19, c. 111, § 2, p. 396.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1498: Kerr's C. ib. Idaho Trust Co. v. Miller (1909) 16 I. 308, 102 P. 360.

N. D. Similar: Prob. C. § 8742.

Cited: (Before '19 amendment) Est. of Coryell (1909) 16 I. 201, 212, 101 P. 723; Chandler v. Probate Court (1914) 26 I. 173, 141 P. 635.

Proper court defined: The "proper court" referred to is the court having civil jurisdiction to try such matter. Idaho Trust Co. v. Miller, supra.

Effect of rejection of claim: The action required to be brought under the provisions of this section to recover the rejected claim, if it be a demand for money, is an action at law, and the rejection of the same by the administrator does not change the character of the claim or of the action required to be brought. Ib.

When action not barred: Limitation held not to apply where administratrix did not reject claim but requested its amendment. Powell-Sanders Co. v. Carssow (1915) 28 I. 201, 152 P. 1067.

No right of action: The refusal of an executor to make a conveyance of real property to decedent's grantee without the decree of the probate court authorized by section 7673 does not create a right of action against the estate in favor of the grantee for money paid by the latter on the purchase price of the property, and a claim therefor is not a valid claim against the estate. Blake v. Lemp, 32 I. —, 179 P. 737.

§ 7587. [5469] **Claims barred by limitations.** No claim must be allowed by the executor or administrator, or by the probate judge, which was barred by the statute of limitations, at the time of the death of the decedent. When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the applicant and others, on oath, and hear any other legal evidence touching the validity of the claim. [R. S. § 5469.]

Hist. (See Prob. Prac. '64, § 137, last sentence omitted) R. S. § 5469, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "is" for "was," the words "at the time of the death of the decedent" are omitted and "claimant" for "applicant": C. C. P. 1872, § 1499; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8743.

Cited: Est. of Coryell (1909) 16 I. 201, 212, 101 P. 723.

Administrator can not waive statute: An administrator of the estate of a deceased person has no power or authority to waive the bar of the statute of limitations so as to set a new date for the statute to begin to run. Dern v. Olsen (1910) 18 I. 358, 110 P. 164, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B) 1016.

§ 7588. [5470] **Claims to be presented before suit.** No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, whether homestead, community or separate property of the deceased, where all recourse against any other property of the estate is expressly waived in the complaint. [R. S. § 5470.]

Hist. (See Prob. Prac. '64, § 138, which omits the exception, Laws '05, p. 82, § 1) R. S. § 5470, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "whether homestead, community or separate property of the deceased" omitted: C. C. P. 1872, § 1500; additional provision as amended: Kerr's C. ib. Idaho Trust Co. v. Miller (1909) 16 I. 308, 312, 102 P. 360.

N. D. Analogous: Prob. C. § 8743.

Cited: Idaho Trust Co. v. Miller (1909) 16 I. 308, 102 P. 360; Dern v. Olsen (1910) 18 I. 358, 110 P. 164, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016.

Application: This section applies to the United States as a claimant as well as to an individual, and the failure of the United States to present its claim to the administrator precludes it from successfully maintaining an action thereon. U. S. v. Hailey (1882) 2 I. 22, 3 P. 263.

Equitable claims: A purely equitable claim or a demand for equitable relief does not constitute a "claim" which must be presented to the administrator before bringing suit. Toulouse v. Burkett (1886) 2 I. 184, 10 P. 26.

The presentation of a claim to an administrator and the rejection thereof by him need not be alleged in the complaint in an action on such claim, but may be proved on the trial without such allegation. Ib.

Mortgage claims: This section does not preclude a mortgagee from first presenting his claim for the mortgage debt to the administrator, and afterward foreclosing his mortgage to obtain the deficiency remaining after part payment out of the estate. First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

§ 7589. [5471] **Vacancy in administration tolls limitations.** The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed. [R. S. § 5471.]

Hist. (Prob. Prac. '64, § 139) R. S. § 5471, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1501: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8743.

Cited: Dern v. Olsen (1910) 18 I. 358, 110 P. 164, Ann. Cas. 1912A 1, L. R. A. (N. S.) 1915B 1016.

§ 7590. [5472] **Pending actions: Claims to be presented.** If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required. [R. S. § 5472.]

Hist. (Prob. Prac. '64, § 140) R. S. § 5472, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1502: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8744.

§ 7591. [5473] **Partial allowance of claim.** Whenever any claim is presented to an executor or administrator, or to the probate judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed. [R. S. § 5473.]

Hist. Prob. Prac. '64, § 141; R. S. § 5473, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1503; same as amended except "to a judge" for "to the probate judge": Kerr's C. ib.

N. D. Analogous: Prob. C. § 8744.

§ 7592. [5474] **Effect of judgment on claim.** A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment. [R. S. § 5474.]

Hist. Prob. Prac. '64, § 142; R. S. § 5474, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1504; similar as amended with superior court system: Kerr's C ib.

N. D. Similar: Prob. C. § 8745.

Applied to appealed case: On appeal from the allowance of a claim by the probate court, a judgment rendered in the district court against the administrator of an estate for the amount due upon said claim, with direction that said judgment be paid by the administrator in due course of administration, is in proper form and not erroneous. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

Effect of judgment: A judgment rendered against an executor or administrator upon a claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. McElroy v. Whitney (1913) 24 I. 210, 133 P. 118.

§ 7593. Judgment before death: Execution. When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death, except as provided in section 6915. A judgment against the decedent for the recovery must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution in like manner and with like effect as if the judgment debtor were still living. [C. L. § 5475.]

Hist. (See Prob. Prac. '64, § 143) R. S. § 5475, reen. R. C. ib.; compiled and reen. C. L. ib.

Comp. leg.—Cal. Same except reference and last sentence omitted: C. C. P. 1872, § 1505; now same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8746.

§ 7594. [5476] **Judgment on verdict before death.** A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered theron, is not a lien on the real property of the decedent, but is payable in due course of administration. [R. S. § 5476.]

Hist. R. S. § 5476, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Prob. C. § 8746.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1506: Kerr's C. ib.

§ 7595. [5477] **Reference of claims.** If the executor or administrator doubts the correctness of any claim presented to him he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the probate judge. Upon filing the agreement and approval of the probate judge in the office of the clerk of the district court for the county in which the letters testamentary or of administration were granted, the clerk must, either in vacation or in term, enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the probate court; and the report of the referee, if confirmed, establishes or rejects the claim, the same as if it had been allowed or rejected by the executor or administrator and the probate judge. [R. S. § 5477.]

Hist. R. S. § 5477, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8747.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1507; similar as amended: Kerr's C. ib.

§ 7596. [5478] **Same: Proceedings on reference.** The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual in all respects as if the same had been rendered in a suit commenced by ordinary process. [R. S. § 5478.]

Hist. R. S. § 5478, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: Prob. C. § 8748.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1508: Kerr's C. ib.

§ 7597. [5479] **Liability of executor for costs.** When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause. [R. S. § 5479.]

Hist. Prob. Prac. '64, § 144; R. S. § 5479, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: Prob. C. § 8749.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1509: Kerr's C. ib.

§ 7598. [5480] **Claims of executor or administrator.** If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the probate judge, and its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims, in due course of administration. If, however, the probate judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the probate judge, who may appoint an attorney at the expense of the estate to defend the action. If the claimant recovers no judgment, he must pay all costs, including defendant's attorney's fees. [R. S. § 5480.]

Hist. (See Prob. Prac. '64, § 145, as to first sentence) R. S. § 5480, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1510; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8750.

§ 7599. [5481] **Failure of executor to publish notice.** If an executor or administrator neglects for two months after his appointment to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment. [R. S. § 5481.]

Hist. (See Prob. Prac. '64, § 146) R. S. § 5481, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1511: Kerr's C. ib.

N. D. Identical: Prob. C. § 8751.

§ 7600. [5482[**Statement of claims against estate.** At the same term at which he is required to return his inventory the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term thereafter he must present a statement of claims subsequently presented to him. In all statements he must designate the names of the creditors, the nature of each claim, when it becomes due or will become due, and whether it was allowed or rejected by him. [R. S. § 5482.]

Hist. Prob. Prac. '64, § 147; R. S. § 5482, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1512; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8752.

Cited: Est. of Coryell (1909) 16 I. 201, 101 P. 723.

§ 7601. [5483] **Payment of interest on claims.** If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts unless the creditor consent to accept the amount. [R. S. § 5483.]

Hist. R. S. § 5483, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872: Kerr's C. § 1513.

N. D. Similar: Prob. C. § 8735.

CHAPTER 279.

SALES AND CONVEYANCES OF PROPERTY OF DECEDENT.

§ 7602. [5490] **Personal property to be first exhausted.** The personal estate of the decedent which comes into the hands of the executor or administrator is first chargeable with the payment of the debts and expenses. If the goods, chattels, rights and credits in the hands of the executor or administrator are not sufficient to pay the debts of the decedent, the expenses of administration and the allowance to the family, the whole of the real estate may be sold for that purpose by the executor or administrator. [R. S. § 5490.]

Hist. Prob. Prac. '64, § 117; R. S. § 5490, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "in the manner prescribed in chapter 7 of this title" added: C. C. P. 1872, § 1516; analogous: Kerr's C. ib.

§ 7603. [5491] **Sales to be reported and confirmed.** No sale of any property of an estate of a decedent is valid unless made under order of the probate court, except as otherwise provided in this chapter. All sales must be reported under oath and confirmed by the probate court before the title of the property sold passes. [R. S. § 5491.]

Hist. (See Prob. Prac. '64, § 148, for first sentence) R. S. § 5491, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1517: Kerr's C. ib.

N. D. Similar: Prob. C. § 8764.

Confirmation: Sales made by an administrator must be reported under oath to, and confirmed by, the probate court before title to the property passes. S. v. Cunningham (1898) 6 I. 113, 53 P. 451.

§ 7604. [5492] **Petition for order of sale.** All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale. [R. S. § 5492.]

Hist. (See Prob. Prac. '64, § 149, for first sentence) R. S. § 5492, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same through first sentence,, rest omitted: C. C. P. 1872, § 1518; same as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8764.

§ 7605. [5493] **Sale of entire estate.** When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in case of perishable property, which may be sold as provided in the next section. The probate court, when a petition for the sale of any property, for any of the purposes herein named, is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required in a petition for the sale of real estate. [R. S. § 5493.]

Hist. R. S. § 5493, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1519: Kerr's C. ib.

N. D. Similar: Prob. C. § 8765.

§ 7606. [5494] **Sales of perishable property.** At any time after receiving letters the executor, administrator or special administrator may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing, the court shall approve the sale. [R. S. § 5494.]

Hist. (See Prob. Prac. '64, § 150) R. S. § 5494, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1522: Kerr's C. ib.

N. D. Similar: Prob. C. § 8766.

§ 7607. Sales of personal property. If claims against the estate have been allowed and a sale of property is necessary for their payment or the expense of administration, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands and sale

thereof is necessary. If it is made to appear for the best interests of the estate he may, at any time after filing the inventory, in like manner and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate whether necessary to pay debts or not. [C. L. § 5495.]

Hist. R. S. § 5495, reen. R. C. ib.; modified by '11, c. 96, p. 340, amending § 3843; compiled and reen. C. L. § 5495.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1523; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8767.

§ 7608. [5496] **Same: Partnership interests and choses in action.** Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs and must examine the surviving partner, if in the county and able to be present in court. [R. S. § 5496.]

Hist. R. S. § 5496, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1524: Kerr's C. ib.

N. D. Identical: Prob. C. § 8768.

§ 7609. [5497] **Order of sale.** If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, the court or judge must so direct; and such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts or family allowance, until all other personal estate has been applied to the payment thereof. [R. S. § 5497.]

Hist. (See Prob. Prac. '64, § 151) R. S. § 5497, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1525; similar as amended except last sentence is omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8769.

§ 7610. [5498] **Personal property: How sold.** The sale of personal property must be made at public auction, and after public notice, given for at least 10 days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold; unless for good reason shown, the probate court or judge orders a private sale, or a shorter notice. Public sales shall not be made of any property which is not present at the time of selling it, unless the court otherwise order. [R. S. § 5498.]

Hist. (See Prob. Prac. '64, § 152) R. S. § 5498, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 1526; as amended: Kerr's C .ib.

N. D. Analogous: Prob. C. § 8770.

§ 7611. Sales of mining property. When the estate of any decedent consists, in whole or in part, of mines or interests in mines in this state, the same may be sold under the order of the probate court having jurisdiction of the estate.

When the decedent, at the time of his death, was not a citizen of this state, but had mining interests herein, the probate court of any county in this state in which such mining interests are situated, may, upon a

proper petition of an heir at law of such decedent, or of any of his coowners or mining partners in any of said mining interests, or of any person having any interest in such mining properties, or in the estate, appoint an administrator, who shall give bonds as required by the court. The probate court first acquiring jurisdiction has exclusive jurisdiction of the administration of all of decedent's mining interests in this state, and after such appointment of an administrator of such nonresident decedent, creditors may present and prove their claims as in other cases, but within such time as the court may order.

The probate court may, when it shall appear that the decedent has no creditors in this state, or when for other causes it shall seem best to the court, permit decedent's foreign administrator or representative to file certified copies of his letters of authority to represent the estate, and thereafter he has all the authority of an administrator appointed under the laws of this state. [C. L. § 5499.]

Hist. R. S. § 5499; am. '99, p. 377, § 1, reen. R. C. § 5499; compiled and reen. C. L. ib.

Comp. leg.—Cal. Similar through first sentence, rest omitted: C. C. P. 1872, § 1529; additional provisions as amended: Kerr's C. ib.

§ 7612. [5500] **Same: Petition for sale:** In the administration of the estate of any decedent, the administrator, or other proper legal representative thereof, or any heir at law, or creditor of the decedent, or any of his coowners or mining partners in mines or mining interests, or any member of any mining partnership, or mining company in which shares or stocks were held by deceased, may file in the proper probate court a written petition describing the mine, interest or shares which it is desired to sell, and the condition and situation of the mine or mining interests, or of the mining company in which such interests or shares are held, and the reasons why the sale is desired. ['99, § 1, p. 377.]

Hist. R. S. § 5500; am. '99, p. 377, § 1, reen. R. C. § 5500, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1530; as amended: Kerr's C. ib.

§ 7613. [5501] **Same: Order to show cause.** Upon the presentation of such petition, the probate judge must make an order directing all persons interested to appear before him at a time and place specified, not less than three nor more than eight weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mines, mining interests, shares or stocks as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate at least 10 days before the time appointed for hearing the petition, or published at least three successive weeks in such newspaper as the court shall specify. If all persons interested in the estate signify, in writing, their assent to such sale, the notice may be dispensed with. ['99, § 1, p. 377.]

Hist. R. S. § 5501; am. '99, p. 377, § 1, reen. R. C. § 5501, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1531; as amended: Kerr's C. ib.

§ 7614. [5502] **Same: Order of sale.** If, upon hearing the petition, it appears to the satisfaction of the probate judge that it is to the interest of such estate that such mining property or interests of the estate should be sold, or if it appears to his satisfaction that an immediate sale is necessary in order to secure the just rights or interests of the mining partner, or tenants in common, such probate judge must make an order authorizing such administrator or other legal representative to sell such mines, mining interests or shares, and for that purpose, when necessary, to enter into written bonds or contracts with parties for the future sale

upon such conditions and at such price as may be considered best, subject to the approval of said judge. ['99, § 1, p. 377.]

Hist. R. S. § 5502; am. '99, p. 377, § 1, reen. R. C. § 5502, reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1532; as amended: Kerr's C. ib.

§ 7615. [5503] **Same: Conduct of sale: Disposal of proceeds:** If the order is made for the sale of the property, such sale must be made and such proceedings had as are provided for in the sale of other real estate and property, but, if it be for the bonding or contracting for the sale thereof, the administrator or legal representative must be authorized to enter into a bond or contract for the sale, and, when necessary, to make and fully execute and place in escrow at some place approved by such judge a proper deed of conveyance for the property. In any case the proceeds of the sale of the property shall be disposed of as other proceeds and assets of the estate: *Provided,* That when the decedent was not a citizen of this state, if no claims are established in the probate court in this state against the estate, such proceeds, in the absence of any proper objections by parties interested in such estate, must, upon the order of the probate court, be paid to the proper foreign administrator or representative or heir of the estate, or to parties entitled thereto as may be determined by the court, less the cost of the proceedings in the probate court in this state. ['99, § 1, p. 377.]

Hist. R. S. § 5503; am. '99, p. 377, § 1, reen. R. C. § 5503, reen. C. L. ib.

§ 7616. Sale of property. When a sale of property of the estate is necessary to pay the allowance of a family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate, upon the order of the court; and an application for the sale of real property may also embrace the sale of personal property. ['15, c. 103, § 1, p. 241.]

Hist. (See Prob. Prac. '64, § 154) R. S. § 5504, reen. R. C. ib.; am. '15, c. 103, § 1, p. 241, reen. C. L. § 5504.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1536; amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8771.

§ 7617. Same: Petition for sale. To obtain such order for the sale of real property, he must present a verified petition to the probate court, or to the judge at chambers, setting forth:

1. The amount of the personal estate that has come to his hands, and
2. How much thereof, if any, remains undisposed of.
3. The debts outstanding against the decedent, as far as can be ascertained or estimated.
4. The amount due upon the family allowance, or
5. That will be due after the same has been in force for one year.
6. The debts, expenses and charges of administration already accrued, and
7. An estimate of what will or may accrue during the administration.
8. A description of all the real estate of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and
9. The condition and value of the respective portions and lots thereof, and

10. Whether the same be community or separate property.

11. The names and ages of the legatees and devisees, if any, and of the heirs of the decedent, so far as known to the petitioner, and

12. If the said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit and best interests of the estate and those interested therein that a sale be made, the petition, in addition to the foregoing facts must set forth in what way an advantage or benefit would accrue to the estate, and those interested therein, by such sale.

If any of the matters above enumerated cannot be ascertained, it must be so stated in the petition, but a failure to set forth facts hereinbefore enumerated will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing and the general facts, showing that such sale is necessary, or that such sale is for the advantage, benefit and best interests of the estate, and those interested therein, be stated in the decree. ['15, c. 103, § 2, p. 242.]

Hist. (See Prob. Prac. '64, § 155) R. S. § 5505, reen. R. C. ib.; am. '15, c. 103, § 2, p. 242, reen. C. L. § 5505.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1537; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8771.

Petition necessary: A petition is a necessary prerequisite to jurisdiction to sell real estate to pay the debts of a decedent and must be produced in evidence on the trial of an action in which jurisdiction to order such sale is questioned; the production of the order without the petition is insufficient to show a valid sale. Ethell v. Nichols (1879) 1 I. 741. But this case has been overruled by Clark v. Rossier (1904) 10 I. 348, 78 P. 358, 3 Ann. Cas. 231, holding that orders of probate courts are not subject to collateral attack.

§ 7618. Same: Order to show cause. If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate, and those interested therein, to sell the whole or some portion of the real estate, for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed, and an order thereupon made, directing all persons interested in the estate to appear before the court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator for the sale of such estate. ['15, c. 103, § 3, p. 243.]

Hist. (See Prob. Prac. '64, § 156) R. S. § 5506, reen. R. C. ib.; am. '15, c. 103, § 3, p. 243, reen. C. L. § 5506.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1538; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8771.

§ 7619. [5507] **Same: Service of order.** A copy of the order to show cause must be personally served on all persons interested in the estate, and on any general guardian of any minor devisee, or heir of the decedent, resident in the county, at least five days before the time appointed for hearing the petition, or must be published at least four successive weeks in such newspaper as the court or judge shall direct.

The notice is served if the publication is completed five days before the day set for hearing. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with. [R. S. § 5507.]

Hist. (See Prob. Prac. '64, § 157) R. S. § 5507, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "10 days" for "five days": C. C. P. 1872, § 1539; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8772.

§ 7620. [5508] **Same: Hearing.** The probate court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed

to hear the petition and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application. [R. S. § 5508.]

Hist. (See Prob. Prac. '64, § 158) R. S. § 5508, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same with additional clause: C. C. P. 1872, § 1540; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8772.

§ 7621. [5509] Examination of witnesses. The executor, administrator and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the probate judge in the same manner and with like effect as in other cases. [R. S. § 5509.]

Hist. (See Prob. Prac. '64, § 160) R. S. § 5509, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1541; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8772.

§ 7622. Sale of whole estate. If it appears to the satisfaction of the court, or a judge thereof, that it is necessary, or that it is for the advantage, benefit, and best interests of the estate and those interested therein, to sell a part of the real estate, and that by a sale thereof the residue of the estate, real and personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among their heirs or devisees as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or any part thereof, as in the judgment of the court is necessary, or for the advantage, benefit and best interests of the estate and those interested therein. ['15, c. 103, § 4, p. 243.]

Hist. (See Prob. Prac. '64, § 161) R. S. § 5510, reen. R. C. ib.; am. '15, c. 103, § 4, p. 243, reen. C. L. § 5510.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1542; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8772.

§ 7623. Order for sale of real estate. If it appears to the satisfaction of the court, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for any of the causes mentioned in this chapter, or that a sale of the whole or some portion of the real estate is for the advantage, benefit and best interests of the estate and those interested therein, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition as the court shall judge necessary or for the advantage, benefit, and best interests of the estate and those interested therein. ['15, c. 103, § 5, p. 243.]

Hist. (See Prob. Prac. '64, § 162) R. S. § 5511, reen. R. C. ib.; am. '15, c. 103, § 5, p. 243, reen. C. L. § 5511.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1543; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8772.

§ 7624. [5512] Same: Contents of order. The order of the sale must describe the lands to be sold and the terms of sale, which may be for cash or on credit not exceeding one year, payable in gross or in instalments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs.

If it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every

such sale must be ordered to be made at public auction unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof, to be sold at either public or private sale as the executor or administrator shall judge to be most beneficial for the estate.

If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell by order of the court, made on motion after due notice, by any party interested. [R. S. § 5512.]

Hist. (See Prob. Prac. '64, § 163) R. S. § 5512, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1544; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8772.

§ 7625. Interested parties may petition for sale. If the executor or administrator neglects or refuses to apply for an order of sale when it is necessary, or when it is for the advantage, benefit and best interests of the estate, and those interested therein, that the real estate or some portion thereof, be sold, any person interested in the estate may make application therefor in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing.

The petition of such applicant must contain as many of the matters required in petitions of executors and administrators as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale. ['15, c. 103, § 6, p. 244.]

Hist. (See Prob. Prac. '64, § 164) R. S. § 5513; reen. R. C. ib.; am. '15, c. 103, § 6, p. 244, reen. C. L. § 5513.

Comp. leg.—Cal. Analogous: C. C. P. 1872, § 1545; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8773.

§ 7626. [5514] **Same: Delivery of order to executor.** Upon making the order mentioned in the last section, a certified copy of the order of sale must be delivered by the court or the clerk to the executor or administrator, who is thereupon authorized and required to sell the real estate as directed. [R. S. § 5514.]

Hist. (See Prob. Prac. '64, § 165) R. S. § 5514, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1546; repealed in 1874.

N. D. Analogous: Prob. C. § 8774.

§ 7627. [5515] **Notice of sale.** When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice. [R. S. § 5515.]

Hist. (See Prob. Prac. '64, § 166) R. S. § 5515, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1547; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8774.

§ 7628. [5516] **Time and place of sale.** Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed. [R. S. § 5516.]

Hist. (See Prob. Prac. '64, § 167) R. S. § 5516, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Prob. C. § 8774.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1548; Kerr's C. ib.

§ 7629. [5517] **Private sale of real estate.** When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county—if none, then in such paper as the court may direct—for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least 15 days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the probate court, to which the return of sale must be made, at any time after the first publication of the notice, and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than 15, but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order. [R. S. § 5517.]

Hist. R. S. § 5517, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Prob. C. § 8774.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1549; similar as amended: Kerr's C. ib.

§ 7630. [5518] **Same: Sufficiency of bid: Appraisement.** No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least 90 per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof. [R. S. § 5518.]

Hist. R. S. § 5518, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Prob. C. § 8775.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1550; Kerr's C. ib.

§ 7631. [5519] **Sales on credit.** The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure their payment. [R. S. § 5519.]

Hist. (See Prob. Prac. '64, § 168) R. S. § 5519, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Prob. C. § 8775.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1551; Kerr's C. ib.

§ 7632. [5520] **Return of sale: Proceedings.** The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently,

and thereupon the court or judge must fix the day for the hearing, of which notice of at least 10 days must be given by the clerk by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least 10 per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of 10 per cent more in amount than that named in the return be made to the court in writing by a responsible person it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. [R. S. § 5520.]

Hist. (See Prob. Prac. '64, § 169) R. S. § 5520, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: C. C. P. 1872, § 1552; similar as amended: Kerr's C. ib. McGregor v. Jensen (1910) 18 I. 320, 109 P. 729.

N. D. Analogous: Prob. C. § 8775.

Discretion defined: The "discretion" referred to is a legal discretion, but before the court can exercise that discretion an offer by a responsible person of 10 per cent more than that named in the return must be made. McGregor v. Jensen (1910) 18 I. 320, 109 P. 729.

Time of offer: The provisions of this section clearly contemplate that the offer there referred to must be made in the probate court at the time of the hearing of the confirmation, and not a long time after said hearing and after an appeal has been taken to the district court. And there must be evidence showing that the proceedings were unfair and that the sum bid was "disproportionate" to the value of the claim at the time the bid was made. Ib.

§ 7633. [5521] **Objections to confirmation.** When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections. [R. S. § 5521.]

Hist. (See Prob. Prac. '64, § 170) R. S. § 5521, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1553; Kerr's C. ib.

N. D. Identical: Prob. C. § 8776.

Objections: The mere filing of objections can avail nothing when unsupported by evidence. Est. of Christensen (1909) 15 I. 692, 99 P. 829.

When written objections are filed, the return to the order of sale and the objections made thereto constitute the issues to be tried and determined by the probate court, from a judgment on which an appeal lies to the district court. Ib.

Objections may be made to the confirmation of the sale by any one interested. McGregor v. Jensen (1910) 18 I. 320, 109 P. 729.

§ 7634. [5522] **Confirmation of sale: Resale.** If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified can not be obtained, or if the increased bid before mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the recorder of the county within which the land sold is situated. If, after the confirmation, the purchaser, neglects or refuses to comply with the terms of the sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of previous sale, such purchaser is liable for the deficiency to the estate. [R. S. § 5522.]

Hist. (See Prob. Prac. '64, § 171) R. S. § 5522, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1554; Kerr's C. ib.

N. D. Similar: Prob. C. §§ 8777-8.

Cited: Est. of Christensen (1909) 15 I. 692, 695, 99 P. 829.

Hearing on objections: If objections are made to the confirmation of the sale, and on a hearing it appears to the probate court that the sale was fair, and that the sum bid was a reasonable and fair value for the property sold, it is the duty of the probate court to confirm the sale; and where the case has been tried anew, on its appeal to the district court, it is equally the duty of that court to confirm the sale, where the same elements of fairness appear. McGregor v. Jensen (1910) 18 I. 320, 109 P. 729.

§ 7635. [5523] **Execution of conveyances.** Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume and page of the record, and such reference shall have the same effect as if the orders were, at large, inserted in the conveyance. Conveyances so made convey all the right, title, interest and estate of the decedent in the premises at the time of his death; if, prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest in the premises other than, or in addition to, that of the decedent at the time of his death, such right, title or interest also passes by such conveyances. [R. S. § 5523.]

Hist. (See Prob. Prac. '64, § 172) R. S. § 5523, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1555; same as amended except "probate" omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8779.

§ 7636. [5524] **Proof of notice necessary.** Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made. [R. S. § 5524.]

Hist. (See Prob. Prac. '64, § 173) R. S. § 5524, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1556; Kerr's C. ib.

N. D. Identical: Prob. C. § 8780.

§ 7637. [5525] **Postponement of sale.** If at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months. [R. S. § 5525.]

Hist. (See Prob. Prac. '64, § 174) R. S. § 5525, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1557; Kerr's C. ib.

§ 7638. [5526] **Notice of postponement.** In case of a postponement, notice thereof must be given by a public declaration at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit. [R. S. § 5526.]

Hist. (See Prob. Prac. '64, § 175) R. S. § 5526, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1558; Kerr's C. ib.

§ 7639. [5527] **Provision in will for debts.** If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation out of the estate thus appropriated, so far as the same is sufficient. [R. S. § 5527.]

Hist. (See Prob. Prac. '64, § 177) R. S. § 5527, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1560; Kerr's C. ib.

§ 7640. [5528] **Sale under power in will.** When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases, and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court. [R. S. § 5528.]

Hist. R. S. § 5528, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C C. P. 1872, § 1561; same as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8781.

Authority of executors: Where executors were authorized by a will to sell and dispose of any part or the whole of the estate and where a sale of real estate was made by them and confirmed by the probate court, such sale was valid and the executors had authority to convey a good, marketable title. Jones v. Broadbent (1912) 21 I. 555, 123 P. 476.

§ 7641. [5529] **Sale of undevised portion of estate.** If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter. [R. S. § 5529.]

Hist. (See Prob. Prac. '64, § 179) R. S. § 5529, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1562; Kerr's C. ib.

§ 7642. [5530] **Shares of legatees liable for debts.** The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devisees or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator and there is other sufficient estate. [R. S. § 5530.]

Hist. (See Prob. Prac. '64, § 180) R. S. § 5530, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1563; Kerr's C. ib.

§ 7643. [5531] **Contribution among legatees.** When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the probate court, when distribution is made, must by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively, for the purpose of paying such contribution. [R. S. § 5531.]

Hist. (See Prob. Prac. '64, § 181) R. S. § 5531, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1564; same as amended except "probate" court omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8782.

§ 7644. [5532] **Sale of contract interest in land.** If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such lands and under such contract may be sold on the application of his executor or administrator in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seized except as hereinafter provided. [R. S. § 5532.]

Hist. (See Prob. Prac. '64, § 182) R. S. § 5532, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1565; Kerr's C. ib.

N. D. Similar: Prob. C. § 8783.

§ 7645. [5533] **Same: Conditions of sale.** The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the probate judge until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the probate judge shall approve. [R. S. § 5533.]

Hist. (See Prob. Prac. '64, § 183) R. S. § 5533, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8784.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1566; same: Kerr's C. ib.

§ 7646. [5534] **Same: Bond of purchaser.** The bond must be conditioned that the purchaser will make all payments for such land that shall become due after the date of the sale, and will fully indemnify the executor or administrator, and the persons so entitled against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract. [R. S. § 5534.]

Hist. (See Prob. Prac. '64, § 184) R. S. § 5534, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8784.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1567; Kerr's C. ib.

§ 7647. [5535] **Same: Assignment of contract.** Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living. [R. S. § 5535.]

Hist. (See Prob. Prac. '64, § 185) R. S. § 5535, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: Prob. C. § 8785.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1568; Kerr's C. ib.

§ 7648. [5536] **Satisfaction of mortgages and liens.** When any sale is made by an executor or administrator pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is effected by the statute of limitations, pending the proceedings for the settlement of the estate.

The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the court without delay in payment of the expenses of the sale, and in satisfaction of the debt, to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator unless for

good cause shown, after notice to the executor or administrator, the court otherwise directs. [R. S. § 5536.]

Hist. (See Prob. Prac. '64, § 186) R. S. § 5536, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1569; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8786.

Cited: First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

§ 7649. [5537] **Mortgagor may purchase.** At any sale, under order of the probate court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court or the clerk thereof an amount sufficient to pay such expenses. [R. S. § 5537.]

Hist. R. S. § 5537, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1570; same as amended except "probate" omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8787.

Cited: First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

§ 7650. [5538] **Liability for misconduct of sale.** If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise. [R. S. § 5538.]

Hist. (See Prob. Prac. '64, § 188) R. S. § 5538, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1571; Kerr's C. ib.

N. D. Similar: Prob. C. § 8787.

§ 7651. [5539] **Same: Fraudulent sales.** Any executor or administrator who fraudulently sells any real estate of a decedent contrary to, or otherwise than under, the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. [R. S. § 5539.]

Hist. (See Prob. Prac. '64, § 189) R. S. § 5539, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1572; Kerr's C. ib.

N. D. Similar: Prob. C. § 8787.

§ 7652. [5540] **Actions to vacate sales: Limitations.** No action for the recovery of any estate sold by an executor or administrator under the provisions of this chapter can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds, upon which the action is based. [R. S. § 5540.]

Hist. (See Prob. Prac. '64, § 190, for first sentence) R. S. § 5540, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1573; same except the words "the settlement of the final account of the executor or administrator" for "the sale": Kerr's C. ib.

N. D. Prob. C. § 8788.

§ 7653. [5541] **Same: Exceptions in cases of disability.** The preceding section shall not apply to minors or others under any legal disability to sue at the time when right of action first accrues, but all such persons may commence an action at any time within three years after the removal of the disability. [R. S. § 5541.]

Hist. (See Prob. Prac. '64, § 191) R. S. § 5541, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1574; Kerr's C. ib.

N. D. Similar: Prob. C. § 8788.

§ 7654. [5542] **Executor to account for sale.** When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the probate court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglects to make such return he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made. [R. S. § 5542.]

Hist. (See Prob. Prac. '64, § 192) R. S. § 5542, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1575; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8789.

§ 7655. [5543] **Executors not to purchase.** No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale. [R. S. § 5543.]

Hist. (See Prob. Prac. '64, § 193) R. S. § 5543, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1576; Kerr's C. ib.

N. D. Similar: Prob. C. § 8789.

Section declaratory: This section may be considered as merely declaratory of the fundamental principle of trusteeship which inhibits the trustee from dealing with the subject matter of the trust in any way which may inure to his personal profit. Est. of Blackinton (1916) 29 I. 310, 158 P. 492.

Applied: An administrator's wife, who receives a deed from an heir before final distribution, must show that it was intended that the property become her separate property, or the transaction will be void. Ib.

Does not apply to property which has been distributed to an heir by a formal order of the probate court. In any event such sale is not absolutely void, but voidable only, at the option of the vendor. Cardoner v. Day, 253 F. 572.

CHAPTER 280.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS

Cross ref. Executors and administrators to pay transfer taxes: §§ 3379, 3381. May deposit securities belonging to the estate with guaranty and trust companies: § 4862. May sign petition for change of boundaries in irrigation districts: § 4412.

§ 7656. [5550] **Executor to take possession of estate.** The executor or administrator must take into possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate, For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration as provided in this title. [R. S. § 5550.]

Hist. (See Prob. Prac. '64, § 194, for first sentence) R. S. § 5550, reen. R. C. ib., reen. C. L. ib.

Cross ref. Executors and administrators may represent corporate stock belonging to the estate: § 4719.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1581; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8797.

§ 7657. [5551] **Actions by and against executors.** Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates. [R. S. § 5551.]

Hist. (Prob. Prac. '64, § 195) R. S. § 5551, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1582; broader as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8798.

§ 7658. [5552] **Actions for waste and trespass.** Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime. [R. S. § 5552.]

Hist. Prob. Prac. '64, § 196; R. S. § 5552, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1583; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8800.

§ 7659. [5553] **Same: Actions against executor.** Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person. [R. S. § 5553.]

Hist. Prob. Prac. '64, § 197; R. S. § 5553, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1584; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8800.

§ 7660. [5554] **Settlement of partnership business.** When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator the probate judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. [R. S. § 5554.]

Hist. Prob. Prac. '64, § 198; R. S. § 5554, reen. R. C. ib., reen. C. L. ib.

Cross ref. Dissolution of partnerships: §§ 5841-55.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1585; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8801.

Cited: Johnson v. Fraser (1888) 2 I. 404, 18 P. 48.

Continuance of business: Upon the death of one partner the surviving partner may continue the partnership business by and with the consent of the executor or administrator of the estate of the deceased and the approval of the probate court. McElroy v. Whitney (1906) 12 I. 512, 88 P. 349.

Compensation of surviving partner: Whilst the general rule is that the surviving partner is not entitled to a salary or compensation for managing and settling up the partnership business it has its exceptions when a partnership has been carried on for some time after a dissolution by death, and such continuance has proved to be beneficial. Ib.

In cases of partnerships among persons engaged in professional employment an exception is also made to the general rule. Jones v. Marshal (1913) 24 I. 678, 135 P. 841.

§ 7661. [5555] **Actions by administrator on executor's bond.** An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate. [R. S. § 5555.]

Hist. Prob. Prac. '64, § 199; R. S. § 5555, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1586; Kerr's C. ib.

N. D. Similar: Prob. C. § 8802.

§ 7662. [5556] **Executors failing to qualify: Joinder as parties.** In actions by or against executors it is not necessary to join those as parties to whom letters were issued but who have not qualified. [R. S. § 5556.]

Hist. Prob. Prac. '64, § 200; R. S. § 5556, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1587; Kerr's C. ib.

§ 7663. [5557] **Executor may compound with debtor.** Whenever a debtor of a decedent is unable to pay all his debts the executor or administrator, with the approbation of the probate court or judge, may compound with him, and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interest of the estate. [R. S. § 5557.]

Hist. Prob. Prac. '64, § 201; R. S. § 5557, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1558; Kerr's C. ib.

N. D. Similar: Prob. C. § 8814.

§ 7664. [5558] **Action to set aside fraudulent transfer by decedent.** When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his life time, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against the creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance. [R. S. § 5558.]

Hist. Prob. Prac. '64, § 202; R. S. § 5558, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1589; Kerr's C. ib.

N. D. Similar: Prob. C. § 8811.

Fraudulent intent necessary: Where it is shown that a decedent, in making a conveyance to his daughter, acted in perfect good faith, and it is not claimed that such decedent had any intent to defraud, an action can not be maintained under this section. Brown v. Perrault (1898) 5 I. 728, 51 P. 752.

§ 7665. [5559] **Same: Creditors to secure costs.** No executor or administrator is bound to sue for such estate as mentioned in the preceding section for the benefit of the creditors unless on application of creditors, who must pay such part of the costs and expenses of the suit or give such security to the executor or administrator therefor as the probate judge shall direct. [R. S. § 5559.]

Hist. (See Prob. Prac. '64, § 203) R. S. § 5559, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1590; Kerr's C. ib.

N. D. Similar: Prob. C. § 8812.

§ 7666. [5560] **Same: Disposition of property recovered.** All real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the probate court; and the proceeds of all goods, chattels, rights and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. [R. S. § 5560.]

Hist. Prob. Prac. '64, § 204; R. S. § 5560, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1591; Kerr's C. ib.

N. D. Similar: Prob. C. § 8813.

§ 7667. [5561] **Power of foreign executors to satisfy mortgages.** Foreign executors and administrators may satisfy mortgages upon the

records of any county in this state upon producing and recording in the office of the county recorder of the county in which such mortgage is recorded a duly certified and authenticated copy of their letters testamentary or of administration, and which certificate shall also recite that said letters have not been revoked. ['15, c. 65, § 1, p. 171.]

Hist. '15, c. 65, § 1, p. 171, reen. C. L. § 5561.

CHAPTER 281.

PROCEEDINGS TO MORTGAGE OR LEASE PROPERTY OF DECEDENTS, MINORS OR INCOMPETENTS.

§ 7668. Power of court. Whenever, in any estate now being administered, or that may hereafter be administered, or in any guardianship proceeding now pending, or that may hereafter be pending, it shall appear to the probate court, or the judge thereof, to be for the advantage of the estate to raise money upon a note or notes to be secured by a mortgage of the real property of any decedent, or of a minor, or an incompetent person, or any part thereof, or to make a lease of said real property, or any part thereof, or to mortgage, pledge or hypothecate personal property, including notes secured by real estate mortgage, or to make a lease of said personal property, or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, or in the course of any guardianship matter, may, on a petition, notice and hearing as provided in this chapter, authorize, empower and direct the executor or administrator, or guardian of such minor or incompetent person, to mortgage such real or personal property, or any part thereof, and to execute a note or notes to be secured by such mortgage, or to lease such real estate or personal property or some part thereof. ['19, c. 57, § 1, p. 167.]

§ 7669. Mortgage of realty. To obtain an order to mortgage such realty, or to mortgage, pledge or hypothecate personal property, including notes secured by real estate mortgages, the proceedings to be taken and the effect thereof shall be as follows:

1. The executor or administrator of any estate, or guardian of any minor or incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition showing:

a. The particular purpose or purposes for which it is proposed to make the note or notes and mortgages which shall be either to maintain the ward and his family, or to maintain and educate the ward when a minor, or to pay, reduce, extend or renew some lien or mortgage already subsisting on the realty of said ward, or some part thereof, and in the case of decedents' estates, to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said realty or some part thereof.

b. A statement of the facts and circumstances showing the insufficiency of the income of the estate under guardianship to maintain the ward and his family, or to maintain and educate the ward, when a minor, and the liens or mortgages to be paid, reduced, extended, or renewed, as the case may be; and in the case of the decedents' estates, to pay the debts, legacies, or charges of administration, and the liens or mortgages to be paid, reduced, extended, or renewed, as the case may be.

c. The advantage that may accrue to the estate from raising the required money by note or notes and mortgage, or providing for the pay-

ment, reduction, extension, or renewal of the subsisting liens or mortgages, as the case may be.

d. The amount to be raised, with a general description of the property proposed to be mortgaged; and

e. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, as the case may be, so far as known to the petitioner.

2. Upon filing such petition, an order shall be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged for the amount mentioned in the petition (stating such amount), or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

3. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or may be published for four successive weeks in a newspaper of general circulation, published in the county.

4. At the time and at the place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service or publication of the order to show cause, the court or judge must proceed to hear the petition and any objections that may be filed or presented thereto.

Upon such hearing, witnesses may be compelled to attend and testify, in the same manner, and with like effect, as in other cases; and if, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage, and a promissory note or notes to the lender, for the amount of the loan, to be secured by said mortgage; the order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest and period of the loan, which shall not exceed five years, and may direct in what coin or currency it shall be paid, and require that the interest and the whole or any part of the principal be paid, from time to time, out of the whole estate or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from such income.

5. After the making of the order to mortgage, the executor, administrator, or guardian of a minor or of an incompetent person shall execute and deliver a promissory note or notes for the amount and period specified in the order, and shall execute, acknowledge, and deliver a mortgage of the premises, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land, or any portion thereof, lies. The note or notes and mortgage shall be signed by the executor, administrator, or guardian as such, and shall create no personal liability against the persons so signing.

6. Every note or notes and mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest and estate which

the decedent, minor or incompetent person had in the premises described therein at the time of the death of such decedent, or at the time of the appointment of the guardian of such minor or of such incompetent person, or prior thereto, and any right, title, or interest in said premises acquired by the estate of such decedent, minor, or incompetent person, by operation of law or otherwise, since the time of the death of such decedent, or the appointment of the guardian of such minor or incompetent person.

Jurisdiction of the court to administer the estate of such decedent, minor, or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee, named in the mortgage, his heirs and assigns. No irregularity in the form of the proceedings shall impair or invalidate the same or the note or notes and mortgage given in pursuance thereof, and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the note or notes and mortgage as if it had been made by the decedent prior to his death, the minor after reaching the age of maturity, or the incompetent person when legally competent.

Provided, That upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the note or notes and mortgage, no judgment or claim for any deficiency of such proceeds to satisfy the note or notes and mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the note or notes and mortgage were given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate, or a lien upon the interest of the minor in said real estate at the time it vested in him, or upon the estate of the incompetent at the time the incompetency of the incompetent person was so declared by the court; and *Provided also,* That in cases affecting the estate of the deceased person, the part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in chapters 278 and 283 with respect to mortgages subsisting at the time of death. ['19, c. 57, § 2, p. 167.]

§ 7670. Mortgage of personal property. To obtain an order to mortgage, pledge or hypothecate personal property the same showing shall be made as required by section 7669 relating to mortgages of real property: *Provided,* That notice of such application shall be given in compliance with the provisions of section 7607, instead of as provided by section 7669, and that such mortgages shall not be for a longer period than three years. ['19, c. 57, § 3, p. 170.]

§ 7671. Lease of realty. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

1. The executor, administrator, guardian of a minor or an incompetent person, or any persons interested in the estate of such decedents, minors or incompetent persons, must file a verified petition showing:

a. The advantage or advantages that may accrue to the estate from giving a lease, and the reasons therefor.

b. A general description of the property proposed to be leased.

c. The term, rental and general conditions of the proposed lease.

d. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, so far as known to the petitioner.

2. Upon filing such petition an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

3. The order to show cause may be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation in the county.

4. At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objection that may have been filed or presented thereto. Upon such hearing witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court may, in its discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for the services, not exceeding $5 per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor, administrator, or the guardian, to make such lease. The order may prescribe the minimum rental or royalty to be received for the premises, and the period of the lease, which must in no case be longer than for five years, and may prescribe the other terms and conditions of such lease.

5. After the making of the order to lease, the executor, administrator, or guardian of a minor or of an incompetent person, shall execute, acknowledge, and deliver a lease of the premises for the term and period and with the conditions specified in the order, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the leased land or any portion thereof lies.

6. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions therein prescribed, the premises described therein. Jurisdiction of the court to administer the estate of the decedent, the minor, or of the incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof. ['19, c. 57, § 4, p. 171.]

§ 7672. Lease of personal property. To obtain an order to lease personal property the same showing shall be made as required by section 7671 relating to leases of real property: *Provided,* That notice of such application shall be given in compliance with the provisions of section 7607 instead of as provided by section 7671, and that such leases shall not be for a longer period than three years. ['19, c. 57, § 5, p. 172.]

CHAPTER 282.

CONVEYANCE OF REAL ESTATE IN PERFORMANCE OF CONTRACTS.

§ 7673 [5565] **Performance of decedent's contract.** When a person who is bound by contract in writing to convey any real estate, dies before making the conveyance, where such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto. [R. S. § 5565.]

Hist. (See Prob. Prac. '64, § 205) R. S. § 5565, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1597; am. Kerr's C. ib.

N. D. Similar: Prob. C. § 8792.

Construed: An executor has no statutory authority to make the conveyance referred to in this section in the absence of a decree of the probate court directing him to do so, and where decedent's grantee seeks such a conveyance the proper procedure is by application to the probate court for such a decree, and not by filing a claim with the executor against the estate. The refusal of the executor to make the conveyance without a decree of the court does not create a right of action against the estate in favor of the grantee for money paid by the latter on the purchase price of the property. Blake v. Lemp, 32 I.—, 179 P. 737.

§ 7674. [5566] **Petition for conveyance.** On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the probate court must appoint a time and place for hearing the petition, at a regular term of the court, and must order notice thereof to be published at least four successive weeks before such hearing in such newspaper in this state as he may designate. [R. S. § 5566.]

Hist. (See Prob. Prac. '64, § 206) R. S. § 5566, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1598; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8793.

§ 7675. [5567] **Hearing and contest.** At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof, by affidavit or otherwise, of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose. [R. S. § 5567.]

Hist. Prob. Prac. '64, § 207; R. S. § 5567, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1599; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8793.

§ 7676. [5568] **Order for conveyance.** If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court, and recorded. [R. S. § 5568.]

Hist. (See Prob. Prac. '64, § 208) R. S. § 5568, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1600; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8793.

§ 7677. [5569] **Conveyance and record of papers.** The executor or administrator must execute the conveyance according to the direc-

tions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the land lies, and is prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance. [R. S. § 5569.]

Hist. R. S. § 5569, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1601; am. Kerr's C. ib.

§ 7678. [5570] **Dismissal: Action in district court.** If, upon hearing in the probate court, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months thereafter, proceed, in the district court, to enforce a specific performance thereof. [R. S. § 5570.]

Hist. Prob. Prac. '64, § 210; R. S. § 5570, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1602; am. Kerr's C. ib.

N. D. Analogous: Prob. C. § 8796.

§ 7679. [5571] **Effect of conveyance.** Every conveyance made in pursuance of a decree of the probate court, as provided in this chapter, shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance. [R. S. § 5571.]

Hist. Prob. Prac. '64, § 211; R. S. § 5571, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1603; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8794.

Cited: Blake v. Lemp, 32 I. —, 179 P. 737.

§ 7680. [5572] **Decree passes title.** A copy of the decree for a conveyance made by the probate court, and duly certified and recorded in the office of the recorder of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree. [R. S. § 5572.]

Hist. Prob. Prac. '64, § 212; R. S. § 5572, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1604; similar as amended: Kerr's C. ib.

§ 7681. [5573] **Enforcement of decree.** The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process. [R. S. § 5573.]

Hist. Prob. Prac. '64, § 213; R. S. § 5573, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1605; as amended: Kerr's C. ib.

§ 7682. [5574] **Conveyance to successor in interest.** If the person entitled to the conveyance dies before the commencement of the proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings, or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit. [R. S. § 5574.]

Hist. (See Prob. Prac. '64, § 214) R. S. § 5574, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1606; similar as amended: Kerr's C. ib.

§ 7683. [5575] **Surrender of possession may be ordered.** The decree provided for in this chapter may direct the possession of the prop-

erty therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered. [R. S. § 5575.]

Hist. R. S. § 5575, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1607; similar as amended: Kerr's C. ib.

CHAPTER 283.

ACCOUNTS AND THE PAYMENT OF DEBTS.

§ 7684. [5580] **Executors not personally liable for debts except by writing.** No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized. [R. S. § 5580.]

Hist. Prob. Prac. '64, § 215; R. S. § 5580, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1612; Kerr's C. ib.

N. D. Identical: Prob. C. § 8815.

§ 7685. [5581] **Executors chargeable with whole estate.** Every executor and administrator is chargeable in his account with the whole estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate. [R. S. § 5581.]

Hist. Prob. Prac. '64, § 216; R. S. § 5581, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1613; Kerr's C. ib.

N. D. Identical: Prob. C. § 8816.

§ 7686. [5582] **Same: Not to profit or suffer loss.** He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement he is not responsible for the loss, if the sale has been justly made. [R. S. § 5582.]

Hist. Prob. Prac. '64, § 217; R. S. § 5582, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1614; Kerr's C. ib

N. D. Similar: Prob. C. § 8817.

§ 7687. [5583] **Same: Liability for uncollected debts.** No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault. [R. S. § 5583.]

Hist. Prob. Prac. '64, § 218; R. S. § 5583, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1615; Kerr's C. ib.

N. D. Identical: Prob. C. § 8818.

§ 7688. [5584] **Compensation of executors.** He shall be allowed all necessary expenses in the care, management and settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument filed in the probate court, he renounce all claim for compensation provided by the will. [R. S. § 5584.]

Hist. Prob. Prac. '64, § 219; R. S. § 5584, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1616; am. Kerr's C. ib.

N. D. Similar: Prob. C. § 8821.

§ 7689. [5585] **Executors not to purchase claims.** No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its normal value he is only entitled to charge in his account the amount he actually paid. [R. S. § 5585.]

Hist. Prob. Prac. '64, § 220; R. S. § 5585, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1617; Kerr's C. ib.

N. D. Identical: Prob. C. § 8819.

§ 7690. [5586] **Commissions of executors.** When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the estate accounted for by him, as follows: For the first thousand dollars, at the rate of 7 per cent; for all above that sum and not exceeding $10,000, at the rate of 5 per cent; for all above that sum at the rate of 4 per cent; and the same commission must be allowed administrators. In all cases such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section. [R. S. § 5586.]

Hist. Prob. Prac. '64, § 221; R. S. § 5586, reen. R. C. ib., reen .C. L. ib.

Comp. leg.—Cal. Same except "whole" inserted before "estate": C. C. P. 1872, § 1618; am. Kerr's C. ib.

N. D. Similar: Prob. C. § 8822.

§ 7691. [5587] **Partial accounts of executors.** At the third term of the court after his appointment, and thereafter at any time when required by the court, either upon its own motion or the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs. [R. S. § 5587.]

Hist. Prob. Prac. '64, § 222; R. S. § 5587, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1622; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8823.

§ 7692. [5588] **Citation to account.** If the executor or administrator fails to render an exhibit at the third term of the court the judge of the probate court must cause a citation to be issued requiring him to appear and render it. [R. S. § 5588.]

Hist. Prob. Prac. '64, § 223; R. S. § 5588, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1623; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8824.

§ 7693. [5589] **Same: Petition for citation.** Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made. [R. S. § 5589.]

Hist. Prob. Prac. '64, § 224; R. S. § 5589, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1624; same as amended except "the court or a judge thereof" for "the probate judge"; Kerr's C. ib.

N. D. Similar: Prob. C. § 8825.

§ 7694. [5590] **Same: Citation on petition.** If the judge is satisfied either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator requiring him to appear at some day to be named in the citation, which must be during a term of the court, and render an exhibit as prayed for. [R. S. § 5590.]

Hist. Prob. Prac. '64, § 225; R. S. § 5590, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1625; same as amended except "the court or a judge thereof" for "the judge," and the words "which must be during a term of the court" are omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8826.

§ 7695. [5591] **Objections to account.** When an exhibit is rendered by an executor or administrator, any person interested may appear, and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled or mismanaged the estate, his letters must be revoked. [R. S. § 5591.]

Hist. Prob. Prac. '64, § 226; R. S. § 5591, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1626; Kerr's C. ib.

N. D. Identical: Prob. C. § 8827.

§ 7696. [5592] **Proceedings to compel account.** If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court. [R. S. § 5592.]

Hist. Prob. Prac. '64, § 227; R. S. § 5592, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1627; Kerr's C ib.

N. D. Identical: Prob. C. § 8828.

§ 7697. [5593] **Account after expiration of notice to creditors.** Within 30 days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account. [R. S. § 5593.]

Hist. (See Prob. Prac. '64, § 228) R. S. § 5593, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but time for rendering account different: C. C. P. 1872, § 1628; same as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8829.

Cited: Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

§ 7698. [5594] **Same: After authority ceases.** When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the probate court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator. [R. S. § 5594.]

Hist. Prob. Prac. '64, § 229; R. S. § 5594, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1629; same as amended except "probate" court omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8829.

§ 7699. [5595] **Neglect to account: Revocation of authority.** If the executor or administrator resides out of the county, or absconds or conceals himself, so that the citation can not be personally served, and neglects to render an account within 30 days after the time above prescribed, or if he neglects to render an account within 30 days after being committed where the attachment has been executed, his letters must be revoked. [R. S. § 5595.]

Hist. Prob. Prac. '64, § 230; R. S. § 5595, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1630; Kerr's C. ib.

N. D. Similar: Prob. C. § 8830.

§ 7700. [5596] **Vouchers to be produced.** In rendering his account the executor or administrator must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason can not be produced on the settlement, the payment may be proved by the oath of any competent witness. [R. S. § 5596.]

Hist. Prob. Prac. '64, § 231; R. S. § 5596, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1631; Kerr's C. ib.

N. D. Similar: Prob. C. § 8831.

§ 7701. [5597] **Same: Claims under $20.** On the settlement of his account he may be allowed any item of expenditure, not exceeding $20, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where and to whom it was made; but such allowances in the whole must not exceed $500 against any one estate. [R. S. § 5597.]

Hist. Prob. Prac. '64, § 232; R. S. § 5597, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1632; same with additions as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8832.

§ 7702. [5598] **Notice of settlement.** When any account is rendered for settlement, the court or judge must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as may be proper. [R. S. § 5598.]

Hist. (Prob. Prac. '64, § 233) R. S. § 5598, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1663; amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8833.

Cited: Est. of Coryell (1909) 16 I. 201, 101 P. 723; Kent v. Dalrymple (1913) 23 I. 694, 132 P. 301; Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

§ 7703. [5599] **Same: Final settlement and distribution.** If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of the settlement must state those facts, which notice must be given by posting or publication, as the court may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings. [R. S. § 5599.]

Hist. R. S. § 5599, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See C. C. P. 1872, § 1634; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8834.

Cited: Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

§ 7704. [5600] Exceptions to settlement. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account and contest the same. [R. S. § 5600.]

Hist. Prob. Prac. '64, § 234; R. S. § 5600, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1635; Kerr's C. ib.

N. D. Identical: Prob. C. § 8835.

Postponement: If exceptions and objections are filed to the allowance of a claim against an estate, in the manner directed by statute, the issue thus presented should be heard and tried by the probate judge, and, until heard and tried, is pending in such court. Est. of Coryell (1909) 16 I. 201, 101 P. 723.

Where there has been a postponement of the hearing on the administrator's report and account it is the duty of the court, at the time to which the postponement has been made, to try and determine the issues of law and fact presented by such report and account. Kent v. Dalrymple (1913) 23 I. 694, 132 P. 301.

Failure to file exception: It is the duty as well as the right of anyone opposed to the final settlement of an administrator's account and final distribution of the estate, in a case where the proper statutory notice is given, to appear in the probate court, file his exceptions in writing, and contest the same. If an interested party neglects to do this he is not entitled to have the order settling the account and the decree of final distribution set aside under § 6726. Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

§ 7705. [5601] Same: Hearing. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown. The hearings and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent. [R. S. § 5601.]

Hist. (See Prob. Prac. '64, § 236) R. S. § 5601, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1636; Kerr's C. ib.

N. D. Identical: Prob. C. § 8836.

Cited: Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

Effect of previous allowance: The fact of previous allowance of a claim would not affect such claim upon a hearing under this section except to cast upon the heir the burden of proof. Est. of Coryell (1909) 16 I. 201, 101 P. 723.

§ 7706. [5602] Conclusiveness of settlement. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities cease; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness. [R. S. § 5602.]

Hist. Prob. Prac. '64, § 237; R. S. § 5602, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1637; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8837.

Cited: Est. of Coryell (1909) 16 I. 201, 101 P. 723.

Effect of approval on listed claims: Where the court approves an account which contains listed claims and no appeal is taken from the order of approval, such order is final and conclusive as to such claims. Miller v. Lewiston Nat. Bk. (1910) 18 I. 124, 108 P. 901.

§ 7707. [5603] Proof of notice of settlement. The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such

proof was made to the satisfaction of the court, and is conclusive evidence of the fact. [R. S. § 5603.]

Hist. Prob. Prac. '64, § 238; R. S. § 5603, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1638; Kerr's C. ib.

N. D. Similar: Prob. C. § 8838.

§ 7708. [5604] **Sale of personalty in lieu of realty.** Whenever it appears to the court on any hearing of an application for the sale of real property that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance. [R. S. § 5604.]

Hist. R. S. § 5604, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; Kerr's C. See § 1536.

N. D. Identical: Prob. C. § 8839.

§ 7709. [5605] **Investment of funds pending settlement.** Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this state. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the court or judge thereof. [R. S. § 5605.]

Hist. R. S. § 5605, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872. Same: Kerr's C. § 1640.

N. D. Similar: Prob. C. § 8840.

§ 7710. [5606] **Order of payment of debts.** The debts of the estate must be paid in the following order:

1. Funeral expenses.
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States.
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date.
5. All other demands against the estate. [R. S. § 5606.]

Hist. Prob. Prac. '64, § 239; R. S. § 5606, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "subject to the provisions of § 1205" are inserted after "estate": C. C. P. 1872, § 1643; Kerr's C. ib.

N. D. Similar: Prob. C. § 8755.

Mortgage claim: A mortgagee can acquire no advantage or preference over other creditors by being allowed to present his claim, and to thereafter foreclose his mortgage for the amount remaining unpaid. First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

§ 7711. [5607] **Same: Preference of mortgage.** The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with the other demands against the estate. [R. S. § 5607.]

Hist. Prob. Prac. '64, § 240; R. S. § 5607, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1644; Kerr's C. ib.

N. D. Similar: Prob. C. § 8756.

Cited: First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623.

Erroneous distribution: Where mortgagee presents his claim as unsecured, and the administrator inadvertently includes him in a pro rata distribution of assets among creditors, and the trial court directs that the amount so paid the mortgagee be refunded to the administrator, the mortgagee cannot be deemed to have participated in the general assets of the estate, and his measure of relief in an action for foreclosure is limited to the security, all right to a deficiency judgment having been waived. Kendrick S. Bk. v. Barnum, 31 I. 562, 173 P. 1144.

§ 7712. [5608] **Same: Payment of dividends.** If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid. [R. S. § 5608.]

Hist. Prob. Prac. '64, § 241; R. S. § 5608, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1645; Kerr's C. ib.

N. D. Similar: Prob. C. § 8758.

§ 7713. [5609] **Payment of funeral expenses.** The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of the administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court. [R. S. § 5609.]

Hist. (See Prob. Prac. '64, § 242) R. S. § 5609, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1646; Kerr's C. ib.

N. D. Similar: Prob. C. § 8759.

§ 7714. [5610] **Order for payment of debts.** Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there are not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge, on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court. [R. S. § 5610.]

Hist. Prob. Prac. '64, § 243; R. S. § 5610, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "at the end of the year" inserted after "administrator": C. C. P. 1872, § 1647; similar as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8760.

Cited: Est. of Coryell (1909) 16 I. 201, 101 P. 723.

§ 7715. [5611] **Contingent and disputed claims.** If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent unless a pro rata distribution is ordered. [R. S. § 5611.]

Hist. (See Prob. Prac. '64, § 244) R. S. § 5611, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1648; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8761.

Cited: Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

§ 7716. [5612] **Liability of executor after decree.** When a decree is made by the probate court for the payment of creditors the executor or administrator is personally liable to each creditor for his allowed

claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the district court, in favor of each creditor, and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator is liable therefor, on his bond, to each creditor. [R. S. § 5612.]

Hist. Prob. Prac. '64, § 245; R. S. § 5612, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8761.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1649; similar as amended: Kerr's C. ib.

§ 7717. [5613] **Claims not included in order.** When the accounts of the executor or administrator have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon their heirs, devisees or legatees, to contribute to the payment of his claim, but if the executor or administrator has failed to give the notice to the creditors, as prescribed by this title, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due 10 months before the day of settlement, or whose claim was contingent and did not become absolute 10 months before such day. [R. S. § 5613.]

Hist. Prob. Prac. '64, § 246; R. S. § 5613, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8763.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1650; Kerr's C. ib.

§ 7718. [5614] **Payment of legacies and distribution.** If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter, but if there be debts remaining unpaid, or if, for other reasons, the estate be not in proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate. [R. S. § 5614.]

Hist. Prob. Prac. '64, § 247; R. S. § 5614, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8762.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1651; Kerr's C. ib.

§ 7719. [5615] **Final account.** At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account and pray a settlement of his administration. [R. S. § 5615.]

Hist. Prob. Prac. '64, § 248; R. S. § 5615, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8754.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1652; Kerr's C. ib.

§ 7720. [5616] **Same: Neglect to render.** If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him, and all the provisions of this chapter relative to the last mentioned account and the notice and settlement thereof, apply to his account presented for final settlement. [R. S. § 5616.]

Hist. Prob. Prac. '64, § 249; R. S. § 5616, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8828.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1653; Kerr's C. ib.

§ 7721. [5617] **Settlement of accounts of trustees.** Where any trust has been created by or under any will to continue after distribution, the probate court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time pending the execution of his trust, or may at the termination thereof, render and pray for the settlement of his accounts as such trustee before the probate court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or in case of his death, his legal representative, shall for that purpose present to the court his petition setting forth his accounts in detail, and upon the filing thereof the court or judge shall fix the day for the hearing, and a citation shall be issued citing all the beneficiaries of the said trust to appear and show cause why the account should not be allowed. Such citation shall be served upon all the beneficiaries in the state in the manner provided for the service of citations to show cause why the final account of an executor or administrator should not be allowed and approved. Any such trustee may, in the discretion of the court, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation, as provided for the service of summons in civil cases. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as are hereinbefore provided. ['01, c. 31, § 1.]

Hist. '01, c. 31, § 1, reen. R. C. § 5617, reen. C. L. ib.

Duties of executors and trustees distinguished: Where the executors of a will are appointed such by its terms and are also thus appointed trustees of a certain portion of said estate, their duties as executors and trustees are separate, distinct and independent of each other, and until the estate is settled or distributed in whole or part and the executors are discharged, their duties as executors continue as to the part of the estate not distributed, and they do not assume the duties of trustees as to the part not distributed. Jones v. Broadbent (1912) 21 I. 555, 123 P. 476.

§ 7722. [5618] **Same: Compensation of trustees.** Unless compensation be provided for in the will, the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may, in its discretion, fix the yearly compensation for the trustee or trustees to continue as long as the court may judge proper. ['01, c. 31, § 2.]

Hist. '01, c. 31, § 2, reen. R. C. § 5618, reen. C. L. ib.

Comp. leg.—Cal. Similar: Kerr's C. C. P. § 1700.

§ 7723. [5619] **Same: Appeal from decree.** From a decree of the probate court settling such account, appeal may be taken to the district court in the manner provided for an appeal from a decree settling the account of an executor or administrator. The decree of the probate court, if affirmed on appeal, or becoming final without appeal, shall be conclusive. ['01, c. 31, § 3.]

Hist. '01, c. 31, § 3, reen. R. C. § 5619, reen. C. L. ib.

Comp. leg.—Cal. Similar: Kerr's C. C. P. § 1701.

CHAPTER 284.

PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

§ 7724. [5621] **Petition for legacy or distributive share.** At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds with security, for the payment of his proportion of the debts of the estate. [R. S. § 5621.]

Hist. Prob. Prac. '64, § 250; R. S. § 5621, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1658; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8841.

Failure to give bond: The objection that a bond has not been given should be made by a creditor, executor or administrator. Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

§ 7725. [5622] **Notice of application.** Notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator. [R. S. § 5622.]

Hist. Prob. Prac. '64, § 251; R. S. § 5622, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1659; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8842.

§ 7726. [5623] **Contest and similar applications.** The executor or administrator or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee or legatee may make a similar application for himself. [R. S. § 5623.]

Hist. Prob. Prac. '64, § 252; R. S. § 5623, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1660; Kerr's C. ib.

N. D. Similar: Prob. C. § 8843.

§ 7727. [5624] **Decree ordering payment.** If, at the hearing, it appears that the estate is but little indebted and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee or devisee obtaining such order, before receiving his share or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the probate judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or proportion of the estate to which he is entitled.

2. The executor or administrator to deliver to the heir, legatee or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, to be apportioned equally among them. [R. S. § 5624.]

Hist. (See Prob. Prac. '64, §§ 253, 254, 256) R. S. § 5624, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1661; Kerr's C. ib.

N. D. Similar: Prob. C. § 8844.

Effect of failure to give bond: The failure to give bond under this section does not render a decree of partial distribution void where the creditors are not complaining and could not possibly be injured. Wilson v. Linder (1910) 18 I. 438, 110 P. 274, 138 A. S. R. 213.

§ 7728. [5625] **Amercement of bond.** When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond. [R. S. § 5625.]

Hist. Prob. Prac. '64, § 257; R. S. § 5625, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1662; Kerr's C. ib.

N. D. Similar: Prob. C. § 8845.

§ 7729. [5626] **Order for final distribution.** Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto, and if the decedent has left a surviving child and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration of such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator since the rendition of his final accounts must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree, or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts. [R. S. § 5626.]

Hist. Prob. Prac. '64, § 258; R. S. § 5626, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1665; Kerr's C. ib.

N. D. Similar: Prob. C. § 8846.

Cited: Diamond v. Connolly, 251 F. 234.

§ 7730. [5627] **Same: Contents and effect of order.** In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal. [R. S. § 5627.]

Hist. (See Prob. Prac. '64, § 259, for first sentence) R. S. § 5627, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1666; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8849.

Cited: Diamond v. Connolly, 251 F. 234.

Effect of decree: A decree of distribution is a final judgment and decree to the extent of determining that all the interest that the state had in certain property shall

pass and be distributed to the heirs of the deceased. It determines who are the heirs and their respective shares and interests in the estate, but it is not a decree affecting or adjudicating the title to the property as between the estate or the heirs to the estate and any third party. Miller v. Mitcham (1912) 21 I. 741, 123 P. 141.

§ 7731. [5628] **Settlement of ancillary administration.** Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the probate court. [R. S. § 5628.]

Hist. R. S. § 5628, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1667; Kerr's C. ib. Vansickle v. Hazeltine (1916) 29 I. 228, 158 P. 326.

Cited: Chandler v. Prob. Ct. (1914) 26 I. 173, 141 P. 635.

Personal property: The general rule prevails here that the succession to and disposition of and distribution of personal property is controlled by the law of the domicile of the owner, or intestate, at the time of his death, without regard to where the property is located or where the owner died. Vansickle v. Hazeltine, supra.

§ 7732. [5629] **Petition for distribution and notice thereof.** The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered. If partition be applied for as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed. [R. S. § 5629.]

Hist. (See Prob. Prac. '64, § 260) R. S. § 5629, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See C. C. P. 1872, § 1668; similar with additional provisions as amended: Kerr's C. ib.

§ 7733. [5630] **Taxes must be paid before distribution.** Before any decree of distribution of an estate is made, the probate court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county and municipal taxes, legally levied upon personal property of the estate, have been fully paid. [R. S. § 5630.]

Hist. R. S. § 5630, reen. R. C. ib., reen. C. L. ib.

Cross ref. Transfer tax on successions, legacies, etc.: §§ 3371-95.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1669; similar as amended; Kerr's C. ib.

N. D. Similar: Prob. C. § 8848.

§ 7734. [5631] **Partition of estates in common.** When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and

their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed. [R. S. § 5631.]

Hist. Prob. Prac. '64, § 261; R. S. § 5631, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1675; Kerr's C. ib.

N. D. Analogous: Prob. C. §§ 8853-4.

§ 7735. [5632] **Same: Petition and notice.** Such partition may be ordered and had in the probate court, on the petition of any person interested. But before the commissioners are appointed, or partition ordered by the probate court, as directed in this chapter, notice thereof must be given to all persons interested, who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the probate court may direct. The petition may be filed, attorneys, guardians and agents appointed, and notice given, at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate. [R. S. § 5632.]

Hist. (See Prob. Prac. '64, § 263) R. S. § 5632, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1676; Kerr's C. ib.

N. D. Analogous: Prob. C. § 8856.

§ 7736. [5633] **Same: Estate in different counties.** If the real estate is in different counties, the probate court may, if deemed proper, appoint a commissioner for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees or legatees, as if there were no other estate to be divided, but the commissioner first appointed must, unless otherwise directed by the probate court, make division of such real estate, wherever situated within this state. [R. S. § 5633.]

Hist. Prob. Prac. '64, § 262; R. S. § 5633, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1677; Kerr's C. ib.

N. D. Similar: Prob. C. § 8855.

§ 7737. [5634] **Partition of conveyed interests.** Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees or devisees. [R. S. § 5634.]

Hist. Prob. Prac. '64, § 264; R. S. § 5634, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1678; Kerr's C. ib.

N. D. Similar: Prob. C. § 8852.

Grantee of heir: Claimant contending as grantee of heir, being neither heir, devisee or creditor can not be heard to question procedure of distribution. Est. of Blackinton (1916) 29 I. 310, 158 P. 492.

If validity of conveyance from heir is disputed, probate court must distribute as though no conveyance made. The grantee has his remedy in proper tribunal. Ib.

§ 7738. [5635] **Partition by metes and bounds.** When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided. [R. S. § 5635.]

Hist. (See Prob. Prac. '64, § 265) R. S. § 5635, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1679; Kerr's C. ib.

N. D. Similar: Prob. C. § 8853.

§ 7739. [5636] **Property incapable of division.** When the real estate can not be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to share therein who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested, their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate can not be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete and the title to the whole of such real estate vests in the person to whom the same is so assigned. [R. S. § 5636.]

Hist. (See Prob. Prac. '64, § 266, for first two sentences) R. S. § 5636, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1680; same as amended except "probate" omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8857.

§ 7740. [5637] **Compensation for unequal partition.** When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and can not be divided without injury to the same, it may be set off by the commissioners appointed to make partition, to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly, but partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction. [R. S. § 5637.]

Hist. Prob. Prac. '64, § 267; R. S. § 5637, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1681; Kerr's C. ib.

N. D. Similar: Prob. C. § 8858.

§ 7741. [5638] **Sale in lieu of partition.** When it appears to the court, from the commissioners' report, that it can not otherwise be fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed in the same manner and under the same requirements provided in chapter 279. [R. S. § 5638.]

Hist. (See Prob. Prac. '64, § 268) R. S. § 5638, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1682; Kerr's C. ib.

N. D. Similar: Prob. C. § 8860.

§ 7742. [5639] **Notice of proposed partition.** Before any partition is made or any estate divided, as provided in this chapter, notice must

be given to all persons interested in the partition, their guardians, agents or attorneys, by the commissioners of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys and take such other steps as may be necessary to enable them to form a judgment upon the matters before them. [R. S. § 5639.]

Hist. (See Prob. Prac. '64, § 270) R. S. § 5639, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: C. C. P. 1872, § 1683; Kerr's C. ib.
N. D. Similar: Prob. C. § 8856.

§ 7743. [5640] **Report of commissioners.** The commissioners must report their proceedings, and the partition agreed upon by them, to the probate court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others, and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the clerk, under the seal of the court, must be recorded in the office of the recorder of the county where the lands lie. [R. S. § 5640.]

Hist. Prob. Prac. '64, § 271; R. S. § 5640, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: C. C. P. 1872, § 1684; Kerr's C. ib.
N. D. Analogous: Prob. C. § 8859.

§ 7744. [5641] **Assignment of estate by court.** When the probate court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made. [R. S. § 5641.]

Hist. (See Prob. Prac. '64, § 272) R. S. § 5641, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: C. C. P. 1872, § 1685; Kerr's C. ib.
N. D. Similar: Prob. C. § 8851.

§ 7745. [5642] **Advancements to heirs.** All questions as to advancements made, or alleged to have been made, by the decedent to his heirs may be heard and determined by the probate court, and must be specified in the decree assigning and distributing the estate, and the final judgment or decree of the probate court, or in case of appeal, of the district or supreme court, is binding on all parties interested in the estate. [R. S. § 5642.]

Hist. (See Prob. Prac. '64, § 273) R. S. § 5642, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same except "district or" omitted: C. C. P. 1872, § 1686; as amended: Kerr's C. ib.
N. D. Similar: Prob. C. § 8850.

§ 7746. [5643] **Appointment of agent for nonresidents.** When any estate is assigned or distributed by a judgment or decree of the court, as provided in this chapter, to any person residing out of and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate as well as to act for such absent person in the distribution. [R. S. § 5643.]

Hist. (See Prob. Prac. '64, § 274) R. S. § 5643, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: C. C. P. 1872, § 1691; same as amended with additional provisions: Kerr's C. ib.
N. D. Similar: Prob. C. § 8867.

§ 7747. [5644] **Same: Bond and compensation of agent.** The agent must first give a bond to the probate judge, to be approved by him, conditioned that he shall faithfully manage and account for the estate. The

court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. [R. S. § 5644.]

Hist. (See Prob. Prac. '64, § 275) R. S. § 5644, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1692; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8868.

§ 7748. [5645] **Same: Sale of unclaimed estate.** When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court; and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the state treasury. When the payment is made the agent must take from the treasury duplicate receipts, one of which he must file in the office of the state auditor, and the other in the probate court. [R. S. § 5645.]

Hist. (See Prob. Prac. '64, § 276) R. S. § 5645, reen. R. C. ib., reen. C. L. ib.

Cross ref. Unclaimed money paid to state treasurer: § 7787. Apportioned to school fund: § 903.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1693.

N. D. Similar: Prob. C. § 8869.

§ 7749. [5646] **Same: Account of agent.** The agent must render to the probate court appointing him, annually, an account showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.
2. The income derived therefrom.
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.
4. Expenses incurred in the care, protection and management thereof, and whether paid or unpaid. When filed, the probate court may examine witnesses and take proofs in regard to the account, and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the state treasury. [R. S. § 5646.]

Hist. R. S. § 5646, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1694; same except "the court appointing him" for "to the probate court" and "probate", subd. 4, omitted: Kerr's C. ib.

N. D. Similar: Prob. C. § 8870.

§ 7750. [5647] **Same: Liability of agent.** The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested. [R. S. § 5647.]

Hist. (See Prob. Prac. '64, § 277) R. S. § 5647, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1695: Kerr's C. ib.

N. D. Identical: Prob. C. § 8871.

§ 7751. [5648] **Same: Claim for money paid into treasury.** When any person appears and claims the money paid into the treasury, the probate court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal, and upon the presentation of the certificate to him the auditor must draw his warrant on the treasurer for the amount. [R. S. § 5648.]

Hist. (See Prob. Prac. '64, § 278) R. S. § 5648, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1696; Kerr's C. ib.

N. D. Similar: Prob. C. § 8872.

§ 7752. Payment of unclaimed distributive share to county treasurer. Whenever any heirs, devisees or legatees shall fail to offer to accept delivery from the executor or administrator of any personal property ordered distributed in any decree of distribution, and to furnish such executor or administrator a receipt therefor within 60 days after the filing of any decree of distribution, such executor or administrator may deliver such property to the county treasurer of the county where such administration is pending, the same to be held by such treasurer and his successors from time to time in office, for delivery to the persons entitled thereto in accordance with such decree of distribution: *Provided, however,* That where any such personal property consists of anything other than money, bills, notes, stocks, bonds, warehouse receipts, bills of lading, accounts or other choses in action, and especially where such property is of a nature that it may depreciate in value or that it can not be kept without expense, the same shall be sold on petition of the executor or administrator therefor after such notice of sale and of the hearing of such petition as the probate court or the judge thereof may deem best, and the proceeds thereof, less all necessary expense in the matter of sale, shall be paid to the county treasurer for the benefit of the persons who may be entitled thereto under such decree of distribution. Any executor or administrator filing in the probate court receipts showing payment or delivery to the county treasurer, as aforesaid, shall be entitled to final discharge as fully and effectually as if such delivery had been made to the heirs, devisees or legatees or their proper representatives personally. ['11, c. 187, § 1, p. 619.]

Hist. '11, c. 187, § 1, p. 619, reen. C. L. § 5648a.

§ 7753. [5649] **Discharge of executors and administrators.** When the estate has been fully administered and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter. [R. S. § 5649.]

Hist. (See Prob. Prac. '64, § 279) R. S. § 5649, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8837.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1697: Kerr's C. ib.

§ 7754. [5650] **Administration on subsequently discovered property.** The final settlement of an estate does not prevent the subsequent issuance of letters testamentary, or of administration with the will annexed, whenever other property of the estate is discovered, or whenever it becomes necessary or proper, from any cause, that letters should be again issued. [R. S. § 5650.]

Hist. (See Prob. Prac. '64, § 280) R. S. § 5650, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1698; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8873.

Application: Where certain property belonging to the deceased is not administered in probate proceedings, and the fact is not discovered until a final decree of distribution has been entered, the final decree should not for this reason be set aside on application of a creditor or party interested. In such a case this section furnishes the proper remedy. Chandler v. Probate Court (1914) 26 I. 173, 141 P. 635.

CHAPTER 285.

ORDERS, DECREES, TRIALS AND APPEALS.

§ 7755. [5655] **Orders to be entered in minute book.** All orders and decrees made by the probate court during its terms, and all orders which the probate judge is specially authorized to make out of term time, or at chambers, must be entered at length in the minute book of the court. Upon the close of each term the judge must sign the minutes. [R. S. § 5655.]

Hist. (See Prob. Prac. '64, § 290) R. S. § 5655, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1704; different as amended: Kerr's C. ib.

N. D. See Prob. C. § 8579.

§ 7756. [5656] **Publication: How made.** When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court or judge may, however, order a less number of publications during the period. [R. S. § 5656.]

Hist. (See Prob. Prac. '64, § 290) R. S. § 5656, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1705: Kerr's C. ib.

§ 7757. [5657] **Effect of recorded order.** When it is provided in this title that any order or decree of a probate court or judge, or a copy thereof, must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof. [R. S. §5657.]

Hist. R. S. § 5657, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1706: Kerr's C. ib.

§ 7758. [5658] **Citations: How directed.** Citations must be directed to the person to be cited, signed by the clerk, and issued under the seal of the court and must contain:

1. The title of the proceeding.
2. A brief statement of the nature of the proceeding.
3. A direction that the person cited appear at a time and place specified. [R. S. § 5658.]

Hist. R. S. § 5658, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8549.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1707: Kerr's C. ib.

§ 7759. [5659] **Same: How issued.** The citation may be issued by the clerk upon the application of any party, without an order of the judge, except in cases in which such order is, by the provisions of this title, expressly required. [R. S. § 5659.]

Hist. (See Prob. Prac. '64, § 294) R. S. § 5659, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8549.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1708: Kerr's C. ib.

§ 7760. [5660] **Same: How served.** The citation must be served in the same manner as a summons in a civil action. [R. S. § 5660.]

Hist. R. S. § 5660, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1709: Kerr's C. ib.

Cross ref. Service of summons: § 6676.

N. D. Analogous: Prob. C. §§ 8551-58.

§ 7761. [5661] **Personal notice by citation.** When personal notice is required and no mode of giving it is prescribed in this title, it must be given by citation. [R. S. § 5661.]

Hist. R. S. § 5661, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Prob. C. § 8559.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1710: Kerr's C. ib.

§ 7762. [5662] **Citation: When served.** When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof. [R. S. § 5662.]

Hist. (See Prob. Prac. '64, § 293) R. S. § 5662, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1711: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8559.

§ 7763. [5663] **Descriptions need not be repeated.** When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court. [R. S. § 5663.]

Hist. R. S. § 5663, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1712: Kerr's C. ib.

§ 7764. [5664] **Rules of practice.** Except as otherwise provided in this title, the provisions of Title LV are applicable to, and constitute the rules of practice in, the proceedings mentioned in this title. [R. S. § 5664.]

Hist. R. S. § 5664, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1713: Kerr's C. ib.

Cited: Connolly v. Probate Court (1913) 25 I. 35, 136 P. 205.

§ 7765. [5665] **Same: New trials and appeals.** The provisions of Title LV relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title. [R. S. § 5665.]

Hist. R. S. § 5665, reen. R. C. ib., reen. C. L. ib.

Cross ref. New trials: §§ 6887-94. Appeals: §§ 7173-78.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1714: Kerr's C. ib.

Cited: Est. of Blackinton (1916) 29 I. 310, 326, 158 P. 492.

§ 7766. [5666] **Time for appeal.** The appeal must be taken within 60 days after the order, decree or judgment is entered. [R. S. § 5666.]

Hist. R. S. § 5666, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1717: Kerr's C. ib.

Cited: Diamond v. Connolly, 251 F. 234.

§ 7767. [5667] **Trial of issues of fact.** All issues of fact joined in the probate court must be tried in conformity with the requirements of chapter 274 of this title, in cases of contests of wills, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise by the probate court as in civil actions. [R. S. § 5667.]

Hist. R. S. § 5667, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1716; similar as amended: Kerr's C. ib.

Cited: Miller v. Kettenbach (1910) 18 I. 253, 109 P. 505, 138 A. S. R. 192.

§ 7768. [5668] **Same: Jury trial: New trial.** If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must

render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions. [R. S. § 5668.]

Hist. R. S. § 5668, reen. R. C. ib., reen. C. L. ib.

Cross ref. Grounds for new trial: § 6888.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1717: Kerr's C. ib.

Construed: When issues triable by a jury are joined in the probate court, and no demand for a jury is made, the court will try such issues; but if a jury is demanded and the court is of the opinion that the issues are not sufficiently made, he is directed by this section to settle, frame and submit them, with the evidence, to the jury. Miller v. Kettenbach (1910) 18 I. 253, 109 P. 505, 138 A. S. R. 192.

§ 7769. [5669] **Appointment of attorney for heirs, etc.** At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmations thereof; settlements, partition, and distribution of estates; setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees, heirs or creditors of the decedent, who are minors and have no general guardian in the county, or who are nonresidents of the state; and those interested who, though they are neither such minors or nonresidents, are unrepresented. The order must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The nonappointment of an attorney will not affect the validity of the proceedings. [R. S. § 5669.]

Hist. R. S. § 5669, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1718; now repealed: Kerr's C. ib.

Cited: Fraser v. Davis (1916) 29 I. 70, 75, 156 P. 913.

Guardian ad litem: Where the interests of minor children are involved in litigation and there is no general guardian, the court is empowered to protect the interests of such children by the appointment of some competent attorney as guardian ad litem. Pine v. Callahan (1902) 8 I. 684, 71 P. 473.

Powers of guardian: Where a will is legal and fair upon its face and the testator therein names a guardian for his minor children, it is within the scope of the guardian's power and authority to pursue reasonable methods for the proof and probate of the will. Re Arva and Elmer Brady (1904) 10 I. 366, 79 P. 75.

Attorney's fees: Probate court in first instance, and district court on appeal must fix attorneys' fees without jury, and such order is final. (On rehearing) Fraser v. Davis (1916) 29 I. 81, 158 P. 233.

§ 7770. [5670] **Record of decrees.** When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real estate, or determining any other matter affecting the title to real estate, a certified copy of the same must be recorded in the office of the recorder of the county in which the land is situated. [R. S. § 5670.]

Hist. (See Prob. Prac. '64, § 299) R. S. § 5670, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same with additional provision added: C. C. P. 1872, § 1719; similar as amended: Kerr's C. ib.

§ 7771. [5671] **Award of costs.** When it is not otherwise prescribed in this title, the probate court, or the district or supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the probate court. [R. S. § 5671.]

Hist. (See Prob. Prac. '64, § 312) R. S. § 5671, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1720; Kerr's C. ib.

Cited: Re Arva and Elmer Brady (1904) 10 I. 366, 79 P. 75.

§ 7772. [5672] **Removal of executor for contempt.** Whenever an executor, administrator or guardian is committed for contempt, in disobeying any lawful order of the probate court or the judge thereof, and has remained in custody for 30 days without obeying such order or purging himself otherwise of the contempt, the probate court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto, executor, administrator or guardian in his stead. [R. S. § 5672.]

Hist. R. S. § 5672, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1721: Kerr's C. ib.

§ 7773. [5673] **Service of process on guardian.** Whenever an infant, insane or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice or order of the court concerning the estate of a deceased person, in which the ward is interested, is equivalent to the service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice or order to show cause, which an adult or a person of sound mind might do. [R. S. § 5673.]

Hist. R. S. § 5673, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; same: § 1722: Kerr's C. ib.

Cited: Re Arva and Elmer Brady (1904) 10 I. 366, 79 Pac. 75.

§ 7774. [5674] **Disposition of life estate.** If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the probate court of the county in which the property is situated his verified petition setting forth such facts, and thereupon, and after such notice, by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if, upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded. [R. S. § 5674.]

Hist. R. S. § 5674, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; similar: Kerr's C. § 1723.

CHAPTER 286.

PUBLIC ADMINISTRATORS.

§ 7775. [5680] **County treasurer is public administrator.** The county treasurers of the various counties of this state are hereby declared to be ex officio public administrators in their respective counties. Each public administrator shall, before he enters upon the duties of his office, take and file his official oath and execute and file an official bond, conditioned as the bonds of other county officers are, with two good and sufficient sureties, in a sum not less than $2000: *Provided,* That the probate court may, upon reasonable cause therefor shown, re-

quire at any time a new official bond, or an additional bond, to be given upon 10 days' notice in writing. [R. S. § 5680.]

Hist. '81, p. 292, § 1, R. S. § 5680, reen. R. C. ib., reen. C. L. ib.

§ 7776. [5681] **Estates to be administered.** Every public administrator, duly qualified, must take charge of the estates of persons dying within his county, as follows:

1. Of the estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for or lost;
2. Of the estates of decedents who have no known heirs;
3. Of estates ordered into his hands by the probate court, and
4. Of estates upon which letters of administration have been issued to him by the probate court, as provided in chapter 275. [R. S. § 5681.]

Hist. R. S. § 5681, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "elected, commissioned and," inserted after "duly", "leave" for "have", subd. 2, and the reference in subd. 4 omitted: C. C. P. 1872, § 1726; similar as amended: Kerr's C. ib.

N. D. Analogous: Pol. C. § 3442.

Cited: Re Rice (1906) 12 I. 305, 85 P. 1109.

§ 7777. [5682] **Procurement of letters.** Whenever a public administrator takes charge of an estate which he is entitled, under the provisions of chapter 275, to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon. No notice of application for letters by a public administrator is necessary, and his official bond and oath are in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court. [R. S. § 5682.]

Hist. R. S. § 5682, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1727: Kerr's C. ib.

Cited: Re Rice (1906) 12 I. 305, 85 P. 1109.

§ 7778. [5683] **To be informed of death of stranger.** Whenever a stranger or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested. [R. S. § 5683.]

Hist. R. S. § 5683, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1728: Kerr's C. ib.

§ 7779. [5684] **Inventory by public administrator.** The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same, according to the provisions of this title, subject to the control and direction of the probate court. When, as shown by the inventory, the estate amounts to less than $250, no notice to creditors or other formal proceedings by the public administrator are required, but after the payment of the funeral expenses, the expenses of the last sickness and of administration, the probate court must order the residue, if any, converted into money and paid as may be just to such creditors or heirs as may appear, or into the state treasury as provided in this chapter. [R. S. § 5684.]

Hist. R. S § 5684, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same to second sentence, rest omitted: C. C. P. 1872, § 1729: Kerr's C. ib.

§ 7780. [5685] **Delivery of estate to executor.** If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the probate court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers and estate of every kind in his possession or under his control. [R. S. § 5685.]

Hist. R. S. § 5685, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1730: Kerr's C. ib.

§ 7781. [5686] **Officers to notify administrator of decedent's property.** All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury or waste, and which, by reason thereof, ought to be in the possession of the public administrator. [R. S. § 5686.]

Hist. R. S. § 5686, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pol. C. § 3446.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1731: Kerr's C. ib.

§ 7782. [5687] **Suits to recover property.** The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers or other estate of the decedent. [R. S. § 5687.]

Hist. '81, p. 294, § 6, R. S. § 5687, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pol. C. § 3447.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1732: Kerr's C. ib.

§ 7783. [5688] **Examination of alleged embezzlers.** When the public administrator complains to the probate judge, on oath, that any person has concealed, embezzled or disposed of, or has in his possession any money, goods, property or effects, to the possession of which such administrator is entitled in his official capacity, the judge may cite such person to appear before the probate court, and may examine him on oath touching the matter of such complaint. [R. S. § 5688.]

Hist. R. S. § 5688, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1733: Kerr's C. ib.

§ 7784. [5689] **Same: Conduct of examination: Contempt.** All such interrogatories and answers must be reduced to writing and signed by the party examined and filed in the probate court. If the person so cited refuses to appear and submit to such an examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain in close custody until he submits to the order of the court. [R. S. § 5689.]

Hist. R. S. § 5689, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1734: Kerr's C. ib.

§ 7785. [5690] **Probate court may require account.** The probate court may, at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed. [R. S. § 5690.]

Hist. R. S. § 5690, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pol. C. § 3448.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1735: Kerr's C. ib.

§ 7786. [5691] **Returns by public administrator.** The public administrator must, once in every six months, make to the probate judge, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which has come into his

hands from each estate, and what he has done with it, and the amount of his fees and expenses incurred, and the balance, if any, remaining in his hands. [R. S. § 5691.]

Hist. R. S. § 5691, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "such" for "each" and an additional clause: C. C. P. 1872, § 1736; superior court system as amended: Kerr's C. ib.

§ 7787. [5692] **Unclaimed moneys paid to state treasurer.** After a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, the public administrator must pay into the state treasury all moneys and effects in his hands belonging to the estate, as provided in chapter 340 of this title for payments by agents. [R. S. § 5692.]

Hist. R. S. § 5692, reen. R. C. ib., reen. C. L. ib.

Cross ref. Disposition of unclaimed estate: § 7748. Apportionment to school fund: § 903.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1737; different as amended: Kerr's C. ib.

§ 7788. [5693] **Public administrator must not be interested in expenditures.** The public administrator must not be interested in the expenditures of any kind, made on account of any estate he administers, nor must he be associated, in business or otherwise, with anyone who is so interested. [R. S. § 5693.]

Hist. '81, p. 293, § 4, R. S. § 5693, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except additional clause: C. C. P. 1872, § 1738; Kerr's C. ib.

§ 7789. [5694] **Proceedings against public administrator.** When it appears that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the state treasurer, the probate judge must order the same to be paid over, and on failure of the public administrator to comply with the order within 10 days after the same is made, the prosecuting attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs. [R. S. § 5694.]

Hist. R. S. § 5694, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1740; similar as amended but with superior court system: Kerr's C. ib.

§ 7790. [5695] **Provisions applicable to public administrator.** When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern. [R. S. § 5695.]

Hist. R. S. § 5695, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1743: Kerr's C. ib.

CHAPTER 287.

SUCCESSION.

Cited: Scott v. Scott (1917) 247 F. 976.

Note: This chapter is devoted to the specific subject of "Succession," and commencing with § 7791, which defines succession, the chapter proceeds step by step to define the interest which passes to heirs and to enumerate the heirs in the order in which they shall be entitled to succeed to the estates of deceased persons and such other matters as naturally pertain to the devolution of estates. Connolly v. Reed (1912) 22 I. 29, 125 P. 213.

§ 7791. [5700] **Succession defined.** Succession is the coming in of another to take the property of one who dies without disposing of it by will. [R. S. § 5700.]

Hist. R. S. § 5700, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal: Same: Civ. Code 1872, § 1383: Kerr's C. ib.

N. D. Identical: Civ. C. § 5741.

Cited: Connolly v. Reed (1912) 22 I. 29, 125 P. 213; Connolly v. Probate Court (1913) 25 I. 35, 136 P. 205.

§ 7792. [5701] **Property of intestate passes to heirs.** The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration. [R. S. § 5701.]

Hist. R. S. § 5701, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: Civ. Code 1872, § 1384; same as amended: Kerr's C. ib.

N. D. Similar: Civ. C. § 5742.

Cited: Reed v. Stewart (1906) 12 I. 699, 87 P. 1002; Connolly v. Prob. Ct. (1913) 25 I. 35, 136 P. 205.

§ 7793. [5702] **Succession to property.** When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to, and must be distributed, unless otherwise expressly provided in this code, subject to the payment of his debts, in the following manner:

1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. If the decedent leave a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; but if there be no child of the deceased living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living or to the child living, and the issue of the deceased child or children by right of representation.

2. If the decedent leave no issue, the estate goes, one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either be dead, the whole of said half goes to the other. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother, in equal shares, or if either be dead, then to the other.

3. If there be neither issue, husband, wife, father nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation.

4. If the decedent leave a surviving husband or wife and neither issue, father nor mother, the whole estate goes to the surviving husband or wife.

5. If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

6. If the decedent leave several children, or one child and the issue

of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

7. If, at the death of such child who dies under age not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parents; and if all the issues are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

8. If the decedent be a widow or widower and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father and mother of such deceased spouse, in equal shares, or if either be dead, then to the other. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse, by right of representation.

9. If the decedent leave no husband, wife or kindred, and there be no heirs to take his estate, or any portion thereof, under subdivision 8 of this section, the same shall be paid into the state treasury for the support of common schools. ['07, p. 338, § 1.]

Hist. (See Prob. Prac. '64, § 315) R. S. § 5702; am. '07, p. 338, § 1, reen. R. C. § 5702, reen. C. L. ib.

Cross ref. Succession of children where marriage of parents is annulled: § 4622. Board of trustees of soldiers' home are heirs of deceased soldiers: § 1257.

Comp. leg.—Cal. Similar but 8th subd. omitted and another subd. inserted: Civ. Code 1872, § 1386; as amended: Kerr's C. ib.

N. D. Analogous: Civ. C. § 5743.

Cited: Whitley v. Spokane etc. Ry. Co. (1913) 23 I. 642, 132 P. 121, aff. 237 U. S. 487, 59 L. ed. 1060, 35 S. C. R. 655; Connolly v. Prob. Ct. (1913) 25 I. 35, 136 P. 205; Diamond v. Connolly, 251 F. 234.

Rights of widow: The rights given to the widow by this section are in lieu of dower and can not be disposed of by the husband by antenuptial will, but such will, if made, will be deemed to be revoked by the marriage. Morgan v. Ireland (1880) 1 I. 786.

Separate and community property distinguished: In the case of property that was the separate estate of the intestate this section makes the heirs to be the wife and children, but in the case of its having been community property, § 7803, makes the wife to be the sole heir. Powell v. Powell (1912) 22 I. 531, 126 P. 1058.

Devolution of U. S. homestead: An entryman, prior to his final proof, has no devisable interest in the land, but the land must go according to the acts of congress, U. S. R. S. §§ 4078-9, and the person taking the same upon the death of the entryman takes as a donee of the government, and not by descent or by devise. The state laws in regard to the descent of property have no application to a public land entry. Hays v. Wyatt (1911) 19 I. 544, 115 P. 13, 34 L. R. A. (N. S.) 397. And the probate court has no jurisdiction over such property and no power or authority to order a sale of such real estate, and the administrator of the estate of the deceased entryman has no power or authority to convey any title to such property. Council Imp. Co. v. Draper (1909) 16 I. 541, 102 P. 7.

§ 7794. [5703] **Heirship of illegitimate children.** Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock, but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child or adopts him into his family, in which case such child and all the legitimate

children are considered brothers and sisters, and on the death of either of them, intestate and without issue, the others inherit his estate and are heirs as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate. [R. S. § 5703.]

Hist. (See Prob. Prac. '64, § 316) R. S. § 5703, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code 1872, § 1387: Kerr's C. ib.

N. D. Identical: Civ. C. § 5745.

§ 7795. [5704] **Mother successor to illegitimate child.** If an illegitimate child who has not been acknowledged or adopted by his father, dies intestate without lawful issue, his estate goes to his mother, or in case of her decease, to her heirs at law. [R. S. § 5704.]

Hist. (See Prob. Prac. '64, § 317) R. S. § 5704, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code 1872, § 1388; additional provisions as amended: Kerr's C. ib.

N. D. Identical: Civ. C. § 5746.

§ 7796. [5705] **Computation of kinship.** The degrees of kindred are computed according to the rules of civil law. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance. [R. S. § 5705.]

Hist. (See Prob. Prac. '64, § 318) R. S. § 5705, reen R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except first sentence omitted: Civ. Code 1872, § 1394: Kerr's C. ib.

N. D. Analogous: Civ. C. §§ 5747-52.

Applied: This section providing that degrees of kindred are computed according to the civil law rules applies to the anti-nepotism law (§§ 416-7). Barton v. Alexander (1915) 27 I. 286, 148 P. 471.

§ 7797. [5706] **Advancements.** Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child or other lineal descendant, is a part of the estate of the decedent for the purpose of division and distribution thereof among his issue, and must be taken by such child or other lineal descendant, toward his share of the estate of the decedent. [R. S. § 5706.]

Hist. (See Prob. Prac. '64, § 319) R. S. § 5706, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code 1872, § 1395; similar as amended: Kerr's C. ib.

N. D. Identical: Civ. C. § 5753.

§ 7798. [5707] **Same: Refund not required.** If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement, and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent. [R. S. § 5707.]

Hist. (See Prob. Prac. '64, § 320) R. S. § 5707, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code 1872, § 1396: Kerr's C. ib.

N. D. Identical: Civ. Code § 5754.

§ 7799. [5708] **Gifts as advancements.** All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir. [R. S. § 5708.]

Hist. (See Prob. Prac. '64, § 321) R. S. § 5708, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code. 1872, § 1397: Kerr's C. ib.

N. D. Similar: Civ. C. § 5755.

§ 7800. [5709] **Valuation of advancement.** If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgement of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise it must be estimated according to its value when given, as nearly as the same can be ascertained. [R. S. § 5709.]

Hist. (See Prob. Prac. '64, § 322) R. S. § 5709, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code. 1872, § 1398: Kerr's C. ib.

N. D. Identical: Civ. C. § 5756.

§ 7801. [5710] **Death of person advanced.** If any child or other lineal descendant receiving advancement dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them. [R. S. § 5710.]

Hist. (See Prob. Prac. '64, § 323) R. S. § 5710, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code. 1872, § 1399; similar as amended: Kerr's C. ib.

N. D. Identical: Civ. C. § 5757.

§ 7802. [5711] **Inheritance of husband and wife.** The provisions of the preceding sections of this chapter, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents. [R. S. 5711.]

Hist. (See Prob. Prac. '64, § 324) R. S. § 5711, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code. 1872, § 1400: Kerr's C. ib.

§ 7803. Devolution of community property. Upon the death of either husband or wife, one-half of all the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, in favor only of his, her or their children or a parent of either spouse, subject also to the community debts, provided that not more than one-half of the decedent's half of the community property may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall go to the survivor, subject to the community debts, the family allowance and the charges and expenses of administration: *Provided, however,* That no administration of the estate of the wife shall be necessary if she dies intestate. ['11, c. 13, § 1, p. 29.]

Hist. R. S. § 5713; am. '07, p. 346, § 1, reen. R. C. § 5713; am. '11, c. 13, § 1, p. 29, reen. C. L. § 5713.

Cross ref. Community property defined: § 4660.

Comp. leg.—Cal. See C. C. P. 1872, §§ 1401-2; as amended: Kerr's C. ib.

Cited: Hall v. Johns (1909) 17 I. 224, 105 P. 71: Powell v. Powell (1912) 22 I. 531, 126 P. 1058.

Purpose of amendment: The undoubted general purpose of the amendment of 1911 was to reduce the number of cases where community estates would be dissolved (with the consequent confusion in business and uncertainty of titles) upon the death of one member of the community. The principle of absolute equality between husband and wife is retained, but the right of succession is practically abolished, and the burden of dividing up the estate is imposed upon the husband or wife, in that his or her wishes can be given effect only by affirmative action, namely, the execution of a will. Scott v. Scott (1917) 247 F. 983.

Title of survivor: This section recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of half of such property subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent or inheritance, but as survivor of the marital community or partnership. Kohny v. Dunbar (1912) 21 I. 258, 121 P. 544, Ann. Cas. 1913D 492,

39 L. R. A. (N. S.) 1107; Ewald v. Hufton, 31 I. 373, 173 P. 247.

Devolution of personal property: This section must be construed with other sections of the statutes in regard to devolution of the property. This section does not change the general rule that the succession to, and disposition and distribution of, personal property, wherever situated, is governed by the lex domicilii of the owner or intestate at the time of his death, without regard to the location of the property or the place of his death. Vansickle v. Hazeltine (1916) 29 I. 228, 158 P. 326.

Succession of adopted child: In view of the fact that an adopted child is given all the rights and made subject to all the burdens of a natural child he is entitled to equality of succession with a child by birth. Scott v. Scott, supra.

§ 7804. [5714] **Inheritance by representation.** Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents. [R. S. § 5714.]

Hist. (See Prob. Prac. '64, § 325) R. S. § 5714, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code. 1872, § 1403: Kerr's C. ib.

N. D. Identical: Civ. C. § 5758.

§ 7805. [5715] **Inheritance by aliens.** Resident aliens may take in all cases by succession as citizens, and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative, but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession. [R. S. § 5715.]

Hist. R. S. § 5715, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Civ. Code. 1872, § 1404: Kerr's C. ib.

N. D. Analogous: Civ. C. § 5759.

Succession by alien: A nonresident foreigner can not take real estate by succession unless he appears and claims succession within five years after the death of the decedent, and if he fails to claim succession within that time the real estate of the decedent escheats to the state. State v. Stevenson (1898) 6 I. 367, 55 P. 886; Connolly v.Prob. Ct. (1913) 25 I. 35, 136 P. 205.

Manner of making claim: It is necessary for a nonresident alien claiming property in the possession or custody of the state or third party, to institute an appropriate proceeding in a court of competent jurisdiction to adjudicate his right of succession within five years from the death of the decedent. Filing a suit in the federal court is not an appearance and claim of the right of succession to an estate as contemplated herein, such action must be in the proper probate court. Connolly v. Reed (1912) 22 I. 29, 125 P. 213.

§ 7806. [5716] **Disposition of unclaimed property.** When the succession is not claimed as provided in the preceding section, the district court, on information, must direct the attorney general to reduce the property to his or the possession of the state, or to cause the same to be sold, and the same, or the proceeds thereof, to be deposited in the state treasury for the benefit of such nonresident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof, to the satisfaction of the state auditor and treasurer, is produced that he is entitled to succeed thereto. [R. S. § 5716.]

Hist. R. S. § 5716, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1405; similar as amended: Kerr's C. ib.

N. D. Analogous: Civ. C. § 5760. See also Civ. C. §§ 5761-5762.

Cited: S. v. Stevenson (1908) 6 I. 367, 55 p. 886; Connolly v. Prob. Ct. (1913) 25 I. 35, 136 P. 205.

Applied: If parties through fraud or deceit obtain possession of property, which no other rightful heirs may lawfully claim, such escheats to the state. Connolly v. Reed (1912) 22 I. 29, 125 P. 213.

§ 7807. [5717] **Same.** When so claimed, the evidence and the joint order of the auditor and treasurer must be filed by the treasurer

as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent is placed by the state treasurer to the credit of the school fund. [R. S. § 5717.]

Hist. R. S. § 5717, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Express reference to this section: Escheated lands part of school lands: § 904.

Comp. leg.—Cal. Same except the words "devolves and escheats to the people of the state and" are inserted after "decedent," line 5; C. C. P. 1872, § 1406; somewhat similar as amended: Kerr's C. ib.

Cited: S. v. Stevenson (1898) 6 I. 367, 55 P. 886; Connolly v. Reed (1912) 22 I. 29, 40, 125 P. 213.

CHAPTER 288.

WILLS.

§ 7808. [5725] **Who may make a will.** Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chapter 287, being chargeable in both cases with the payment of all the decedent's debts, as provided in this code. [R. S. § 5725.]

Hist. R. S. § 5725, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Probate of wills: § 7440 et seq.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1270: Kerr's C. ib.

N. D. Similar: Civ. C. § 5640.

Cited: Scott v. Harkness (1899) 6 I. 736; 59 P. 556.

§ 7809. [5726] **Same: Married women.** A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be attested, witnessed, and proved in like manner as all other wills. [R. S. § 5726.]

Hist. R. S. § 5726, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Power of married woman to dispose of her interest in community property by will: § 7803; to make olographic will: § 7811.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1273; same as amended except "executed" for "attested, witnessed": Kerr's C. ib.

N. D. Similar: Civ. C. § 5641.

Cited: Scott v. Harkness (1899) 6 I. 736, 59 P. 556.

§ 7810. [5727] **Execution of will.** Every will, other than a nuncupative will, must be in writing, and every will, other than olographic will and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them, to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence. [R. S. § 5727.]

Hist. R. S. § 5727, reen. R. C. ib. reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1276; similar as amended: Kerr's C. ib.

N. D. Identical: Civ. C. § 5649.

Cross ref. Wills must be in writing: § 6006.

Cited: Scott v. Harkness (1899) 6 I. 736, 59 P. 556.

Evidence of compliance: Evidence showing this section has been complied with entitles the will to be probated as such in the absence of a contest or contrary showing. Head v. Nixon (1912) 22 I. 765, 128 P. 557.

§ 7811. Olographic wills. An olographic will is one that is entirely written, dated and signed by the hand of the testator or testatrix (who may be either married or unmarried). It is subject to no other form, and may be made in or out of this state, and need not be witnessed. ['15, c. 17, p. 69.]

Hist. R. S. § 5728, reen. R. C. ib.; am. '15, c. 17, p. 69, reen. C. L. § 5728.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1277: Kerr's C. ib.

N. D. Similar: Civ. C. § 5648.

Married woman: Prior to amendment, a married woman could not make an olographic will. Scott v. Harkness (1899) 6 I. 736, 59 P. 556.

§ 7812. [5729] **Requirements as to witnesses.** A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will. [R. S. § 5729.]

Hist. R. S. § 5729, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1278: Kerr's C. ib.

N. D. Identical: Civ. C. § 5651.

§ 7813. [5730] **Subsequent incompetency of witness.** If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved. [R. S. § 5730.]

Hist. R. S. § 5730, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1280: Kerr's C. ib.

N. D. Identical: Civ. C. § 5682.

§ 7814. [5731] **Revocation of wills.** Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. [R. S. § 5731.]

Hist. R. S. § 5731, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1292: Kerr's C. ib.

N. D. Identical: Civ. C. § 5660.

§ 7815. [5732] **Proof of revocation.** When a will is cancelled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses. [R. S. § 5732.]

Hist. R. S. § 5732, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1293: Kerr's C. ib.

N. D. Identical: Civ. C. § 5661.

§ 7816. [5733] **Revocation of duplicate will.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates. [R. S. § 5733.]

Hist. R. S. § 5733, reen. R. C. ib. reen. C. L. ib.

N. D. Identical: Civ. C. § 5663.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1295: Kerr's C. ib.

§ 7817. [5734] **Revival of previous will by revocation.** If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished. [R. S. § 5734.]

Hist. R. S. § 5734, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Civ. C. § 5665.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1297: Kerr's C. ib.

§ 7818. [5735] **Revocation by marriage and issue.** If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received. [R. S. § 5735.]

Hist. R. S. § 5735, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5666.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1298: Kerr's C. ib.

§ 7819. [5736] **Revocation by marriage.** If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received. [R. S. § 5736.]

Hist. R. S. § 5736, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1299: Kerr's C. ib.

Cited: (erroneously as R. C. § 2763. in dis. op.) Bliss v. Bliss (1911) 20 I. 467, 504, 119 P. 451.

N. D. Identical: Civ. C. § 5667.

§ 7820. [5737] **Revocation by marriage of woman.** A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband. [R. S. §5737.]

Hist. R. S. § 5737, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5668.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1300; Kerr's C. ib.

§ 7821. [5738] **Contract not a revocation.** An agreement made by a testator for the sale or transfer of property disposed of by will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors if the same had passed by succession. [R. S. § 5738.]

Hist. R. S. § 5738, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5669.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1301: Kerr's C. ib.

§ 7822. [5739] **Mortgage not a revocation.** A charge or incumbrance upon any estate for the purpose of securing the payment of money

or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass subject to such charge or incumbrance. [R. S. § 5739.]

Hist. R. S. § 5739, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5670.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1302: Kerr's C. ib.

§ 7823. [5740] **Conveyance not a revocation.** A convevance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession. [R. S. § 5740.]

Hist. R. S. § 5740, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5671.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1303: Kerr's C. ib.

§ 7824. [5741] **Same: Inconsistent conveyance.** If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect. [R. S. § 5741.]

Hist. R. S. § 5741, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5672.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1304: Kerr's C. ib.

§ 7825. [5742] **Revocation of codicils.** The revocation of a will revokes all its codicils. [R. S. § 5742.]

Hist. R. S. § 5742, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5673.

Comp. leg.—Cal. Same: C. C. P. 1872, 1305: Kerr's C. ib.

§ 7826. [5743] **Succession by afterborn child.** Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. [R. S. § 5743.]

Hist. R. S. § 5743, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1306; same as amended with an additional provision: Kerr's C. ib.

N. D. Identical: Civ. C. § 5674.

§ 7827. [5744] **Children unprovided for.** When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section. [R. S. § 5744.]

Hist. R. S. § 5744, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1307; same as amended except "has" for "must have," and an additional provision: Kerr's C. ib.

N. D. Identical: Civ. C. § 5675.

§ 7828. [5745] **Same: Apportionment of share.** When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as herein-

before mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted. [R. S. § 5745.]

Hist. R. S. § 5745, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872. § 1308: Kerr's C. ib.

N. D. Identical: Civ. C. § 5676.

§ 7829. [5746] **Children provided for by advancement.** If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections. [R. S. § 5746.]

Hist. R. S. § 5746, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1309: Kerr's C. ib.

N. D. Identical: Civ. C. § 5677.

§ 7830. [5747] **Succession of descendants of devisee.** When any estate is devised to any child or other relative of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done had he survived the testator. [R. S. § 5747.]

Hist. R. S. § 5747, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1310: Similar: Kerr's C. ib.

N. D. Identical: Civ. C. § 5679.

Cited: (erroneously for R. C. § 5774). Re Martin (1916) 29 I. 716, 161 P. 573.

§ 7831. [5748] **Effect of devise of land.** Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate. [R. S. § 5748.]

Hist. R. S. § 5748, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1311: Kerr's C. ib.

N. D. Identical: Civ. C. § 5678.

Devolution of U. S. homestead: An entryman, prior to his final proof, has no devisable interest in the land, but the land must go according to the acts of Congress, U. S. R. S. §§ 2291-2, and the person taking the same upon the death of the entryman takes as a donee of the government, and not by descent or by devise. Hays v. Wyatt (1911) 19 I. 544, 115 P. 13, 34 L. R. A. (N. S.) 397.

§ 7832. [5749] **Same: After acquired estates.** Any estate, right or interest in lands, acquired by the testator after the making of his will, passes thereby and in like manner as if the title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms devising or in any other terms denoting the intent of the testator to devise, all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease. [R. S. § 5749.]

Hist. R. S. § 5749, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "if it" for "unless the contrary," line 4: C. C. P. 1872, § 1312; same as amended: Kerr's C. ib.

N. D. Identical: Civ. C. § 5684.

§ 7833. [5750] **Devise to charitable uses.** No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses,

except the same be done by will duly executed at least 30 days before the decease of the testator; and if so made at least 30 days prior to such death such devise or legacy, and each of them, shall be valid: *Provided,* That no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving lineal descendants, and in such case, a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law. [R. S. § 5750.]

Hist. R. S. § 5750, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; same except "legal heirs" for "lineal descendants,'" Kerr's C. § 1313.

§ 7834. [5751] **All property chargeable with debts.** When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code. [R. S. § 5751.]

Hist. R. S. § 5751, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1358; same as amended except "and the Code of Civil Procedure" added: Kerr's C. ib.

N. D. Similar: Civ. C. § 5721.

§ 7835. [5752] **Same: Order of exhaustion.** The property of a testator, except as otherwise specially provided for in this code, must be resorted to for the payment of debts in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts.
2. Property not disposed of by the will.
3. Property which is devised or bequeathed to a residuary legatee.
4. Property which is not specially devised or bequeathed; and
5. All other property ratably.

Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for. [R. S. § 5752.]

Hist. R. S. § 5752, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Civ. C. § 5722.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1359; same: Kerr's C. ib.

§ 7836. [5753] **Legacies: Out of what property payable.** The property of a testator, except as otherwise specially provided for in this code, must be resorted to for the payment of legacies, in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies.
2. Property not disposed of by the will.
3. Property which is devised or bequeathed to a residuary legatee.
4. Property which is specifically devised or bequeathed. [R. C. § 5753.]

Hist. R. S. § 5753; am. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1360; same as amended: Kerr's C. ib.

N. D. Similar: Civ. C. § 5723.

§ 7837. [5754] **Preference of legacies to kindred.** Legacies to husband, widow, or kindred of any class, are chargeable only after legacies to persons not related to the testator. [R. S. § 5754.]

Hist. R. S. § 5754, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5724.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1361: Kerr's C. ib.

§ 7838. [5755] **Effect of specific devise.** In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the judge of the

probate court to sell the property devised and bequeathed in the cases herein provided. [R. S. § 5755.]

Hist. R. S. § 5755, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Civ. C. § 5726.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1363: Kerr's C. ib.

§ 7839. [5756] **Legacies and annuities: When due.** Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease. [R. S. § 5756.]

Hist. R. S. § 5756, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Civ. C. § 5731.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1368: Kerr's C. ib.

§ 7840. [5757] **Power of executor before qualification.** No person has any power as an executor until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate. [R. S. § 5757.]

Hist. R. S. § 5757, reen. R. C. ib. reen. C. L. ib.

N. D. Identical: Civ. C. § 5736.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1373: Kerr's C. ib.

§ 7841. [5760] **Conflict of laws concerning wills.** Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real property within this state, by the laws of this state; when relating to personal property, by the law of the testator's domicile. [R. S. § 5760.]

Hist. R. S. § 5760, reen. R. C. ib., reen. C. L. ib.

Cross ref. Conflict of laws in relation to personal property: § 5363.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1376; different as amended: Kerr's C. ib.

N. D. Identical: Civ. C. § 5739.

CHAPTER 289.

GUARDIAN AND WARD.

Cross ref. Service of process on guardians: § 7773.

§ 7842. [5770] **Appointment of guardians.** The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if 14 years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to any person having the care of such minor, and to such relatives of the minor in the county as the court may deem proper. [R. S. § 5770.]

Hist. '67, p. 30, § 1; R. S. § 5770, reen. R. C. ib., reen. C. L. ib.

Cross. ref.— Homefinding society as guardian of homeless children: c. 290.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1747; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8874.

Presumptions: Probate courts are, in matters of guardianship, courts of general jurisdiction, and every intendment is in favor of the regularity of their proceedings, so that in a petition for the settlement of a guardian's account, it is not necessary to allege the steps taken in procuring the appointment of the guardian. Re Arva and Elmer Brady (1904) 10 I. 366, 79 P. 75.

Jurisdiction: By this section the power of the court to appoint a guardian is limited to cases of minors who have no guardian legally appointed by will or deed. Re Crocheron (1909) 16 I. 441, 101 P. 741, 33 L. R. A. (N. S.) 868.

§ 7843. [5771] **Nomination of guardian.** If the minor is under the age of 14 years, the probate court may nominate and appoint his guardian.

If he is above the age of 14 years, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly. [R. S. § 5771.]

Hist. '67, p. 30, § 2; R. S. § 5771, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1748; similar: Kerr's C. ib.

N. D. Similar: Prob. C. § 8875.

§ 7844. [5772] **Same : Failure of minor to nominate.** If the guardian nominated by the minor is not approved by the court or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for 10 days to nominate a suitable person, the court may nominate and appoint the guardian, in the same manner as if the minor were under the age of 14 years. [R. S. § 5772.]

Hist. '67, p. 30, § 3; R. S. § 5772, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1749: Kerr's C. ib.

N. D. Similar: Prob. C. § 8876.

§ 7845. [5773] **Same: Subsequent nomination by minor.** When a guardian has been appointed by the court for a minor under the age of 14, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the probate court. [R. S. § 5773.]

Hist. '67, p. 31, § 4; R. S. § 5773, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1750; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8877.

§ 7846. [5774] **Parents entitled to guardianship.** Either the father or mother of a minor, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor. ['97, p. 55, § 5774.]

Hist. (See '67, p. 30, § 5) R. S. § 5774; am. '97, p. 55, § 5774, reen. '99, p. 302, § 1, reen. R. C. § 5774, reen. C. L. ib.

Cross. ref. Parents equally entitled to custody of children: § 4681; custody of children on annulment of marriage: § 4623; after separation of parents: § 4679.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1751; additional provision as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8878.

Cited: Re Crocheron (1909) 16 I. 441, 101 P. 741, 33 L. R. A. (N. S.) 868; S. v. Beslin (1901) 19 I. 185, 190, 112 P. 1053.

Parent's right: It is only where the legal right of the parent to the custody of his child is not clear that the child can be committed to the custody of another on the ground of welfare: if the parent is competent to transact his or her own business, and is not otherwise unsuitable, the custody of the child is not to be given to another even though such other may be a more suitable person. Jain v. Priest (1917) 30 I. 273, 164 P. 364.

Abandonment of right: While the parent being competent and not unsuitable, is absolutely entitled to the guardianship of a minor child, yet the right of a parent may be abandoned or forfeited by act or conduct on his part and if his right is not clear, the best interest of the child will govern the decision of the court. Andrino v. Yates (1906) 12 I. 618, 87 P. 787.

Where a child has resided with its aunt from the time it was two and one-half years old until it was nearly twelve years of age, without having seen its mother during that time, and the conditions are such, in view of the conduct of the mother, and the absence of parental care on her part during that period, that the custody cannot be changed without endangering the happiness and welfare of the child, the mother will be deemed "unsuitable" to have the custody of the child and the child will be left with its aunt, notwithstanding an application of the mother for its custody. Ib.

Surrender of right: Parents when suitable are absolutely entitled to the guardianship of their minor children and the surrender of such right may be made only in the manner provided by law. Re Martin (1916) 29 I. 716, 161 P. 573.

§ 7847. [5775] **Custody of minor by guardian.** If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same. [R. S. § 5775.]

Hist. '67, p. 31, § 6, R. S. § 5775, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1752: Kerr's C. ib.

N. D. Identical: Prob. C. § 8879.

§ 7848. [5776] **Education and management of estate.** Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged. [R. S. § 5776.]

Hist. '67, p. 31, § 7, R. S. § 5776, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1753: Kerr's C. ib.

N. D. Identical: Prob. C. § 8880.

§ 7849. [5777] **Bond and letters of guardian.** Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form a part of such bond, without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward.

3. To render an account, on oath, of the property, estate and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the court or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form, the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon that he will perform the duties of his office, as such guardian, according to law. [R. S. § 5777.]

Hist. '67, p. 31, § 8, R. S. § 5777, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Provisions of c. 22 apply to bonds of guardian: § 448. Allowance to guardian of premium paid for company bond: §§ 5106, 5112.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1754; similar, as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. §§ 8692, 8881.

§ 7850. [5778] **Same: Additional conditions.** When any person is appointed guardian of a minor, the probate court may, with the consent of such person, insert in the order of appointment, conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor. The performance of such conditions is a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond are responsible. [R. S. § 5778.]

Hist. R. S. § 5778, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1755; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8882.

§ 7851. [5779] **Letters and bonds to be recorded.** All letters of guardianship issued, and all guardians' bonds executed, under the provisions of this chapter, with the affidavits and certificates thereon, must

be recorded by the clerk of the probate court having jurisdiction of the persons and estates of the wards. [R. S. § 5779.]

Hist. R. S. § 5779, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1756: Kerr's C. ib.

§ **7852.** [5780] **Maintenance of ward.** If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the probate court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. [R. S. § 5780.]

Hist. '67, p. 32, § 9, R. S. § 5780, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1757; Kerr's C. ib.

N. D. Similar: Prob. C. § 8883.

§ **7853.** [5781] **Appointment of testamentary guardian.** A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

1. If the child be legitimate, by the father, with the written consent of the mother, or by either parent, if the other be dead or incapable of consent.

2. If the child be illegitimate, by the mother. [R. S. § 5781.]

Hist. R. S. § 5781, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or estate, or of both" omitted: C. C. P. 1872, § 241; same as amended: Kerr's C. ib.

§ **7854.** [5782] **Same: Bond.** Every testamentary guardian must give bond and qualify, and has the same powers, and must perform the same duties, with regard to the person and estate of his ward, as guardians appointed by the probate court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed. [R. S. § 5782.]

Hist. R. S. § 5782, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1758; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8884.

§ **7855.** [5783] **Appointment of guardians ad litem.** Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein. [R. S. § 5783.]

Hist. '67, p. 32, § 11, R. S. § 5783, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1759: Kerr's C. ib.

N. D. Identical: Prob. C. § 8885.

§ **7856.** [5784] **Petition for guardian for incompetent.** When it is represented to the probate judge, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing. [R. S. § 5784.]

Hist. '67, p. 32, § 12, R. S. § 5784, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1763; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8886.

§ 7857. [5785] **Same: Appointment.** If, after a full hearing and examination upon such petition, it appears to the probate court that the person in question is incapable of taking care of himself and managing his property, the court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified. [R. S. § 5785.]

Hist. '67, p. 33, § 13, R. S. § 5785, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1764; similar: Kerr's C. ib.

N. D. Similar: Prob. C. § 8887.

§ 7858. [5786] **Same: Powers.** Every guardian appointed as provided in the preceding section has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond to such ward in like manner and with like conditions as before prescribed with respect to the guardian of a minor. [R. S. § 5786.]

Hist. '67, p. 33, § 14, R. S. § 5786, reen. R. C. ib., reen. C. L. ib.

Cross ref. May sign petition for annexation of lands to irrigation district: § 4412.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1765: Kerr's C. ib.

N. D. Similar: Prob. C. § 8888.

§ 7859. [5787] **Restoration to sanity: Proceedings.** Any person who has been declared insane or incompetent, or the guardian or any relative of such person, or any friend, may apply by petition to the probate court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified and shall state that such person is then sane or competent.

Upon receiving the petition the court must appoint a day for a hearing before the court, and if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease. [R. S. § 5787.]

Hist. R. S. § 5787, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in Codes of 1872; similar as amended: Kerr's C. § 1766.

N. D. Similar: Prob. C. § 8889.

§ 7860. [5788] **Payment of debts of ward.** Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents. [R. S. § 5788.]

Hist. '67, p. 33, § 15, R. S. § 5788, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1768: Kerr's C. ib.

N.D. Similar: Prob. C. § 8891.

§ 7861. [5789] **Collection of debts.** Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the probate judge compound for the same and give discharges to the debtors, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose. [R. S. § 5789.]

Hist. '67, p. 33, § 16; R. S. § 5789, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1769: Kerr's C. ib.

N. D. Similar: Prob. C. § 8892.

§ 7862. [5790] **Management of estate.** Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance, support and education of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any. [R. S. § 5790.]

Hist. '67, p. 33, § 17; R. S. § 5790, reen. R. C. ib., reen. C. L. ib.

Cross ref. Guardian may represent corporate stock of his ward: 4719. Guardians may deposit securities with guaranty and trust companies: § 4862.

Comp. leg.—Cal. Same except "maintenance and support" for "maintenance, support and education": C. C. P. 1872, § 1770; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8893.

§ 7863. [5791] **Allowance for maintenance: Failure to maintain ward.** When a guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements.

Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process. [R. S. § 5791.]

Hist. R. S. § 5791, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1771: Kerr's C. ib.

N. D. Similar: Prob. C. § 8894.

§ 7864. [5792] **Guardian may consent to partition.** The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person. [R. S. § 5792.]

Hist. '67, p. 33, § 18; R. S. § 5792, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sale of ward's property in partition: §§ 7017-19.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1772; additional provisions as amended: Kerr's C. ib.

§ 7865. [5793] **Inventory of estate.** Every guardian must return to the probate court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. The probate

court may, upon application for that purpose by any person, compel the guardian to render an account to the probate court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the probate court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return. [R. S. § 5793.]

Hist. '67, p. 33, § 19; R. S. § 5793, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "when the value of the estate exceeds the sum of $100,000 semiannual returns must be made to the probate court" inserted after "thereafter," and "made" inserted after "application": C. C. P. 1872, § 1773: Kerr's C. ib.

N. D. Similar: Prob. C. § 8895.

§ 7866. [5794] **Settlement of accounts.** The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the probate court for settlement and allowance. [R. S. § 5794.]

Hist. '67, p. 36, § 35; R. S. § 5794, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1774; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8896.

§ 7867. [5795] **Same: Accounts of joint guardians.** When an account is rendered by two or more joint guardians, the probate judge may, in his discretion, allow the same upon the oath of any of them. [R. S. § 5795.]

Hist. R. S. § 5795, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1775: Kerr's C. ib.

N. D. Similar: Prob. C. § 8897.

§ 7868. [5796] **Expenses and compensation of guardian.** Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable. [R. S. § 5796.]

Hist. R. S. § 5796, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1776: Kerr's C. ib.

N. D. Identical: Prob. C. § 8898.

Expenses of litigation: Where a testamentary guardian seeks to establish the will of the testator and the probate court decides against the validity of the will and the guardian appeals to the district court, which confirms the decision of the probate court, the guardian should be allowed the costs and expenses of those courts but can not charge up the costs and expenses of a further appeal to the supreme court against the estate of his ward. Re Arva and Elmer Brady (1904) 10 I. 366, 79 P. 75.

§ 7869. [5797] **Sale of property for maintenance.** When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor. [R. S. § 5797.]

Hist. '67, p. 34, § 20; R. S. § 5797, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1777; same as amended except "or mortgage the real estate" inserted after "personal estate": Kerr's C. ib.

N. D. Similar: Prob. C. § 8899.

§ 7870. [5798] **Same: Sale for investment.** When it appears to the satisfaction of the court, upon the petition of the guardian, that, for the benefit of his ward, his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor. [R. S. § 5798.]

Hist. '67, p. 34, § 21; R. S. § 5798, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8900.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1778: Kerr's C. ib.

§ 7871. [5799] **Application of proceeds of sale.** If the estate is sold for the purposes mentioned in this chapter the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward, when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward. [R. S. § 5799.]

Hist. '67, p. 34, § 22; R. S. § 5799, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: Prob. C. § 8901.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1779: Kerr's C. ib.

§ 7872. [5800] **Same: Investment of proceeds.** If the estate is sold for the purpose of putting out or investing the proceeds the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the probate court. [R. S. § 5800.]

Hist. '67, p. 34, § 23; R. S. § 5800, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8902.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1780; Kerr's C. ib.

§ 7873. [5801] **Petition for sale.** To obtain an order for such sale the guardian must present to the probate court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale. [R. S. § 5801.]

Hist. '67, p. 34, § 24; R. S. § 5801, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8903.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1781: Kerr's C. ib.

§ 7874. [5802] **Order to show cause.** If it appears to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appears that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made. [R. S. § 5802.]

Hist. '67, p. 35, § 25; R. S. § 5802, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8904.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1782: Kerr's C. ib.

§ 7875. [5803] **Service of order.** A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least 14 days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county; if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order.

If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published. [R. S. § 5803.]

Hist. '67, p. 35, § 26; R. S. § 5803, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1783; similar as amended: Kerr's C. ib.

§ 7876. [5804] **Hearing of application.** The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application. [R. S. § 5804.]

Hist. '67, p. 35, § 27; R. S. § 5804, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1784: Kerr's C. ib.

N. D. Similar: Prob. C. § 8905.

§ 7877. [5805] **Same: Examination of witnesses.** On the hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the probate court or judge, in the same manner and with like effect as in other cases provided for in this title. [R. S. § 5805.]

Hist. '67, p. 35, § 28; R. S. § 5805, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1785: Kerr's C. ib.

N. D. Similar: Prob. C. § 8906.

§ 7878. [5806] **Same: Costs of contest.** If any person appears and objects to the granting of any order prayed for under the provisions of this chapter and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof. [R. S. § 5806.]

Hist. '67, p. 35, § 29; R. S. § 5806, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: C. C. P. 1872, § 1786: Kerr's C. ib.

§ 7879. [5807] **Order of sale.** If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale. [R. S. § 5807.]

Hist. '67, p. 35, § 30; R. S. § 5807, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1787: Kerr's C. ib.

N. D. Similar: Prob. C. § 8907.

§ 7880. [5808] **Guardian to give bond on sale.** Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this chapter and chapter 279 of this code. [R. S. § 5808.]

Hist. '67, p. 36, § 31; R. S. § 5808, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "the probate judge" for "the ward," and "approved by him" for "approved by the court or a judge thereof": C. C. P. 1872, § 1788; same as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8908.

§ 7881. [5809] **Statutory provisions governing sales.** All the proceedings under petitions of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of account, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter. [R. S. § 5809.]

Hist. R. S. § 5809, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1789: Kerr's C. ib.

N. D. Similar: Prob. C. § 8909.

§ 7882. [5810] **Duration of order of sale.** No order of sale granted in pursuance of this chapter continues in force more than one year after granting the same, without a sale being had. [R. S. § 5810.]

Hist. '67, p. 36, § 33; R. S. § 5810, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: C. C. P. 1872, § 1790: Kerr's C. ib.

N. D. Identical: Prob. C. § 8910.

§ 7883. [5811] **Terms of sale.** All sales of real estate of wards must be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as, in the discretion of the probate judge, is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon. [R. S. § 5811.]

Hist. R. S. § 5811, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1791; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8911.

§ 7884. [5812] **Order for investment of proceeds.** The probate court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the probate judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the probate court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require. [R. S. § 5812.]

Hist. '67, p. 36, § 36; R. S. § 5812, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1792: Kerr's C. ib.

N. D. Similar: Prob. C. § 8912.

§ 7885. [5813] **. Guardians for nonresidents.** When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state, and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the probate court of any county in which there is any estate of such absent person, for the appointment of a guardian; and, if after notice

given to all interested, in such manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed. [R. S. § 5813.]

Hist. '67, p. 38, § 43; R. S. § 5813,, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8913.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1793; similar as amended: Kerr's C. ib.

§ 7886. [5814] **Same: Powers.** Every guardian appointed under the preceding section has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter. [R. S. § 5814.]

Hist. '67, p. 38, § 44; R. S. § 5814, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8914.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1784: Kerr's C. ib.

§ 7887. [5815] **Same: Bond of guardian.** Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state. [R. S. § 5815.]

Hist. '67, p. 38, § 45; R. S. § 5815, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8915.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1795: Kerr's C. ib.

§ 7888. [5816] **Same: Exclusiveness of guardianship.** The guardianship which is first lawfully granted, of any person residing without this state, extends to all the estate of the ward within the same, and excludes the jurisdiction of the probate court of every other county. [R. S. § 5816.]

Hist. '67, p. 38, § 46; R. S. § 5816, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Prob. C. § 8916.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1796: Kerr's C. ib.

§ 7889. [5817] **Removal of nonresident's property.** When the guardian and ward are both nonresidents, and the ward is entitled to property in this state which may be removed to another state or territory or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state, territory or foreign country of the residence of the ward, upon the application of the guardian to the probate court of the county in which the estate of the ward, or the principal part thereof, is situated. [R. S. § 5817.]

Hist. '67, p. 39, § 51; R. S. § 5817, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Same: C. C. P. 1872, § 1797; similar as amended: Kerr's C. ib.

§ 7890. [5818] **Same: Proceedings for removal.** The application must be made upon 10 days' notice to the resident executor, administrator or guardian, if there be such, and upon such application the nonresident guardian must produce and file a certificate under the hand of the clerk and seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled, by the laws of the state or territory of his appointment, to the possession of the estate of the ward.

Upon such application, unless good cause to the contrary is shown, the probate court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward. [R. S. § 5818.]

Hist. '67, p. 39, § 52; R. S. § 5818, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Substantially same: C. C. P. 1872, § 1798; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8917.

§ 7891. [5819] **Effect of order of removal.** Such order is a discharge of the executor, administrator, local guardian or other person in whose possession the property may be at the time the order is made, on filing with the probate court the receipt therefor of the foreign guardian of such absent ward. [R. S. § 5819.]

Hist. '67, p. 39, § 53, last clause omitted; R. S. § 5819, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1799; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8918.

§ 7892. [5820] **Embezzlement of ward's property.** Upon complaint made to him by any guardian, ward, creditor or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled or conveyed away any of the money, goods or effects, or an instrument in writing, belonging to the ward or his estate, the probate judge may cite such suspected person to appear before him, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of, and charged with, concealing or embezzling the effects of a decedent. [R. S. § 5820.]

Hist. '67, p. 37, § 42; R. S. § 5820, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1800; similar: Kerr's C. ib.

N. D. Similar: Prob. C. § 8919.

§ 7893. [5821] **Removal and resignation of guardian.** When a guardian, appointed either by the testator or the probate court, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for 30 days, after being required, to render an account or make a return, the probate court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian as herein provided the probate court or the judge thereof may appoint another in the place of the guardian who has resigned or has been removed. [R. S. § 5821.]

Hist. '67, p. 37, § 37; R. S. § 5821, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "after being required" is omitted: C. C. P. 1872, § 1801; similar as amended: Kerr's C. ib.

N. D. Similar: Prob. C. § 8920.

Cited: Jain v. Priest (1917) 30 I. 273, 164 P. 364.

§ 7894. [5822] **Termination of guardianship.** The marriage of a minor ward terminates the guardianship, and the guardian of an insane or other person may be discharged by the probate court when it appears to him, on the application of the ward, or otherwise, that the guardianship is no longer necessary. [R. S. § 5822.]

Hist. '67, p. 37, § 38; R. S. § 5822, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1802; similar as amended: Kerr's C. ib.

Notice required: When a guardianship is terminated by the probate court a reasonable notice should be given although notice is not required by the statute; but

an informal notice of that fact, brought home to the representative of the guardian, who is apprised of such termination and of the reasons therefor, is sufficient to bind the guardian. Jain v. Priest (1917) 30 I. 273, 164 P. 364.

§ 7895. [5823] **New bonds may be required.** The probate judge may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability, after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate. [R. S. § 5823.]

Hist. '67, p. 37, § 39; R. S. § 5823, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1803; Kerr's C. ib.

§ 7896. [5824] **Filing of bonds: Action for breach.** Every bond given by a guardian must be filed and preserved in the office of the clerk of the probate court of the county; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate. [R. S. § 5824.]

Hist. '67, p. 37, § 40; R. S. § 5824, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8921.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1804; Kerr's C. ib.

§ 7897. [5825] **Limitation of actions on bonds.** No action can be maintained against the sureties on any bond given by a guardian unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed. [R. S. § 5825.]

Hist. '67, p. 37, § 41; R. S. § 5825; reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Prob. C. § 8922.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1805; Kerr's C. ib.

§ 7898. [5826] **Same: Actions to recover property sold.** No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof. [R. S. § 5826.]

Hist. '67, p. 36, § 34; R. S. § 5826, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8923.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1806; Kerr's C. ib.

§ 7899. [5827] **Appointment of joint guardians.** The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian. [R. S. § 5827.]

Hist. '67, p. 38, § 48; R. S. § 5827, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Prob. C. § 8924.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1807; Kerr's C. ib.

§ 7900. [5828] **Proceedings in court or at chambers.** The power conferred upon the probate judge in relation to guardians and wards, may be exercised by him at chambers, or as the act of the probate court, when holding such court; and any order appointing a guardian must be entered as, and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the probate or district courts, apply to proceedings under this chapter. [R. S. § 5828.]

Hist. '67, p. 40, § 55; R. S. § 5828, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1808; as amended: Kerr's C. ib.

N. D. Analogous: Prob. C. § 8925.

§ 7901. [5829] **Justification of sureties.** The provisions as to qualification and justification of sureties to undertakings are hereby declared to apply to guardians appointed by the court, and to the bonds taken, or to be taken, from such guardians, and to the sureties on such bonds. [R. S. § 5829.]

Hist. R. S. § 5829, reen. R. C. ib., reen. C. L. ib.

Cross ref. Justification of sureties: § 7237.

Comp. leg.—Cal. Same except "of § 1057" for "as to qualification and justification of sureties to undertakings": C. C. P. 1872, § 1809; Kerr's C. ib.

CHAPTER 290.

DEPENDENT CHILDREN: POWERS OF BENEVOLENT SOCIETIES.

Hist. A former law on this subject was passed '09, p. 38, H. B. 267, reen. C. L. c. 346, and repealed '19, c. 161.

Citations to former law: Re Martin (1916) 29 I. 716, 161 P. 573; Jain v. Priest (1917) 30 I. 273, 164 P. 364.

Cross ref. Proceedings for the correction of delinquent children: § 1010. Adoption: § 4682. Religious, social and benevolent corporations: § 4870. Guardian and ward: § 7842.

§ 7902. Dependent children: Powers of benevolent societies. Any benevolent or charitable society incorporated under chapter 196, all the officers and agents of said society to be residents of the state of Idaho, and having for its object the receiving, aiding, caring for, placing out for adoption and consenting to adoption or improving the condition of the orphan, homeless, neglected or abused children of this state, shall have authority to receive, control, train, educate, aid, care for, dispose of, place out for adoption and consent to the adoption of children under 18 years of age under the following provisions:

1. When the father and mother or person or persons legally entitled to act as guardian of any minor child shall, in writing, surrender such child to the charge and custody of such society the child shall thereafter be in the legal custody of the society for the purpose herein stated: *Provided,* That in case of the death or legal incapacity of the father, then the mother alone shall have the authority to make such surrender, and in the case of the death or legal incapacity of the mother, then the father alone shall have authority to make such surrender of such a child.

2. When there is in the county any child under the age of 18 years

a. Who, being an orphan, is destitute or homeless or

b. Who, having been abandoned by its parents, is dependent upon the public for support, or

c. Of whom the parents or guardian have for the period of six months wilfully neglected to take reasonable care, or

d. For whom the parents, because of mental incompetency, physical disability, slothfulness, drunkenness or the habitual use of narcotics or other dissipation or their immoral practices or standards are failing and will probably continue to fail to care and provide for, or

e. Who is in the care and custody of depraved or habitually vicious, immoral, corrupt, drunken, cruel or indigent persons, whether they be parents, guardians or other custodians, or

f. Who is constantly or frequently subjected to or who is surrounded by vicious, corrupt, or immoral influences, or

g. Who is habitually permitted or required to frequent public places,

either alone or with others, for the purpose of begging or securing alms or to frequent the company of or to consort with reputed thieves or prostitutes, either alone or with its parents or other custodians, or

h. Who is permitted or required to play any instrument of music or to sing in pool halls or on the streets or public highways, for hire, or

i. Who being the child of any person confined in any penal, charitable or state educational institution in the state for the period of more than six months, is left without reasonable care and protection or lawful guardian or next of kin who is able and willing to give it proper care. ['19, c. 161, § 1, p. 520.]

§ 7903. Same: Control: By benevolent societies: By courts. When any child shall have been surrendered in accordance with subdivision *a* of section 7902 and such child shall have been accepted by such society as herein provided under said subdivision, then the rights of its natural parents, guardian of its person, if any, or other custodian shall cease, and such society shall become entitled to the custody and control of such child and shall have authority to care for, educate, train, place out temporarily or for adoption in a suitable home and to consent to its adoption under the laws of Idaho in such a manner as shall best secure its welfare. Children of the classes described in subdivision *b* of section 7902 shall be subject to the control and disposition of the courts, as hereinafter provided. ['19, c. 161, § 2, p. 521.]

§ 7904. Same: Jurisdiction of probate courts: Records. The probate courts of the several counties in this state shall have jurisdiction in all cases coming within the terms and provisions of this chapter. Record books shall be kept by the court for all cases coming within the provisions of this chapter, to be known as the dependent child record, and the docket or calendar upon which shall appear the case or cases under the provisions of this chapter shall be known as the dependent child docket. Between the 1st and 30th days of October of each year the court shall submit to the governor a report in writing upon blanks to be furnished by the state showing the number and disposition of dependent children, as provided by this chapter, brought before such court, together with other useful information regarding such cases and the parentage of such children as may be reasonably obtained at the trials thereof: *Provided,* That the name or identity of any such child or children shall not be disclosed in such reports and such reports shall not be published at state expense. ['19, c. 161, § 3, p. 521.]

§ 7905. Same: Petition for taking of children from parents. Any person may file a verified petition in writing in the probate court showing that there is within the county a child falling within one of the classes described in section 7902, subdivision *b,* (naming it) or stating that its name is unknown to petitioner and that it is for the interest of the child and of this state that such child shall be taken from its parents, guardian or custodian and placed under the guardianship of some reputable person of good moral character or some suitable institution or under the care and custody of some society organized and existing under the laws of this state having as one of its objects the receiving, caring for, placing out for adoption and consenting to the adoption of children or for the improving of the condition of the homeless and neglected children, such person, institution or society to be designated by the court. In addition to the showing of the place where the child is kept and of the facts bringing it within one of the classes defined in section 7902, subdivision *b,* the petition should set forth the name and residence of the parents, guardian or custodian of such child, if known to the petitioner, and all persons, if any,

whose names are stated in the petition to be unknown to the petitioner, shall be deemed and taken as parties by name or designation of "To whom it may concern." ['19, c. 161, § 4, p. 522.]

§ 7906. Notice and citation. Upon the filing of such a petition the judge or clerk of the probate court shall issue a notice and citation, requiring the person having custody or control of the child or with whom the child may be, to appear with the child at a place and time stated in the notice and citation. Service thereof shall be made upon such person and upon the parents of the child, if living and the residence known, and upon its legal guardian, if there is known to be one, and if his residence be known or if there is neither parent nor guardian, or if their residence is not known, then on some relative in the county, if there is known to be one, and his residence is known. If the person having custody or charge of the child shall, without reasonable cause, fail to appear and abide the order of the court or bring the child, he shall be proceeded against as for contempt of court. And the court may, in its discretion, take possession and charge of such child during the pendency of the proceeding and may enjoin its removal from the county, and to that end it may issue and enforce such orders, writs and process as may be deemed appropriate and necessary to or against the child and the custodian thereof and all persons related thereto or having any rights or interest therein. Final hearing upon such petition shall not be had until at least five days after the service of such notice and citation, which may be made anywhere in the state by handing a copy thereof personally to the person to be served, and if the original is not served upon any or all the parties, other notices and citations may be issued by the judge or clerk of the probate court and served. Such notice and citation may be served by any sheriff, probation officer or constable or by any other person over the age of 21 years and a citizen of this state. The return of such notice and citation with the indorsement of service thereon by any such officer or with an affidavit of service by the person so designated, in accordance with the provisions of this chapter to make service, shall be deemed sufficient proof of service thereof. Such notice and citation shall be directed to the parent, parents, guardian, custodian or other person or persons claiming the right to the custody and control of the child, if their names are known and if not known, the phrase "To whom it may concern" shall be used and applied to and be binding upon such persons whose names are unknown. The name of the court, the name of the child or children, if of one family, the date of filing the complaint or petition and the date for appearance and answer, which shall not be less than five or more than 15 days from the date of personal service or of the last publication, and the object of the proceedings in general terms shall be set forth and the whole shall be subscribed by the probate judge.

The notice and citation shall require all persons interested, who shall be known as defendants, to answer the petition within such time (but not less than five nor more than 15 days) after service, as may be prescribed in the notice and citation. ['19, c. 161, § 5, p. 522.]

§ 7907. Same: Publication. In any case where it appears by affidavit that a parent or guardian or other person having the custody and control of the person of any child or any other proper defendant is a nonresident of this state or has departed from this state or cannot, after due diligence, be found within this state, (an affidavit setting forth in ordinary and concise language any of the grounds as above set forth upon which the publication of the notice and citation is asked for shall be sufficient without setting forth or showing what efforts have been made or

what diligence has been exerted in attempting to find the parties) or conceals himself therein to avoid the service of the notice and citation as provided by this chapter, the probate court may make an order for the publication of such notice and citation for a period of not less than 10 days, if published in a daily newspaper, and not less than two consecutive issues, if published in a weekly newspaper printed in the county and having a general circulation therein, if there be one printed in the county, if none, then in such paper as the court may direct.

There shall be filed with said court an affidavit of the printer or his foreman or principal clerk showing due publication of the notice and citation as provided herein, and the cost of the publication shall be paid by the county at not to exceed the rate paid by the county for other legal notices.

Such publication of such notices and citation shall be deemed equivalent to personal service upon the persons known or unknown who have been designated as provided herein and the service of the notice and citation is complete at the expiration of the time prescribed by the order for publication.

In addition to the publication of the notice and citation, the court must direct a copy of the notice and citation or petition to be forthwith deposited in the postoffice, directed to the person or persons to be served at their last known place of residence, if their names and postoffice addresses are known. ['19, c. 161, § 6, p. 523.]

§ 7908. Hearing: Order for removal of child. On the date set for the hearing of such petition or as soon thereafter as may be the court shall proceed to hear and dispose of the case without a jury, and if it appears to the court that the child comes within one of the classes defined in section 7902, subdivision *b*, then the court may make an order removing such child from the custody and control of its parent or parents, guardian or other custodian and committing it to the care of some reputable person of good moral character or to some suitable institution or to some society organized and existing under and by virtue of the laws of this state embracing as one of its objects the purpose of caring for, placing out for adoption and consenting to the adoption of any such child, as provided in this chapter.

Pending the final disposition of the case the child may, by order of the court, remain in the possession of the person having control of the same or may be kept in some suitable home under the supervision of the probation officer or any other suitable person or may be placed with some society having for its object the care and disposition of homeless and dependent children, as herein provided. ['19, c. 161, § 7, p. 524.]

§ 7909. Order for commitment: Order for permanent adoption. In every case where the court shall make an order, as provided in the foregoing sections, removing a child from its parents, guardian or custodian and committing it to the care of some person, institution or to some society, as herein provided, the child shall, unless otherwise ordered, become a ward of and be subject to the guardianship of such person, institution or society until it shall have reached the age of eighteen years, and all the rights and powers of the parents, guardian or custodian in respect to the care and disposition of such child shall be vested in such person, institution or society, who shall have the authority to care for, control, educate, place out temporarily or for adoption in some suitable home as approved by such person, institution or society and to consent to its adoption: *Provided,* That no order for permanent adoption of such child shall be made until the expiration of three months after the

date of the order of commitment, and the court making the commitment may, in the order of commitment, but not otherwise, extend this time to not exceed altogether the period of six months. And at any time within such period, upon petition filed for that purpose, said probate court of original jurisdiction may, for good cause shown and upon such terms as it may deem just as to reimbursement for the care of such child in the meantime, vacate the order of commitment and direct the return of the child to its parents or guardian or other custodian. Such petition must be verified and must be filed within the specified period and must show that since the order of commitment was made the condition and disposition and status of the parents or the custodian had so changed that it would be for the best interests of the child to return to its parents or such custodian. Notice of ten days of the hearing of such petition must be given to the person, institution or society having the custody and possession of the child. If upon the hearing the court finds that the well being of the child will be subserved by revoking the commitment, an order may be made to that effect: *Provided,* That reimbursement be first made to the person or society for the care and keeping of the child.

Such petition or a copy thereof must be served upon the person, institution or society having the care and custody of said children, and such person, institution or society shall have at least ten days in which to answer the same.

The order of adoption made by the court having jurisdiction will be binding upon the child, its parents, guardians and other persons the same as if such persons were in court and consented thereto, whether made a party to the proceedings or not. ['19, c. 161, § 8, p. 525.]

§ 7910. Hearings. The hearings of such cases either for commitment or adoption may be conducted in any room provided for the purpose in the court house or building where sessions of the court are held, and in so far as practicable such cases shall not be heard in conjunction with the other business of the court. At the hearing of any case involving a child, as herein provided, the court shall have power to exclude the general public from the room where the hearing is had, admitting thereto only such persons as may have direct interest in the case. Any child may have a private hearing on the question of its dependency upon the request of said child or either of its parents, guardian or custodian. The investigation and record in each case shall be withheld from public inspection, but such record shall be open to inspection of such child, its parents or guardian or its attorney or to such other persons who may secure a special order of the court therefor. ['19, c. 161, § 9, p. 526.]

§ 7911. Duties of peace officers. When any officer or agent of such institution or society as designated in this chapter or any citizen of this state shall request a police officer or other peace officer or probation officer in this state to investigate or assist in the investigation of any alleged case of neglected or abused child, such officer must immediately make or assist in such investigation, and if he deem it proper shall forthwith take such child into custody without warrant and report such case at once to the probate judge for such proceedings as may be proper under the provisions of this chapter. ['19, c. 161, § 10, p. 526.]

§ 7912. Suspension of sentence. When any minor child under eighteen years of age shall be convicted of any charge the punishment for which may be imprisonment or confinement in the industrial training school the probate judge, if he finds that the good of such minor child demands it or such minor child is an orphan or a homeless, neglected or abused minor child, within the terms of this chapter, or is a

county charge or the parents or guardian of such minor child consent thereto, may suspend sentence and surrender the custody of such minor child to any institution or society as is contemplated in this chapter when such institution or society is willing to receive such minor child until such time such minor child shall attain the age of eighteen years or for the term of years to be fixed in the order of surrender and such society may find a home for such minor child and surrender his custody to the person providing such home for the fixed term in such order of surrender, which surrender by said society shall be approved by the order of said court: *Provided,* That nothing in this chapter shall be held to affect the natural rights of said minor child or his parents or guardians except in the matter of his custody: *Provided, further,* That if said minor child shall fail to conform to the order of the court fixing custody, he may be apprehended and brought before the court and the court may sentence said minor child as provided by law or surrender him as the court may deem best for the interest of said minor child. ['19, c. 161, § 11, p. 526.]

§ **7913. Dependent children: Estates.** Nothing in this chapter shall be construed to give the person, institution or society designated under this chapter the guardianship or control of the estate of the child. ['19, c. 161, § 12, p. 527.]

§ **7914. Habeas corpus: Evidence.** Upon the hearing of any writ of habeas corpus for the custody of any such child if it appears that such child has been surrendered or committed to any such person, institution or society, under the provisions of this chapter, such surrender or commitment shall be taken as prima facie evidence that the child was legally and properly surrendered or committed to such person, institution or society and that such person, institution or society is entitled to the custody and control of such child under the provisions of this chapter. ['19, c. 161, § 13, p. 527.]

§ **7915. County aid.** The board of county commissioners of any county, upon the application of any society contemplated in this chapter and incorporated and existing under the laws of this state and having an institution in this state and none other, may make an order for the payment by the county of $10 per month for each child so cared for or aided to such society for the receiving, aiding, caring for or placing out for adoption and consenting to the adoption or improving the condition of the orphan, homeless, neglected or abused children of this state coming from said county. Said provision shall apply to all cases where the child is either surrendered under subdivision *a* or committed under subdivision *b* of section 7902.

The board of county commissioners shall pay the expense of bringing the child before the court and caring for it pending a hearing under the provisions of this chapter.

When a child is surrendered or committed to a society under the provisions of this chapter by the probate court of any county the county shall pay to such society the sum of $25 to cover the incidental expenses of taking such child, and in addition to such sum the railroad fare to the home of such society.

No clerk, sheriff, police officer, probation officer or county commissioner or any agent of such society shall charge or be allowed any costs whatever in any proceedings herein provided for, except where a petition shall be judged to be without probable cause and malicious, in which event all the costs shall be taxed against the complainant.

Any child shall be deemed to belong to the county in which said child

has been a bona fide resident for a period of thirty days immediately preceding said surrender or commitment, but in the absence of evidence to the contrary residence of thirty days in the county from which the child was taken in custody shall be presumed. ['19, c. 161, § 14, p. 527.]

§ 7916. Investigation officers. In the trial of cases under this chapter the court shall have the right to select a discreet man or woman as an officer of the court who shall have the power to visit the home the child or children may be in and investigate the conditions and report to the court his or her findings. ['19, c. 161, § 15, p. 528.]

§ 7917. Probation officers have powers of peace officers. Probation officers are hereby vested with all powers and authority of sheriffs, constables and other peace officers to make arrests or investigations and perform other duties incident to the office of probation officers in carrying out the provisions of this chapter. ['19, c. 161, § 16, p. 528.]

§ 7918. Inducing dependent children to leave legal custody. It shall be unlawful for any person to induce any child or for any child so surrendered or committed to leave the person, institution or society or for any person to induce or attempt to induce a child to leave such person, institution or society who has the care, custody and control of such child as provided herein, and any person who violates the provisions of this chapter shall be guilty of a misdemeanor. Any violation of this section shall be considered a crime subject to extradition. ['19, c. 161, § 17, p. 528.]

§ 7919. Appeals. All orders of final judgment made by any court or the judge thereof, adverse to the parents, guardian or custodian of the child, as provided by this chapter, may be appealed to the district court, such appeal to be governed by the laws relating to appeals from probate and justices' courts to the district courts in civil actions, provided by article 4 of chapter 261, excepting there shall be no bond or costs required of the appellant. The trial in the district court shall be anew and without a jury.

During such appeal the child shall be subject to the order of the probate court and such order of the court shall remain in full force and effect until the matter has been finally adjudicated, unless otherwise ordered by the judge of the district court. ['19, c. 161, § 18, p. 528.]

§ 7920. Duty of prosecuting attorney. It shall be the duty of the prosecuting attorney to prosecute all cases in behalf of the petitioner arising in his county under the provisions of this chapter, but the petitioner shall have the right to be represented by private or special counsel at his own expense. ['19, c. 161, § 19, p. 529.]

§ 7921. Definitions. Words used in this chapter have the following meaning:

The words "child" or "children" may mean one or more children.

The word "parent" shall include "parents."

The word "court" means either "court" or "judge."

The word "abandonment," for the purpose of this chapter, implies an intent to repudiate all obligations, both present and future, and a parent entertaining such a wrongful intent shall be deemed to have forthwith forfeited and waived all rights. ['19, c. 161, § 20, p. 529.]

§ 7922. Construction of law. This chapter shall be liberally construed to the end that its purpose may be carried out, to-wit: That the care, custody and control of the child shall be approximately that which should be given by its parents, and that in all cases of dependency the child shall, when such cases are practicable, be placed in some suitable

and approved family home and become a member of a home and family by legal adoption or otherwise. ['19, c. 161, § 21, p. 529.]

§ **7923. Validity of law.** If any section, subsection, sentence, clause or phrase of this chapter is for any reason held to be unconstitutional by any court of competent jurisdiction, the validity of the remaining parts of this chapter shall not thereby be effected or impaired. ['19, c. 161, § 22, p. 529.]

§ **7924. Repeal: Interpretation.** This chapter is intended and shall be considered to repeal all existing laws in conflict with this chapter, but as to all other laws it shall be considered accumulated and not exclusive. ['19, c. 161, § 23, p. 529.]

CHAPTER 291.

PROCEEDINGS TO DETERMINE HEIRSHIP.

§ **7925.** [5840] **Petition and order to show cause.** In all estates being administered, or that may hereafter be administered, and in cases of estates that have been heretofore administered and closed, leaving real estate the title to which has not been determined by testament duly allowed and recorded, whether the owner of the record title resided in this state or otherwise, also, in cases where real estate has been left by any deceased person, whether a resident of this state or elswhere, where no proceedings have been had in this state for the administration of such estate, any person claiming to be heir to the deceased or entitled to distribution in full or in any part of such estate, or otherwise interested therein, may, at any time, after the expiration of one year from the issuing of letters testamentary or of administration upon such estate in cases of administration either had, or hereafter to be had, and within one year after the death of the owner of the record title to such real estate in other cases, file in the probate court of the county where such estate had been or is being administered, or in such other cases in the probate court of any county wherein any such real estate is situated, a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause on a day to be therein named, not less than 60 days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court may direct, and also a description of the real estate whereof said deceased died seized or possessed, so far as known, described with certainty to a common intent, and requiring all said persons, and all persons named or not having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership or interest in said estate, to said court, which notice shall be served in the same manner as a summons in a civil action. Upon proof of said service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased, and such determination shall be final

and conclusive in the administration of said estate, and the title and ownership of said property. ['07, p. 333, § 1.]

Hist. '07, p. 333, § 1, reen. R. C. § 5840, reen. C. L. ib.

Cross ref. Service of summons: § 4144.

Comp. leg.—N. D. Analogous: Prob. C. § 8675.

§ 7926. [5841] **Appearance and default.** The court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court shall, after the expiration of the time limited for appearing as aforesaid, enter the default of all persons who shall not have appeared as aforesaid. [R. C. § 5841.]

Hist. '07, p. 333, § 2; am R. C. § 5841, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Prob. C. § 8676.

§ 7927. [5842] **Complaint may be filed.** At any time within 20 days after the date of the order or decree of the court establishing proof of the service of such notice, any person so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership or interest in said estate with such reasonable certainty as the court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his post office address. ['07, p. 333, § 3.]

Hist. '07, p. 333, § 3, reen. R. C. § 5842, reen. C. L. ib.

§ 7928. [5843] **Answer and subsequent proceedings.** Such parties are allowed 20 days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions: *Provided, however,* That all appeals herein must be taken within 60 days from the date of the entry of the judgment or the order complained of. ['07, p. 333, §4.]

Hist. '07, p. 333, § 4, reen. R. C. § 5843, reen. C. L. ib.

§ 7929. [5844] **Designation of parties.** The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership or interest in said estate, with such particularity as the court may require, and serve a copy thereof on the plaintiff. ['07, p. 333, part of § 5.]

Hist. '07, p. 333, part of § 5, reen. R. C. § 5844, reen. C. L. ib.

§ 7930. [5845] **Evidence: Depositions: Scope of hearing.** Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served upon the parties, or the attorneys of the parties, so appearing in said proceeding. The court shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon a trial of the issues arising upon the pleadings in such proceeding, the court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. ['07, p. 333, § 6 and part of § 5.]

Hist. '07, p. 333, § 6, and part of § 5, reen. R. C. § 5845., reen. C. L. ib.

§ 7931. [5846] **Costs: Conclusiveness of judgment.** The cost of the proceedings under this chapter shall be apportioned in the discretion of the court. In any proceeding under this chapter the court may appoint an attorney for any minor mentioned in said proceedings not having a guardian. Nothing in this chapter shall be construed to exclude the right, upon final distribution of any estate, to contest the question of heirship, title or interest in the estate so distributed, where the same shall not have been determined under the provisions of this chapter; but where such question shall have been litigated under the provisions of this chapter, the determination thereof as herein provided shall be conclusive in the distribution of said estate. [R. C. § 5846.]

Hist. '07, p. 333, § 7; am. R. C. § 5846, reen. C. L. ib. **Comp. leg.—N. D. Analogous: Prob. C.** § 8679.

§ 7932. [5847] **Effect of foreign decrees.** If it shall appear on the trial of any matter under this chapter that the estate of any deceased owner of any of the property affected thereby has been probated in any other state or territory, or foreign country, or that any probate proceedings in said estate have been theretofore had in any other county of this state, any final order or decree entered in any such proceedings either in this state, or in any other state, or in any foreign country, may be shown in evidence by a duly certified copy thereof, and the same shall have full faith and credit, and the determination of the court in such matter shall be in accordance therewith, anything in this chapter to the contrary notwithstanding: *Provided, however,* That this shall not prevent any person interested in any such property from showing that the court which rendered the decree or order shown by such certified copy had no jurisdiction to render the same. ['07, p. 333, § 8.]

Hist. '07, p. 333, § 8, reen. R. C. § 5847, reen. C. L. ib. **Comp. leg.—N. D.** Similar: C. C. P. § 8348.

TITLE LVIII. EVIDENCE.

CHAPTER 292.

KINDS AND DEGREES OF EVIDENCE.

ARTICLE 1.

JUDICIAL KNOWLEDGE.

§ 7933. [5950] Facts judicially noticed. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of legal expressions.
2. Whatever is established by law.
3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.
4. The seals of all the courts of this state and of the United States.
5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.
6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.
7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.
8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference. [R. S. § 5950.]

Hist. C. C. P. '81, § 896, R. S. § 5950, reen. R. C. ib., reen. C. L. ib.

Cross ref. Other facts judicially noticed: Corporate existence of city on organization from village: § 3859; seal of Idaho technical institute: § 1113; seal of Albion state normal school: § 1096; seal of industrial training school: 1130; seal of Lewiston normal school: § 1082; seal of public utilities commission: § 2405; seal of industrial accident board: 6251.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1875: Kerr's C. ib.

Mont. Similar: C. C. P. § 3150, S. v. Schmitz (1911) 19 I. 566, 572, 114 P. 1.

N. D. Analogous: C. C. P. § 7936.

Cited: O. S. L. Ry. Co. v. Gooding (1899) 6 I. 773, 59 P. 821; Castle v. Bannock Co. (1901) 8 I. 124, 67 P. 35; (In brief of counsel) S. v. Sheridan (1908) 14 I. 224; Shaw v. Martin (1911) 20 I. 168, 117 P. 853.

Facts judicially noticed: Judicial notice has been taken of the following facts: As to whether or not a statute dependent for its existence upon a successful local election is in force in any particular county. S. v. Schmitz (1911) 19 I. 566, 114 P. 1. That all townships in Nez Perce county are situated north of the base line. Armstrong v. Jarron (1912) 21 I. 747, 125 P. 170. The laws of nature, resorting for information to appropriate books and documents of reference. Petajaniemi v. Washington etc. Co. (1912) 22 I 20, 124 P. 783. The size and location of the city of Lewiston. Chamberlain v. Lewiston (1912) 23 I. 154, 129 P. 1069. The official position of the prosecuting officer of the county, and the person holding that office. S. v. Burtenshaw (1914) 25 I. 607, 138 P. 1105. The journals of the house of representatives and senate. Peavy v. McCombs (1914) 26 I. 143, 140 P. 965. The meaning of abbreviations in common use describing legal subdivisions of land. Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 149 P. 499; Empire Mill Co. v. Dist. Ct. (1915) 27 I. 400, 149 P. 505. National banks. First Nat. Bk. v. Walker (1915) 27 I. 199, 148 P. 46.

Facts not judicially noticed: Courts have refused to take judicial notice of the following: The signification of Chinese words and phrases. S. v. Moon (1911) 20 I. 202, 117 P. 757, Ann. Cas. 1913A 724. The supreme court will not take judicial notice of the rules adopted by the district judges of the several districts of the state. Powell v. Springston L. Co. (1906) 12 I. 723, 88 P. 97. Nor of terms of the district court. S. v. Cotterel (1906) 12 I. 572, 86 P. 527.

§ 7934. [5951] Questions of law addressed to court. All questions of law arising upon the trial, including the admissibility of testimony,

the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court when submitted and before the trial proceeds, and all discussions of law are to be addressed to the court. Whenever the knowledge of the the court is by this chapter made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it. [R. S. § 5951.]

Hist. R. S. § 5951, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2102: Kerr's C. ib.

ARTICLE 2.

WITNESSES.

§ 7935. [5956] **Who may be witnesses.** All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility. [R. S. § 5956.]

Hist. C. C. P. '81, § 897, R. S. § 5956, reen. R. C. ib., reen. C. L. ib.

Cross ref. Rights and duties of witnesses: §§ 8043-8. Fees of witnesses: §§ 8069-70.

Comp. leg.—Cal. Same through "question," rest omitted: C. C. P. 1872, § 1879: Kerr's C. ib.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945; S. v. Harp, 31 I. 597, 173 P. 1148.

Impeaching evidence: This section adds nothing to the established rule of impeaching the credibility of witnesses; it does not authorize incompetent impeaching questions such as whether the witness is truthful and whether he has repeatedly told falsehoods. P. v. Barnes (1886) 2 I. 161, 9 P. 532.

§ 7936. [5957] **Same: Who may not testify.** The following persons can not be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person. [R. S. § 5957.]

Hist. C. C. P. '81, § 898, R. S. § 5957, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same through subd. 2, rest omitted: C. C. P. 1872, § 1880; same as amended: Kerr's C. ib.

Cited: Tritthart v. Tritthart (1913) 24 I. 186, 133 P. 121; S. v. Harp, 31 I. 597, 173 P. 1148.

Competency of witness: Insane person: A person who can apprehend the obligation of an oath and is capable of giving a fairly accurate account of the things he has seen or heard, is competent as a witness, although he may be afflicted with some form of insanity; thus a female who is ravished is not necessarily disqualified from testifying in a prosecution for the rape, although such prosecution is based on her mental incapacity to consent to the act complained of, but in such case the question of her competency to testify in view of her insanity is to be determined in the same manner as the competency of other witnesses. S. v. Simes (1906) 12 I. 310, 85 P. 914.

Same: Actions against administrators: This subdivision does not apply to an action brought to establish a trust. (Overruled, Rice v. Ridgley, post.) Nasholds v. McDonnell (1898) 6 I. 377, 55 P. 894.

An action by A and B against the estate of C to enforce specific performance of an alleged oral prospector's contract and seeking to hold the estate of C as trustee of an interest in a mining claim, is a claim or demand against said estate and the plaintiffs are disqualified from being witnesses as to matters of fact occurring before the death of C. Rice v. Ridgley (1900) 7 I. 115, 61 P. 290, overruling Nashold v. McDonnell, supra.

In an action brought against a bank by a depositor to recover the amount of a deposit made by the plaintiff's father in the name of the plaintiff, the cashier of the bank is not rendered incompetent to testify that, by the terms of the deposit made by the plaintiff's father, since deceased, the plaintiff's father was to be permitted to check against the account. Greene v. Bk. of Camas Prairie (1901) 7 I. 576, 64 P. 888.

A party to a trust agreement with a person since deceased can not testify to the terms of such agreement in an action involving title to the property covered thereby. Coats v. Harris (1904) 9 I. 458, 75 P. 243.

An action in claim and delivery to which an administrator is a party, and in which certain of the parties claim the right to possession as assignees of a claim against the estate represented by the administrator, which is secured by mortgage upon the property in question, and in which action no relief is sought against the estate, is not an action "upon a claim or demand against the estate of a deceased person" such as to preclude a party thereto from testifying. Cunningham v. Stoner (1905) 10 I. 549, 79 P. 228.

Harmless error: The admission of testimony in violation of this section is not ground for reversal when it only goes to the proof of facts admitted in the pleadings. Toulouse v. Burkett (1886) 2 I. 184, 10 P. 26.

§ 7937. [5958] **Confidential relations and communications.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases:

1. A husband can not be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other.

2. An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest can not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A physician or surgeon can not, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

5. A public officer can not be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. [R. S. § 5958.]

Hist. C. C. P. '81, § 899, R. S. § 5958, reen. R. C. ib., reen. C. L. ib.

Cross ref. Competency of husband and wife in criminal proceedings: § 9130.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1881; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7871, 7923.

Testimony of spouses: The wife of a defendant may be examined as a witness on the part of the plaintiff without the consent of her husband, where there are other defendants than the husband against whom a separate judgment may be rendered; but in such case the court should instruct the jury that the testimony of the wife should only apply to such other defendants. Shields v. Ruddy (1891) 3 I. 148, 28 P. 405.

A party to a divorce action by calling the other as a witness, under § 8035, consents to his testifying. Boeck v. Boeck (1916) 29 I. 639, 161 P. 576.

The rule precluding the husband or wife from testifying for or against the other without the latter's consent admits of no exceptions other than those expressly specified in the statute. Watkins v. Lord (1918) 31 I. 352, 171 P. 1133.

Communications with attorney: A third person who, by accident or by design of

the attorney, overhears confidential communications between the client and the attorney, may be compelled to divulge what he so hears. (Huston, C. J. dissents) S. v. Perry (1894) 4 I. 224, 38 P. 655.

Communications which pass between one who is merely a conveyancer or friendly adviser of the grantor or grantee in a deed are not privileged communications under this subdivision. Later v. Haywood (1906) 12 I. 78, 85 P. 494.

When an attorney is called as a witness and declines to answer a question or produce letters or documents, on the ground that the same are privileged under the provisions of subd. 2 of this section, the burden is upon him to show sufficient facts and circumstances to establish the general privileged character of the communications or documents. The rule does not necessitate the attorney disclosing the contents of the documents or import of the communications, but rather devolves upon him the necessity of showing the relation existing between him and his client at the time the communications or documents were received, and the circumstances under which he came into possession of the same, and that they were obtained by him while acting as attorney for the client. Re Niday (1908) 15 I. 559, 98 P. 845.

Communications with physician: A stipulation for life insurance waiving the provision of this section disqualifying a physician from testifying to any information acquired by him while attending his patient, is invalid, and entitles both the beneficiary in the policy and the insurer, in an action on the policy, to call and examine the physician who attended insured during his last sickness, and to exact information which, except for such waiver, would be regarded as a privileged communication. Trull v. M. W. of A. (1906) 12 I. 318, 85 P. 1081.

A patient may, under the provisions of this section waive her right to secrecy in respect to one of her physicians; such waiver does not operate as a waiver of her right to object to the testimony of another of her physicians called by the opposing party in the action. Jones v. Caldwell (1911) 20 I. 5, 116 P. 110, 48 L. R. A. (N. S.) 119.

Any information acquired by the attending physicians at an operation or gathered from an examination of the diseased parts removed by the operation a considerable time afterwards is privileged information and can not be given in evidence without the consent of the patient. (Sullivan, J., dissents.) Jones v. Caldwell (1913) 23 I. 467, 130 P. 995.

A consulting physician employed to take and interpret an X-ray picture of a fractured arm comes within the terms of the statute. Shaw v. Nampa (1918) 31 I. 347, 171 P. 1132.

All statements made to physician by patient for purpose of determining patient's condition, are privileged, although they have nothing to do with patient's treatment. Brayman v. Russell etc. Co. (1917) 31 I. 140, 169 P. 932.

It is immaterial in application of this statute that physician was not hired by patient but patient's employer. Ib.

Patient does not waive privilege of statute by testifying he followed physician's advice. Ib.

Plaintiff servant, by testifying that one of the results of the accident was hernia, did not waive privilege, where he did not testify that a physician had attended him. Fed. M. & S. Co. v. Dalo, 252 F. 356.

§ 7938. [5959] **Judge or juror may testify.** The judge himself, or any juror, may be called as a witness by either party, but in such case it is in the discretion of the court to order the trial to be postponed or suspended, and to take place before another judge or jury. [R. S. § 5959.]

Hist. C. C. P. '81, § 900, R. S. § 5959, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1883: Kerr's C. ib.

N. D. Similar: C. C. P. § 7925.

§ 7939. [5960] **Interpreters.** When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned who fails to attend at the time and place named in the summons is guilty of a contempt. [R. S. § 5960.]

Hist. C. C. P. '81, § 901, R. S. § 5960, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1884: Kerr's C. ib.

N. D. Similar: C. C. P. § 7926.

Cross ref. Interpreters' fees: § 8071.

Necessity for interpreter: The question whether or not a witness requires an interpreter, is a question for the court. S. v. Bogris (1914) 26 I. 587, 144 P. 789.

ARTICLE 3.

PUBLIC WRITINGS.

§ 7940. [5965] **Public writings may be inspected.** Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute. [R. S. § 5965.]

Hist. C. C. P. '81, § 902, R. S. § 5965, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1892: Kerr's C. ib.

§ 7941. [5966] **Officers must furnish copies.** Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing. [R. S. § 5966.]

Hist. C. C. P. '81, § 903, R. S. § 5966, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1893; same as amended: Kerr's C. ib.

§ 7942. [5967] **Classification of statutes.** Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations. [R. S. § 5967.]

Hist. C. C. P. '81, § 904, R. S. § 5967, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1898: Kerr's C. ib.

§ 7943. [5968] **Same: Of public writings.** Public writings are divided into four classes:

1. Laws.
2. Judicial records.
3. Other official documents.
4. Public records kept in this state of private writings. [R. S. § 5968.]

Hist. C. C. P. '81, § 905, R. S. § 5968. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1894: Kerr's C. ib.

§ 7944. [5969] **Statute books admissible in evidence.** Books printed or published under the authority of a state, territory or foreign country, and purporting to contain the statutes, code or other written law of such state, territory or country, or proved to be commonly admitted in the tribunals of such state, territory or country as evidence of the written law thereof, are admissible in this state as evidence of such law. [R. S. § 5969.]

Hist. C. C. P. '81, § 906, R. S. § 5969, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1900: Kerr's C. ib.

N. D. Similar: C. C. P. § 7910.

Presumption as to foreign law: In the absence of proof to the contrary, the court will assume that the same law prevails in a sister state as that which prevails here. Moore v. Pooley (1909) 17 I 57, 61, 104 P. 898; Maloney v. Winston Bros. Co. (1910) 18 I. 740, 757, 763, 111 P. 1080, 1086, 47 L. R. A. (N. S.) 634.

§ 7945. [5970] **Certified copies of foreign laws and writings.** A copy of the written law, or other public writing, of any state, territory or country, attested by the certificate of the officer having charge of the original, under the public seal of the state, territory or country, is admissible as evidence of such law or writing. [R. S. § 5970.]

Hist. C. C. P. '81, § 907, R. S. § 5970, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1901; same as amended: Kerr's C. ib.

§ 7946. [5971] **Oral evidence of common law.** The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of another state, territory or foreign country, as are also printed and published books of reports of decisions of the courts of such state, territory or country, commonly admitted in such courts. [R. S. § 5971.]

Hist. C. C. P. '81, § 908, R. S. § 5971, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1902: Kerr's C. ib.

§ 7947. [5972] **Recitals in statutes: Conclusiveness.** The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further. [R. S. § 5972.]

Hist. C. C. P. '81, § 909, R. S. § 5972, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1903: Kerr's C. ib.

Cited: (In brief of counsel) Boise v. Wilkinson (1909) 16 I. 150.

§ 7948. [5973] **Judicial record defined.** A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding. [R. S. § 5973.]

Hist. C. C. P. '81, § 910; R. S. § 5973, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1904: Kerr's C. ib.

§ 7949. [5974] **Authentication of judicial record.** A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form. [R. S. § 5974.]

Hist. C. C. P. '81, § 911; R. S. § 5974, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1905: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7911.

Effect of certified copies: A copy certified by the clerk as provided for in this section has the same effect in court as the originals when they are produced and their execution is proved; it is not necessary to first prove the execution of the papers filed and recorded before the certifications can be received in evidence. Kramer v. Settle (1873) 1 I. 485.

§ 7950. [5975] **Same: Of foreign country.** A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and in either case that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge, or presiding magistrate, must be authenticated by the certificate of the minister or ambassador, or a consul, vice consul, or consular agent of the United States in such foreign country. [R. S. § 5975.]

Hist. C. C. P. '81, § 912; R. S. § 5975, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1906; same as amended: Kerr's C. ib.

N. D. Identical: C. C. P. § 7912.

§ 7951. [5976] **Same: Compared copy of foreign record.** A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original and is an exact transcript of the whole of it.
2. That such original was in the custody of the clerk of the court, or other legal keeper of the same: and
3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court,

or if there be no such seal, or if it be not the record of a court, by the signature of the legal keeper of the original. [R. S. § 5976.]

Hist. C. C. P. '81, § 913; R. S. § 5976, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1907: Kerr's C. ib.

§ 7952. [5977] **Proof of other official documents.** Other official documents may be proved as follows:

1. Acts of the executive of this state, by the records; and of the United States, by the records of the departments of the United States, certified by the heads of those departments respectively. They may also be proved by public documents, printed by the order of the legislature or congress, or either house thereof.

2. The proceedings of the legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk, or printed by their order.

3. The acts of the executive, or the proceedings of the legislature, of another state or territory in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof, in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book, published by the authority of such corporation.

6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.

7. Documents of any other class in another state or territory, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, district, superior or county court, or mayor of a city of such state or territory, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof. [R. S. § 5977.]

Hist. C. C. P. '81, § 914; R. S. § 5977, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar with subd. 9 omitted: C. C. P. 1872, § 1918; similar as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7919.

Prima facie evidence: A certificate in the form prescribed by law and purporting to be made by the proper custodian, is prima facie evidence of the genuineness of a city ordinance, entitling it to be admitted in evidence without other proof. Nor is its admissibility affected by the lapse of time or the fact that the person who made it was not in office at the time it was offered in evidence. S. v. Dawe, 31 I. 796, 177 P. 393.

Acts of municipal corporation: Under this statute proof of publication of ordinances as a prerequisite to their introduction in evidence is not required. S. v. Dawe, supra.

§ 7953. [5978] **Public record of private writing.** A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record. [R. S. § 5978.]

Hist. C. C. P. '81, § 915; R. S. § 5978, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1919: Kerr's C. ib.

§ 7954. [5979] **Entries in public and official books.** Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein. [R. S. § 5979.]

Hist. C. C. P. '81, § 916; R. S. § 5979, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1920; as amended: Kerr's C. ib.

Minutes of county commissioners: The clerk of the board, under the provisions of § 1915, is required to enter the order calling a special meeting upon the records of said board, and under this section the record copy becomes prima facie evidence of the facts stated in such order. Black Canyon Irr. Dist. v. Marple (1911) 19 I. 176, 112 P. 766.

§ 7955. [5980] **Transcript of justice's docket.** A transcript from the record or docket of a justice of the peace of another state or territory of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein. [R. S. § 5980.]

Hist. C. C. P. '81, § 917; R. S. § 5980, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1921: Kerr's C. ib.

Cited: Nadel v. Campbell (1910) 18 I. 335, 110 P. 262.

§ 7956. [5981] **Same: Certificate of justice and clerk.** There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under seal of the county, or the seal of the court of common pleas, or county court, or court of general jurisdiction thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness. [R. S. § 5981.]

Hist. C. C. P. '81, § 918; R. S. § 5981, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1922: Kerr's C. ib.

Cited: Nadel v. Campbell (1910) 18 I. 335, 340, 110 P. 262.

§ 7957. [5982] **Certified copies of writings.** Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance, that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be a clerk of a court having a seal, under the seal of such court. [R. S. § 5982.]

Hist. C. C. P. '81, § 919; R. S. § 5982, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1923; same as amended: Kerr's C. ib.

§ 7958. [5983] **Certificates of purchase or location of lands.** A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes. [R. S. § 5983.]

Hist. C. C. P. '81, § 920; R. S. § 5983, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or of this state" inserted after "United States": C. C. P. 1872, § 1925: Kerr's C. ib.

Homestead entry: A homestead is recognized as private property by this section and the certificate of entry is primary evidence that the holder thereof is the owner of the land therein described. Johnson v. O. S. L. Ry. Co. (1900) 7 I. 355, 63 P. 112; Fall Creek Sheep Co. v. Walton (1913) 24 I. 760, 136 P. 438, Ann. Cas. 1915C 1252.

§ 7959. [5984] **Entries by officers.** An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry. [R. S. § 5984.]

Hist. C. C. P. '81, § 921; R. S. § 5984, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1926; same as amended: Kerr's C. ib.

ARTICLE 4.

PRIVATE WRITINGS.

Cross ref. Abstracts of title as evidence: § 2263. Bank stock books: § 5246. Affidavit of performance of labor on mining claims: § 5525.

§ 7960. [5989] **Public and private seals.** A public seal in this state is a stamp or impression, made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign made in another state or territory or foreign country, and there recognized as a seal, must be so regarded in this state. [R. S. § 5989.]

Hist. C. C. P. '81, § 922; R. S. § 5989, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1931; same as amended: Kerr's C. ib.

§ 7961. [5990] **Historical works, maps, etc.** Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest. [R. S. § 5990.]

Hist. C. C. P. '81, § 923; R. S. § 5990, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1936; same as amended: Kerr's C. ib.

§ 7962. [5991] **Notice to produce writing.** If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party. [R. S. § 5991.]

Hist. C. C. P. '81, § 924; R. S. § 5991, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1938: Kerr's C. ib.

§ 7963. [5992] **Same: Writing need not be introduced.** Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case. [R. S. § 5992.]

Hist. C. C. P. '81, § 925; R. S. § 5992, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1939: Kerr's C. ib.

§ 7964. [5993] **Proof of writings.** Any writing may be proved either:

1. By any one who saw the writing executed; or
2. By evidence of the genuineness of the handwriting of the maker; or
3. By a subscribing witness. [R. S. § 5993.]

Hist. C. C. P. '81, § 926; R. S. § 5993, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 1940; same as amended: Kerr's C. ib.

§ 7965. [5994] **Denial by subscribing witness.** If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence. [R. S. § 5994.]

Hist. C. C. P. '81, § 927, R. S. § 5994, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1941: Kerr's C. ib.

§ 7966. [5995] **Evidence of admission of execution.** Where, however, evidence is given that the party against whom the writing is offered, has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one produced from the custody of the adverse party, and has been acted upon by him as genuine. [R. S. § 5995.]

Hist. C. C. P. '81, § 928; R. S. § 5995, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1942; Kerr's C. ib.

§ 7967. [5996] **Entries made by decedent.** The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it.

2. When it was made in the professional capacity, and in the ordinary course of professional conduct.

3. When it was made in the performance of a duty specially enjoined by law. [R. S. § 5996.]

Hist. C. C. P. '81, § 929; R. S. § 5996, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1946; same as amended: Kerr's C. ib.

Entries in account books: Entries in an account book kept by a decedent are not admissible in evidence where it is not shown that the entries were against the interest of the person making them, or that they were made in a professional capacity and in the ordinary course of professional conduct, or that they were made in the performance of a duty specially enjoined by law. Kent v. Richardson (1902) 8 I. 750, 71 P. 117.

§ 7968. [5997] **Acknowledgment of private writings.** Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property. [R. S. § 5997.]

Hist. C. C. P. '81, § 930; R. S. § 5997, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "primary" for "prima facie": C. C. P. 1872, § 1948; same as amended: Kerr's C. ib.

§ 7969. [5998] **Certified copies of deeds, etc.** Every instrument conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy. [R. S. § 5998.]

Hist. C. C. P. '81, § 931; R. S. § 5998, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; similar as amended: Kerr's C. § 1951.

§ 7970. [5999] **Secondary evidence of writings.** There can be no evidence of the contents of a writing other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
3. When the original is a record or other document in the custody of a public officer.
4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statutes.
5. When the original consists of numerous accounts or other documents which can not be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents. [R. S. § 5999.]

Hist. C. C. P. '81, § 932; R. S. § 5999, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1855; same as amended: Kerr's C. ib.

Applied: The rule stated in subd. 5 of this section cannot be extended to cover a case where some of the books and records could not be properly identified and others had been permitted to be lost, or destroyed, by representatives of the creditors in whose behalf the action was being prosecuted. Stoltz v. Scott (1916) 28 I. 417, 154 P. 982.

§ 7971. Exemplar. Whenever the genuineness of a writing is at issue, any writing admitted or proved to be genuine is competent evidence as an exemplar for the purpose of comparison with the disputed writing: *Provided,* That such writing so admitted or proved to be genuine shall in no way refer or relate to any matter then in issue. ['15, c. 154, p. 335.]

Hist. R. C. § 6000, enacted by '15, c. 154, p. 335, reen. C. L. § 6000.

ARTICLE 5.

INDISPENSABLE EVIDENCE.

Cross ref. Executors and administrators can not be personally charged with the decedent's debts, except by written agreement: § 7684. Corroboration required in divorce cases: § 4641. Parol evidence of livestock brands inadmissible: § 1927.

§ 7972. [6005] **Perjury and treason.** Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances. [R. S. § 6005.]

Hist. C. C. P. '81, § 933; R. S. § 6005, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1968: Kerr's C. ib.

N. D. Analogous: Pen. C. § 10839.

§ 7973. [6006] **Wills must be in writing.** A last will and testament, except a nuncupative will, is invalid unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given. [R. S. § 6006.]

Hist. C. C. P. '81, § 934; R. S. § 6006, reen. R. C. ib., reen. C. L. ib.

Cross ref. Formal requisites of wills: § 7810.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 1969; same as amended: Kerr's C. ib.

§ 7974. [6007] **Transfers of real property to be in writing.** No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. [R. S. § 6007.]

Hist. C. C. P. '81, § 935; R. S. § 6007, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1971: Kerr's C. ib.

N. D. Analogous: Civ. C. § 5963.

Cited: Stowell v. Tucker (1900) 7 I. 312, 62 P. 1033; Francis v. Green (1901) 7 I. 668, 65 P. 362; Kurdy v. Rogers (1904) 10 I. 416, 79 P. 195; Grice v. Woodworth (1904) 10 I. 459, 80 P. 912; Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482; (In brief of counsel) Campbell v. Kerns (1907) 13 I. 287; Coughanour v. Grayson (1911) 19 I. 255, 113 P. 274; Rowe v. Stevens (1913) 25 I. 237, 137 P. 159; Davenport v. Burke (1915) 27 I. 464, 473, 149 P. 511; Keane v. Kibble (1915) 28 I. 274, 149 P. 972; (Indefinite memorandum) Wolf v. Eagleson (1916) 29 I. 177, 157 P. 1122.

Verbal contracts: A verbal contract for the sale or transfer of real estate is not admissible in evidence to establish title against a stranger to the contract. McGinness v. Stanfield (1898) 6 I. 372, 55 P. 1020.

A written contract for the sale of real property may be modified by a subsequent oral agreement, but where it is claimed that an oral agreement modifies the terms of a written contract, the evidence to establish such oral agreement should be clear and satisfactory. Prairie Dev. Co. v. Leiberg (1908) 15 I. 379, 98 P. 616.

Extended agreements: A written contract, giving an option to purchase real estate within a specified time, cannot be legally extended by a verbal agreement. Lawyer v. Post (1901) 109 F. 512, 47 C. C. A. 491.

Sufficiency of writing: A deed properly executed and left with the attorney of the grantor of real estate for the inspection of the grantee, who has already paid the purchase price, is a sufficient writing to remove the bar of the statute of frauds and the conveyance may be specifically enforced. Robbins v. Porter (1906) 12 I. 738, 88 P. 86.

To comply with this section, the writing must state the contract with such certainty that its essentials will be known from the memorandum itself or by reference contained in it to some other writing, without recourse to parol evidence. Thompson v. Burns (1908) 15 I. 572, 99 P. 111.

Agency: When agency is denied it is necessary to show such agency in writing subscribed by owner of the land. Thompson v. Burns, supra.

Right of way: A right of way for a ditch over land is an easement or interest in real property, which, under this section, can be created only by operation of law, or a conveyance or other instrument in writing, subscribed by the party granting such easement or right of way. McReynolds v. Harrigfeld (1914) 26 I. 26, 140 P. 1096.

Powers of equity courts: Courts of equity have power to so reform an executory contract valid and binding on its face, as to make the statements speak the truth as it was intended, but have no power to construct an executory agreement for the parties or to insert therein new and essential elements or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding. Allen v. Kitchen (1909) 16 I. 133, 100 P. 1052, 18 Ann. Cas. 914.

An executory contract for the sale of real estate, which fails to designate the state, county, civil or political district in which the land is situated, and fails to disclose the municipal or other subdivision to which the tract of land is an "addition," is an insufficient and void description and cannot be supplied or aided by parol evidence. Ib.

Under the provisions of § 7975, the provisions of this section must not be construed to abridge the power of any court to compel the specific performance of an agreement made in regard to the sale of real estate in case of part performance thereof. King v. Seebeck (1911) 20 I. 223, 118 P. 292.

A court will not by operation of law declare a parol license an easement where licensee has mere naked possession and can be placed in statu quo. McReynolds v. Harrigfeld, supra.

§ 7975. [6008] **Same: Exceptions.** The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof. [R. S. § 6008.]

Hist. C. C. P. '81, § 936; R. S. § 6008, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1972; Kerr's C. ib.

Cited: Deeds v. Stephens (1902) 8 I. 514, 69 P. 534; Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482; (In brief of counsel) Armstrong v. Henderson (1909) 16 I. 566; (In brief of counsel) Idaho F. L. Co. v. Great Western etc. Co. (1910) 18 I. 1; (In brief of counsel) Smith v. Stanfield (1916) 29 I. 190, 192 (See p. 200).

Resulting trust: A resulting trust arises by operation of law in favor of a person who advances the purchase money for land, though the title be taken in the name of another; or in favor of a person for whom it is advanced by way of a loan, the title being taken in the name of the lender. Such a trust, being one which results by implication or construction of law, does not fall within the provisions of the statute of frauds, and may be established by parol evidence. Pittock v. Pittock (1908) 15 I. 426, 98 P. 719; Coughanour v. Grayson (1911) 19 I. 255, 113 P. 724.

Specific performance of oral agreements partly performed: An oral contract for the conveyance of real property or under which the title thereto is acquired may be enforced, and is binding upon the parties thereto, and is not within the statute of frauds, where there is partial or complete performance of the same. Stowell v. Tucker (1900) 7 I. 312, 62 P. 1033; Feeney v. Chester (1900) 7 I. 324, 63 P. 192; Male v. Leflang (1900) 7 I. 348, 63 P. 108; Francis v. Green (1901) 7 I. 668, 65 P. 362; Barton v. Dunlap (1901) 8 I. 82, 66 P. 832; Fleming v. Baker (1906) 12 I. 346, 85 P. 1092; Havlick v. Davidson (1909) 15 I. 787, 100 P. 91; King v. Seebeck (1911) 20 I. 223, 118 P. 292; Houser v. Hobart (1912) 22 I. 735, 127 P. 997, 43 L. R. A. (N. S.) 410; Wolf v. Eagleson (1916) 29 I, 177, 157 P. 1122.

§ 7976. Certain agreements to be in writing. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in the next section.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than five hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them of such things in action, or pay, at the time, some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing, for a longer period than one year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged. ['19, c. 149, § 79a, p. 472.]

Hist. C. C. P. '81, § 937; R. S. § 6009, reen. R. C. ib., reen. C. L. ib.; am. '19, c. 149, § 79a, p. 472.

Comp. leg.—Cal. Same except $200 for $500; C. C. P. 1872, § 1973; Kerr's C. ib.

N. D. Similar; Civ. C. § 5888; Analogous: Civ. C. §§ 5961, 5962.

Cross ref. Leases of more than 10 head of live stock to be in writing; § 1955; sales contracts: § 5676.

Cited: Ferguson v. Blood (1907) 152 F. 98, 82 C. C. A. 482; Valley L. Co. v. McGilvery (1909) 16 I. 338, 101 P. 94.

Substantive law: Notwithstanding the decisions generally to the contrary, this section announces more than a mere rule of evidence. It is a substantive law dealing with contracts affecting personal property and commercial transactions. It deals with the origin and basis of a cause of action, and the rule of evidence it embodies is only an incident to the remedy under the statute. Kerr v. Finch (1913) 25 I. 32, 135 P. 1165.

Execution required of both parties: Where the consideration of such contracts consists of the mutual promises of each, the memorandum must be signed by both parties, and it must be complete in all essentials and leave nothing to parol. Houser v. Hobart (1912) 22 I. 735, 127 P. 997, 43 L. R. A. (N. S.) 410.

A contract within the purview of this section, executed as required by law by one party but not by the other is invalid and cannot be enforced by either party at any time. Kerr. v. Finch, supra.

Parol proof inadmissible: To render an oral contract that falls within the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them. Blumauer-Frank Drug Co. v. Young (1917) 30 I. 501, 167 P. 21.

Performance within one year: A contract whereby a corporation agrees to employ a man at a specified salary so long as he continues to own and hold his stock in the corporation does not come within the purview of the statute of frauds on the ground that the same was not in writing, for the reason that such contract is capable of being fully performed, completed and terminated within a year. Darknell v. Coeur d'Alene etc. Co. (1910) 18 I. 62, 108 P. 536.

The first subdivision of this section will not prevent the recovery of an agreed and stipulated price contracted to be paid for services and labor which have been rendered by the employee during a period exceeding one year, simply because the contract was not reduced to writing. Ib.

Debt of another: One who has property of a debtor in his hands and agrees to sell it and to apply the proceeds of the sale to the payment of the debtor's debt, does not thereby promise to answer for the debt of another, within the meaning of this section. Smith v. Caldwell (1899) 6 I. 436, 55 P. 1065.

When the consideration of a party's promise is for money to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money, such promise is collateral, and under the statute of frauds will not bind the party unless it be in writing. Storer v. Heitfeld (1910) 19 I. 170, 113 P. 80.

Sales of goods: Where none of the requirements of this section are complied with at the time the sale is made, the contract can only be enforced against a purchaser if he afterwards receives and accepts the goods; but in case he does afterwards so receive and accept them, the contract becomes executed and the statute has no application. Coffin v. Bradbury (1894) 3 I. 770, 35 P. 715.

Where the seller orders goods for the buyer from a third person according to specifications furnished by the latter, and the goods are shipped by the third person and stored in a warehouse for the buyer, who, on being informed of the fact, makes a payment on the purchase price and states that he will remove the goods in a few days, the transaction is not a sale from the seller to the buyer within the provisions of this section, but the seller is rather an agent for the buyer. Shaw v. Manville (1895) 4 I. 369, 39 P. 559.

Where W sues F and procures an attachment, and F by way of cross-complaint claims damages against A, resulting from the wrongful issuance of the attachment, and orally assigns to C, for a consideration already paid, any judgment that he may recover on his cross-complaint, such assignment is not within the statute of frauds. McCornick v. Friedman (1904) 9 I. 754, 76 P. 762.

Where the evidence is conflicting, the question of what constitutes such a receipt and acceptance of the goods as to take the contract out of the statute, is a question for the jury. Coffin v. Bradbury, supra.

Where an essential part of a contract for the sale of mining stock for more than $200 rests in parol, and there has been no delivery of any part of the property and no payment of any part of the purchase price, such contract is void. Snow Storm M. Co. v. Johnson (1911) 186 F. 745, 108 C. C. A. 615.

The act of a buyer of goods under a contract in offering to sell the goods which he has contracted to purchase is such an act as constitutes an acceptance of the goods so as to take the contract out of the operation of the statute. Bicknell v. Owyhee Sheep & Land Co., 31 I. 696, 176 P. 782.

Sales of realty: A receipt or memorandum in the following language: "Lowe, Idaho, March 7, 1902. Received from S. C. Kurdy, one hundred and ninety dollars on land, Sec. 25, Ts. 32 R. 2 E. 160 acres," signed by the parties sought to be charged, is insufficient upon which to enforce specific performance. Kurdy v. Rogers (1904) 10 I. 416, 79 P. 195.

Effect of part performance: Part performance of an oral agreement for the lease of property for longer than a year takes the same out of the statute and renders it enforcible. Deeds v. Stephens (1902) 8 I. 514, 69 P. 534.

See also annotations under § 7975.

§ 7977. [6010] **Same: Original obligations.** A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise.

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligations in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person.

4. Where a factor undertakes, for a commission, to sell merchandise and guarantee the sale.

5. Where the holder of an instrument for the payment of money, upon which a third person is, or may become, liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration and in connection with such transfer, enters into a promise respecting such instrument. [R. S. § 6010.]

Hist. C. C. P. '81 § 938; R. S. § 6010, reen. R. C. ib., reen. C. L. ib.

Original agreements: An agreement by one who has the property of a debtor in his possession to sell it and apply the proceeds in payment of the debt, is within this section. Smith v. Caldwell (1899) 6 I. 436, 55 P. 1065.

Where D works for R and on settlement of his work R agrees to pay C and S, to whom D is indebted, the debt thus assumed becomes the debt of R and is not within the statute of frauds. Sherer v. Rubedew (1905) 11 I. 536, 83 P. 512.

Under subd. 3 a promise to answer for the obligation of another is deemed an original obligation of the promisor, and need not be in writing where the promise is for an antecedent obligation of another, and is made upon the consideration that the party receiving it cancels the antecedent obligation and accepts the new promise as a substitute therefor. McCallum v. McClarren (1908) 15 I. 374, 98 P. 200.

Where one corporation has purchased all the property and rights of another corporation, and as a part of the consideration for such purchase and transfer the purchaser has agreed to assume and pay the outstanding debts and liabilities of the old corporation, such a transaction constitutes the liability of the new company to pay such indebtedness an original obligation, which is not required to be in writing under the statute of frauds. Mineau v. Imperial Dredge etc. Co. (1911) 19 I. 458, 114 P. 23.

Collateral agreement. If the consideration of a party's promise is for money to be furnished to or received by a third person, such promise is collateral, where the transaction is such that the third person remains answerable to the person who furnishes him with such money; such promise will not, therefore, bind the party unless it is in writing. Storer v. Heitfeld (1910) 19 I. 170, 113 P. 80.

§ 7978. [6011] Representations of credit. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged. [R. S. § 6011.]

Hist. C. C. P. '81, § 939; R. S. § 6011, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1974; Kerr's C. ib.

§ 7979. Real estate commission contracts. No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, signed by the owner of such real estate, or his legal, appointed and duly qualified representative. [C. L. § 6012.]

Hist. '15, c. 131, p. 287; compiled and reen. C. L. § 6012.

CHAPTER 293.

PRODUCTION OF EVIDENCE.

ARTICLE 1.

BY WHOM TO BE PRODUCED.

§ 7980. [6030] **Explanation of alterations.** The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that he may give the writing in evidence, but not otherwise. [R. S. § 6030.]

Hist. C. C. P. '81, § 940; R. S. § 6030, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1982; Kerr's C. ib.

Cited: S. v. Baird (1907) 13 I. 126, 89 P. 298.

Explanation of alteration: A party presenting a written instrument in evidence which, upon its face, shows that it has been altered, is required to explain such alteration or at least to show that such instrument has not been altered since it came into his hands. The party who made or executed the instrument may have made or assented to the alteration before its execution and yet the holder be unable to prove that fact. Therefore, the exigency of the statute is complied with when the party presenting the instrument shows that there has been no alteration since it came into his hands. Mulkey v. Long (1897) 5 I. 213, 47 P. 949.

An altered bail bond is admissible in evidence where it is explained that the alteration appearing thereon was made with the consent of the obligors, and it is shown that no alterations were made since the delivery of the bond to the proper authorities. S. v. Baird (1907) 13 I. 126, 89 P. 298.

ARTICLE 2.

MEANS OF PRODUCTION.

§ 7981. [6035] **Subpoena defined.** The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence. [R. S. § 6035.]

Hist. C. C. P. '81, § 941; R. S. § 6035, reen. R. C. ib., reen. C. L. ib.

Cross ref. Procurement of subpoenas in contested election cases before the legislature: § 87. Subpoenas for witnesses to appear before legislature: § 99. Issuance of subpoenas by the legislature: §§ 99-103. Issuance of subpoenas by department of finance: § 298. Issuance of subpoenas in arbitration of labor disputes: § 2287. Issuance of subpoenas for witnesses by county board of equalization: § 3159. Issuance of subpoenas for abstracts by state board of equalization: § 3170. Issuance of subpoenas by board of county commissioners: §§ 3451-2. Subpoenas for witnesses before police courts in cities: § 3886. Subpoenas for witnesses before county commissioners in fixing water rates: § 5644.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1985; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7873.

Cited: Anderson v. Ferguson-Bach Sheep Co. (1906) 12 I. 418, 86 P. 41.

§ 7982. [6036] **Same: How issued.** The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued in the name of the court before which the attendance is required, or in which the issue is pending.

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice or any other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of

any other state or territory in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdictions, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein. [R. S. § 6036.]

Hist. C. C. P. '81, § 942; R. S. § 6036, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1986; similar as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. § 7872.

§ 7983. [6037] **Same: How served.** The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, or by leaving a copy with some suitable person at the place of his abode, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person. [R. S. § 6037.]

Hist. C. C. P. '81, § 943; R. S. § 6037, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Same except the words "or by leaving a copy with some suitable person at the place of his abode" are omitted: C. C. P. 1872, § 1897; Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7875, 7877.

§ 7984. [6038] **Same: Where witness is concealed.** If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing the subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena, and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed. [R. S. § 6038.]

Hist. C. C. P. '81, § 944; R. S. § 6038, reen. R. C. ib., reen. C. L. ib.

Cross ref. Neglect of witnesses to attend after service: 8073.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1988; Kerr's C. ib.

§ 7985. [6039] **Witness not obliged to attend, when.** A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than 30 miles from his place of residence to the place of trial. [R. S. § 6039.]

Hist. C. C. P. '81, § 945; R. S. § 6039, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1989; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7876.

Cited: Anderson v. Ferguson-Bach Sheep Co. (1906) 12 I. 418, 86 P. 41.

Allowance of mileage: This section does not preclude the allowance of mileage to witnesses who attend from a greater distance than they could be required to travel by subpoena, and the taxation of such mileage as costs. Raft River etc. Co. v. Langford (1898) 6 I. 30, 51 P. 1027.

Although a witness resides out of the state and is not obliged to attend he is entitled to fees and mileage for the distance actually traveled within the state in going to the place of trial. S. v. Baird (1907) 13 I. 126, 89 P. 298.

§ 7986. [6040] **Subpoenas unnecessary when person is present.** A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer. [R. S. § 6040.]

Hist. C. C. P. '81, § 946; R. S. § 6040, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1990; Kerr's C. ib.

§ 7987. [6041] **Disobedience of witness a contempt.** Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out. [R. S. § 6041.]

Hist. C. C. P. '81, § 947; R. S. § 6041, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1991; Kerr's C. ib.

§ 7988. [6042] **Same: Penalty to aggrieved party.** A witness disobeying a subpoena also forfeits to the party aggrieved the sum of $100, and all damages which he may sustain by the failure of a witness to attend, which forfeiture and damages may be recovered in a civil action. [R. S. § 6042.]

Hist. C. C. P. '81, § 948; R. S. § 6042, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1992; Kerr's C. ib.

Cross ref. Civil damages for refusal to testify in an election contest before the legislature: § 89.

§ 7989. [6043] **Attachment of witness.** In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required. [R. S. § 6043.]

Hist. C. C. P. '81, § 949; R. S. § 6043, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1993; Kerr's C. ib.

§ 7990. [6044] **Warrant of commitment: Contents.** Every warrant of commitment, issued by a court or officer pursuant to this article, must specify therein particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness pursuant to this article, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the district court. [R. S. § 6044.]

Hist. C. C. P. '81, § 950; R. S. § 6044, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1994; Kerr's C. ib.

§ 7991. [6045] **Production of prisoner to testify.** If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court.

2. By a justice of the supreme court, judge of the district court or probate judge of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court. [R. S. § 6045.]

Hist. C. C. P. '81, § 951; R. S. § 6045, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1995; similar as amended: Kerr's C. ib.

§ 7992. [6046] **Same: Affidavit and order.** Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness and its materiality. [R. S. § 6046.]

Hist. C. C. P. '81, § 952; R. S. § 6046, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1996; Kerr's C. ib.

§ 7993. [6047] **Same: Examination in person or by deposition.** If the witness be imprisoned in the county where the action or proceeding

is pending his production may be required. In all other cases his examination, when allowed, must be taken upon deposition. [R. S. § 6047.]

Hist. C. C. P. '81, § 953; R. S. § 6047; reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 1997; Kerr's C. ib.

ARTICLE 3.

AFFIDAVITS.

Cross. ref. Judges may take acknowledgments: § 6505.

§ 7994. [6052] **Verification of papers.** An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this code. [R. S. § 6052.]

Hist. C. C. P. '81, § 954; R. S. § 6052, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2009; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7887.

§ 7995. [6053] **Proof of publication.** Evidence of the publication of a document or notice required by law, or by an order of the court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which, the publication was made. [R. S. § 6053.]

Hist. C. C. P. '81, § 955; R. S. § 6053, reen. R. C. ib., reen C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2010; Kerr's C. ib.

N. D. Similar: C. C. P. § 7913.

Cited: Armstrong v. Jarron (1912) 21 I. 747, 768, 125 P. 170.

§ 7996. [6054] **Same: Where filed.** If such affidavit be made in an action or special proceding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the recorder of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof, certified by the judge of the court or officer having it in custody, is prima facie evidence of the facts stated therein. [R. S. § 6054.]

Hist. C. C. P. '81, § 956; R. S. § 6054, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2011; similar as amended: Kerr's C. ib.

§ 7997. [6055] **Affidavit: Before whom taken.** An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace, or notary public in this state. [R. S. § 6055.]

Hist. C. C. P. '81, § 957; R. S. § 6055, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2012; Kerr's C. ib. S. v. Jones (1916) 28 I. 428, 154 P. 378.

Not exclusive: This section is not exclusive or a limitation upon § 3553. An oath taken before any officer authorized to administer it has the same force as if taken before an officer particularly designated. S. v. Jones, supra.

§ 7998. [6056] **Same: In other states.** An affidavit taken in another state or territory of the United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such state or territory, or before any notary public in such state or territory, or before any judge or clerk of a court of record having a seal. [R. S. § 6056.]

Hist. C. C. P. '81, § 958; R. S. § 6056, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2013; as amended: Kerr's C. ib.

§ 7999. [6057] **Same: In foreign country.** An affidavit taken in a foreign country to be used in this state, may be taken before an ambas-

sador, minister, consul, vice consul or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country. [R. S. § 6057.]

Hist. C. C. P. '81, § 959; R. S. § 6057, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2014; Kerr's C. ib.

§ 8000. [6058] **Same: Certificate of clerk.** When an affidavit is taken before a judge or a court in another state or territory, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof. [R. S. § 6058.]

Hist. C. C. P. '81, § 960; R. S. § 6058, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2015; Kerr's C. ib.

ARTICLE 4.

DEPOSITIONS.

Cross ref. Judges may take acknowledgments: § 6505. Proceedings to perpetuate testimony: § 8051 et seq. Examination of witness on commission in criminal cases: §§ 9152-65.

§ 8001. [6059] **Who may take depositions.** Depositions of witnesses, taken within or without the state, may be taken according to the regulations hereinafter provided, before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions; but depositions shall not be taken before any person or the kin of any person interested in the action. ['93, p. 132, § 1.]

Hist. '93, p. 132, § 1, reen. '99, p. 215, § 1, reen. R. C. § 6059, reen. C. L. ib.

Cited: Salisbury v. Lane (1900) 7 I. 370, 63 P. 383.

Comp. leg.—N. D. Analogous: C. C. P. §§ 7891-4.

§ 8002. Notice to take depositions. A party wishing to take depositions shall give notice to the adverse party, if there be only one person; if there be several, to any one of them who is a real party in interest, his agent or attorney. Such notice shall specify:

1. The cause or matter in which the deposition is to be used.
2. The court or tribunal in which the trial is to be had.
3. The time and place of taking the deposition, and the names of the witnesses.
4. After the default of any defendant has been entered no notice of the taking of any depositions shall be served upon said defendant in default. ['19, c. 191, p. 574.]

Hist. '93, p. 132, § 2, reen. '99, p. 215, § 2, reen. R. C. § 6060, reen. C. L. ib.; am. '19, c. 191, p. 574.

Comp. leg.—N. D. Analogous: C. C. P. § 7895.

§ 8003. [6060a] **Time allowed adverse party for travel.** The adverse party shall be allowed one day for each 20 miles required to be traveled from his usual place of abode to the place of taking the deposition by the ordinary route of travel, not exceeding, however, 30 days in all. If served on an attorney or agent, a reasonable time shall be allowed him to communicate the same to the party, not exceeding 10 days in all. ['93, p. 132, § 3.]

Hist. '93, p. 132, § 3, reen. '99, p. 215, § 3; am. '99, p. 373, § 1, reen. R. C. § 6060a, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7895.

§ 8004. [6060b] **Service of notice.** The notice may be served in the same manner, and by any person authorized to serve a subpoena for a witness. If neither the party nor his agent or attorney reside in the

state, the notice may be filed in the clerk's office, and be published three weeks successively in the county in which the suit is pending, and a copy thereof mailed to each party or his attorney at his last known address, and personal service without the state shall be equivalent to filing such notice with the clerk and publication as herein provided. ['93, p. 132, § 4.]

Hist. '93, p. 132, § 4, reen. '99, p. 215, § 4, reen. R. C. § 6060b, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7898.

§ 8005. [6061] **Order for taking.** In all actions the court may order the taking of depositions whenever deemed necessary to determine the rights of the parties or to expedite the trial of causes; and may, if necessary for that purpose, order a continuance until the next term. ['93, p. 132, § 5.]

Hist. '93, p. 132, § 5, reen. '99, p. 215, § 5, reen. R. C. § 6061, reen. C. L. ib.

§ 8006. [6062] **Depositions may be taken without order.** In all actions depositions may be taken by either party in vacation or term time; at any time after service of summons, without order of court therefor. They may be used in the trial of all issues, in any action in the following cases:

1. When the witness does not reside in the county, or when he resides in a county adjoining and more than 30 miles from the place of trial, or is absent from the state.
2. When the deponent is so aged, infirm or sick as not to be able to attend the court or place of trial, or is dead.
3. When the depositions have been taken by agreement of parties, or by the order of the court trying the cause.
4. When the deponent is a state or county officer, or judge or a practicing physician, or attorney at law, and the trial is to be had in any county in which the deponent does not reside. In either of the foregoing cases the attendance of the witness can not be enforced.
5. When notice is given fixing the time of taking any deposition on a day in term time, the court, if in session, or the judge thereof in vacation may, on notice given by the adverse party of the time and place of hearing the motion, fix another day for such taking, and the court on the hearing of such motion, may fix the time for such taking, from which there shall be no appeal. ['93, p. 132, § 6.]

Hist. '93, p. 132, § 6, reen. '99, p. 215, § 6, reen. R. C. § 6062, reen. C. L. ib.

Cited: Anderson v. Ferguson-Bach Sheep Co. (1906) 12 I. 418, 86 P. 41.

§ 8007. [6063] **Witnesses need not attend, when.** A witness is not obliged to attend for examination upon a deposition in any other county than that of his residence, but may consent to do so. ['93, p. 132, § 7.]

Hist. '93, p. 132, § 7, reen. '99, p. 215, § 7, reen. R. C. § 6063, reen. C. L. ib.

§ 8008. [6064] **Deposition shall not be read, when.** No deposition shall be read in evidence on the trial of a cause, if at that time the witness is produced in court, unless the deposition has been taken by the agreement of the parties, or by the order of the court. ['93, p. 215, § 8.]

Hist. '93, p. 215, § 8, reen. '99, p. 215, § 8, reen. R. C. § 6064, reen. C. L. ib.

§ 8009. [6065] **Powers of officer: Contempt.** The officer taking the deposition shall have power to summon and compel the attendance of witnesses. In case of the refusal of a witness to attend or testify, such fact shall be reported by the officer to any probate or district court of the

county, or the judge thereof, and such court or judge shall order such witness to attend and testify; and on the failure or refusal to obey such order, such witness shall be dealt with as for a contempt. ['93, p. 132, § 9.]

Hist. '93, p. 132, § 9, reen. '99, p. 215, § 9, reen. R. C. § 6065, reen. C. L. ib.

Probate court: By this statute the same power is given to the probate court that is possessed by the district court to deal with witnesses for contempt in reference to attending and testifying before an officer taking depositions. Re Niday (1908) 15 I. 559, 98 P. 845.

§ 8010. [6065a] **Application of preceding section.** The provisions of the last section shall extend to all officers and commissioners authorized to take depositions in this state to be read in the courts of other states or countries. ['93, p. 132, § 10.]

Hist. '93, p. 132, § 10, reen. '99 p. 215, § 10, reen. R. C. § 6065a, reen. C. L. ib.

Cited: Re Niday (1908) 15 I. 559, 98 P. 845.

§ 8011. [6065b] **Swearing and examination of witness.** The deponent shall first be sworn by the officer to testify to the truth, the whole truth, and nothing but the truth relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and by the officer or parties afterward if they see cause. ['93, p. 132, § 11.]

Hist. '93, p. 132, § 11, reen. '99, p. 215, § 11, reen. R. C. § 6065b, reen. C. L. ib.

§ 8012. [6065c] **Writing, reading and signing depositions.** The deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence and under the direction of the officer; and after the same has been carefully read to or by the deponent, it shall be subscribed by him. ['93, p. 132, § 12.]

Hist. '93, p. 132, § 12, reen. '99, p. 215, § 12, reen. R. C. § 6065c, reen. C. L. ib.

Comp. leg.—N. D. Similar: C. C. P. § 7899.

Failure to read depositions: A deposition is not rendered inadmissible in evidence because it fails to show that it was read to the witness and corrected by him. Darby v. Heagerty (1887) 2 I. 282, 13 P. 85.

§ 8013. [6066] **Certificate of officer.** The officer shall annex his certificate to the deposition stating the following facts:

1. That the deponent was sworn according to law.
2. By whom the deposition was written, and if written by the deponent or some disinterested person, that it was written in the presence and under the direction of the officer.
3. Whether or not the adverse party attended.
4. The time and place of taking the deposition, and the hours between which the same was taken. And the officer shall sign and attest the certificate, and seal the same, if he have a seal of office. ['93, p. 132, § 13.]

Hist. '93, p. 132, § 13, reen. '99, p. 215, § 13, reen. R. C. § 6066, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. C. P. § 7903.

§ 8014. [6066a] **Transmission of deposition to clerk.** The officer taking the deposition shall seal up the same in a secure envelope, and direct the same to the clerk of the court in which the action is pending, indorsing upon the envelope the names of the parties and of the witnesses whose depositions are inclosed. ['93, p. 132, § 14.]

Hist. '93, p. 132, § 14, reen. '99, p. 215, § 14, reen. R. C. § 6066a, reen. C. L. ib.

Comp. leg.—Cal. Analogous: C. C. P. § 7900.

§ 8015. [6067] **Offer in evidence: Continuance of grounds for taking.** When a deposition is offered to be read in evidence it must appear

to the satisfaction of the court that the cause for taking and reading it still exists. ['93, p. 132, § 15.]

Hist. '93, p. 132, § 15, reen. '99 p. 215, § 15, reen. R. C. § 6067, reen. C. L. ib. Comp. leg.—N. D. Analogous: C. C. P. § 7904.

§ 8016. [6068] **Commission to take deposition.** When a deposition is to be taken within or without the state, but within the United States, no commission shall be necessary for taking the deposition. When taken out of the United States, the clerk shall, upon the request of the party taking the deposition, issue a commission to the officer or commissioner designated to take the deposition. No order of the court or affidavit shall be necessary to authorize the issuing of the commission. ['93, p. 132, § 16.]

Hist. '93, p. 132, § 16, reen. '99, p. 215, § 16, reen. R. C. § 6068, reen. C. L. ib. Comp. leg.—N. D. Analogous: C. C. P. § 7894.

§ 8017. [6068a] **Authentication of commissioner's certificate.** When the commission contains the name of the officer before whom the deposition is to be taken, his attestation, officially certifying the same, shall be sufficient; but if the commission do not specify the name of the officer, and he have no official seal, his certificate shall be authenticated by the certificate and seal of the clerk or prothonotary of any court of record of the county in which the officer exercises the duties of his office. ['93, p. 132, § 17.]

Hist. '93, p. 132, § 17, reen. '99, p. 215, § 17, reen. R. C. § 6068a, reen. C. L. ib. Comp. Leg.—N. D. Analogous: C. C. P. § 7902.

§ 8018. [6068b] **Filing of deposition.** Every deposition intended to be read in evidence must be filed in the court at least one day before the time at which the cause in which the deposition is to be used stands on the docket for trial; or, if filed afterward and claimed to be used on the trial, the adverse party shall be entitled to a continuance, at the cost of the party filing the deposition, upon showing good cause by affidavit. ['93, p. 132, § 18.]

Hist. '93, p. 132, § 18, reen, '99, p. 215, § 18, reen. R. C. § 6068b, reen. C. L. ib. Comp. leg.—N. D. Analogous: C. C. P. § 7900.

§ 8019. [6068c] **Publication of deposition.** Depositions, after being filed, may be published by the clerk, at the request of either party after giving the other, his agent or attorney, reasonable notice of the time of publication, or they may be published by order of the court on motion of either party. ['93, p. 132, § 19.]

Hist. '93, p. 132, § 19, reen. '99, p. 215, § 19, reen. R. C. 6068c, reen. C. L. ib. Comp. leg.—N. D. Analogous: C. C. P. § 7900.

§ 8020. [6069] **Objections to competency and to questions.** Objections to the competency of a deponent, or to the propriety of any question proposed to him or answers given by him, may be made at the time of taking his deposition, or in court whether made at the taking of the deposition or not. ['93, p. 132, § 20.]

Hist. '93, p. 132, § 20, reen, '99, p. 215, § 20, reen. R. C. § 6069, reen. C. L. ib. Comp. leg.—N. D. Analogous: C. C. P. § 7906.

§ 8021. [6069a] **Objections to validity and admissibility.** All objections to the validity of any deposition or its admissibility in evidence shall be made before entering upon the trial and not afterward. But any deposition may be suppressed after the commencement of the trial, if any matter which is not disclosed in the deposition appears which is sufficient to authorize such suppression. ['93, p. 132, § 21.]

Hist. '93, p. 132, § 21, reen. '99, p. 215, § 21, reen. R. C. § 6069a, reen. C. L. ib. Comp. leg.—N. D. Analogous: C. C. P. § 7906.

§ 8022. [6069b] **Use of deposition in subsequent action.** When an action has been dismissed and another action has been commenced for the same cause, the deposition taken in the first action may be used in the second or any other action between the parties, or their assignees or representatives, for the same cause; but it must appear that the depositions have been duly filed in the court where the previous cause was pending, and have remained on file from the time the action was dismissed until the time at which it was proposed to use them. ['93, p. 132, § 22.]

Hist. '93, p. 132, § 22, reen. '99, p. 215, § 22, reen. R. C. § 6069b, reen. C. L. ib. **Comp. leg.—N. D.** Analogous: C. C. P. § 7901.

§ 8023. [6069c] **Irregularities not fatal.** An unimportant deviation from any direction relative to taking depositions shall not cause any deposition to be excluded where no substantial prejudice would be done to the opposite party. ['93, p. 132, § 29.]

Hist. '93, p. 132, § 29, reen. '99, p. 215, § 29, reen. R. C. § 6069c, reen. C. L. ib. **Comp. leg.—N. D.** Analogous: C. C. P. § 7894.

§ 8024. [6069d] **Failure to take deposition: Judgment for expenses.** When a party shall, in response to a notice to take depositions orally, attend at the time and place, by himself or attorney, and the deposition shall not be taken, he shall, upon notice and affidavit of the facts, have judgment against the party at whose instance the notice was given, for $2 per day for each day he may attend under the notice, and 6 cents per mile for the distance necessarily traveled in going to and returning from the place fixed for taking such depositions, unless it shall be shown that the failure to take such depositions did not result from the negligence or fault of the party giving the notice, or that he had previously notified the opposite party that he could not attend such taking. ['93, p. 132, § 30.]

Hist. '93, p. 132, § 30, reen. '99, p. 215, § 30, reen. R. C. § 6069d, reen. C. L. ib.

§ 8025. [6070] **Depositions upon written interrogatories.** The deposition may be taken upon written interrogatories as follows: The party desiring to take such deposition shall serve upon the opposite party notice of his intention together with a copy of the interrogatories which he intends to propound, and file such notice and interrogatories with the clerk. The opposite party shall file with the clerk, within five days thereafter, such cross-interrogatories as he desires to propound, and reexamining interrogatories shall be served and filed within five days thereafter. The clerk shall then issue to some officer, by him to be selected, authorized to take depositions, a commission with the interrogatories, cross-interrogatories and reexamining interrogatories annexed thereto, requiring him to cause the witness to come before him at such time and place as he may appoint, and to faithfully take his deposition, upon the questions annexed to the commission, and thereupon to make return to the court of his doings under such commission without delay. The officer shall first swear or affirm the witness that he will make a true, full and perfect answer to the interrogatories to be propounded to him; and then he shall propound the interrogatories annexed to the commission in their order and accurately write the answers of the witness to such interrogatories. He shall then read carefully to the witness such interrogatories and his answers thereto, and correct the answers as the witness may desire, and then the witness shall sign such deposition. The officer shall annex to the deposition his certificate, showing specifically a fulfillment of each of the requirements of this section; and shall then inclose the deposition with

the commission, interrogatories and answers securely sealed, and transmit the same addressed to the clerk of the court in which the suit is pending with the title of the cause indorsed thereon: *Provided, however,* That additional oral testimony may be adduced by either party, upon not less than three days' notice to the opposite party, and the commission and officers' certificate shall be modified accordingly. ['93, p. 132, § 31.]

Hist. '93, p. 132, § 31, reen. '99, p. 215, § 31, reen. R. C. § 6070, reen. C. L. ib.

§ 8026. [6071] **Depositions to be used out of state.** Any party to an action or special proceeding in a court, or before a judge of another state or territory may obtain the testimony of a witness residing in this state to be used in such action or proceeding, in the cases mentioned in the next two sections. [R. S. § 6071.]

Hist. C. C. P. '81, § 972; R. S. § 6071, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 2035; Kerr's C. ib.

§ 8027. [6072] **Same: Subpoenas for witnesses.** If a commission to take such testimony has been issued from the court or judge before whom such action or proceeding is pending, on producing the commission to a district or probate judge, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place. [R. S. § 6072.]

Hist. C. C. P. '81, § 973; R. S. § 6072, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 2036; similar as amended: Kerr's C. ib.

§ 8028. [6073] **Same.** If a commission has not been issued, and it appears to a district or probate judge, or justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;
2. That a commission to take the testimony of such witness has not been issued;
3. That according to the law of the state or territory where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding;

He must issue his subpoena, requiring the witness to appear and testify before him at a specified time and place. [R. S. § 6073.]

Hist. C. C. P. '81, § 974; R. S. § 6073, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 2037; similar: Kerr's C. ib.

§ 8029. [6074] **Same: Taking of deposition.** Upon the appearance of the witness the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state or territory requires. [R. S. § 6074.]

Hist. C. C. P. '81, § 957; R. S. § 6074, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 2038; Kerr's C. ib.

ARTICLE 5.

EXAMINATION OF WITNESSES.

§ 8030. [6075] **Exclusion of adverse witnesses.** If either party requires it the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses. [R. S. § 6075.]

Hist. C. C. P. '81, § 976; R. S. § 6075, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 2043; Kerr's C. ib.

§ 8031. [6076] **Direct and cross-examination.** The examination of a witness by the party producing him is denominated the direct examina-

tion; the examination of the same witness, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct. [R. S. § 6076.]

Hist. R. S. § 6076, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "upon the same matter" inserted after "witness," in second mention: C. C. P. 1872, § 2045; Kerr's C. ib.

§ 8032. [6077] **Leading questions.** A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On direct examination leading questions are not allowed, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it. [R. S. § 6077.]

Hist. R. S. § 6077, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: C. C. P. 1872, § 2046; Kerr's C. ib.

§ 8033. [6078] **Refreshment of memory.** A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution. [R. S. § 6078.]

Hist. R. S. § 6078, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2047; Kerr's C. ib. S. v. Marren (1910) 17 I. 766, 107 P. 993.

Refreshing memory: Under the provisions of this section a witness may refresh his recollection by reading evidence given by him upon a former trial, and then testify, if he has an independent recollection of the transaction. (Ailshie, J. dissents) S. v. Marren, supra.

§ 8034. [6079] **Rules governing cross-examination.** The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters such examination is to be subject to the same rules as a direct examination. [R. S. § 6079.]

Hist. '88-89, § 5; R. S. § 6079, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2048; Kerr's C. ib.

Cited: S. v. Gruber (1911) 19 I. 692, 708, 115 P. 1; Park v. Johnson (1911) 20 I. 548, 119 P. 52; S. v. Silva (1912) 21 I. 247, 120 P. 835.

Scope of cross-examination: The cross-examination of a witness should be confined to facts stated by the witness in his direct examination, or connected therewith. S. v. Anthony (1899) 6 I. 383, 55 P. 884.

A defendant in a criminal action who has testified in his own behalf can only be cross-examined by the state as to the facts stated in his direct examination, or in connection therewith. S. v. Larkin (1897) 5 I. 200, 47 P. 945.

The defendant in a criminal case can not be compelled to testify in such action, but if he voluntarily takes the stand and testifies for himself, he does so subject to the rule that he may be cross-examined in regard to any facts material to the issue. Ib.

In the trial of a criminal action the defendant should be permitted to cross-examine the prosecuting witness as to any matters in connection with the transaction, as, for example, to the acts of the prosecuting witness during the interim between the meeting of the prosecuting witness and the defendant in the morning and the time of the commission of the offense in the evening. S. v. Webb (1899) 6 I. 428, 55 P. 892.

This section does not preclude a person separately charged with the same offense with which the accused is charged from refusing to answer in cross-examination any questions that would tend to incriminate him. S. v. Bond (1906) 12 I. 424, 86 P. 43.

§ 8035. Cross-examination of adverse party. A party to the record of any civil action or proceedings, or person for whose immediate benefit such action or proceedings is prosecuted or defended, or the direc-

tors, officers, superintendent or managing agents of any corporation which is a party to such record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses; and the testimony given by such witnesses may be rebutted by the party calling him for such examination by other evidence. Such witness when so called may be examined by his own counsel, but only as to matters testified to on such examination.

Nothing contained in this section shall be construed in such manner as to compel the husband or wife to testify against the other, nor to compel a witness to disclose information or communications which are privileged by law. ['09, p. 334, S. B. 28, §§ 1, 2.]

Hist. '09, p. 334, S. B. 28, §§ 1, 2, reen. C. L. § 6079a.

Cited: Shellenberger v. Nourse (1911) 20 I. 323, 118 P. 508; Mantle v. Jack Waite M. Co. (1913) 24 I. 613, 632, 135 P. 854; Farnsworth v. Pepper (1915) 27 I. 159, 148 P. 48; Osborn v. Cary (1915) 28 I. 89, 93, 152 P. 473.

Constitutionality: The purpose of this act is sufficiently expressed in the title and meets the requirements of Const. III, 16. Darry v. Cox (1916) 28 I. 519, 155 P. 660.

Construed: This statute permits the examination of the persons designated according to the liberal rules governing cross-examination. Leading questions may be propounded and the witness' testimony may be rebutted. Ib.

Persons who may be called: Three classes may be examined; first, a party to the record of any civil proceeding; second, the person for whose immediate benefit such action is prosecuted or defended; third, directors, officers, superintendent or managing agent of any corporation which is a party to the record. A locomotive engineer comes in none of these classes in a suit against a railroad. Burrow v. Idaho etc. Rr. Co. (1913) 24 I. 652, 135 P. 838.

Under this section either party to a divorce action may call the other as a witness. Boeck v. Boeck (1916) 29 I. 639, 161 P. 576.

Not applicable to quasi criminal proceedings: A proceeding for the removal of an officer under § 8684 while in form a civil action is in substance and effect a criminal prosecution within Const. I, 13, and a defendant in such an action can not be compelled to become a witness against himself under the provisions of this section. Daugherty v. Nagel (1915) 28 I. 302, 154 P. 375.

Court's discretion: Trial courts have the same discretion to limit an examination under this section that they have of cross-examination generally, and should exercise this discretion to the end that the purpose of the law be not abused. Darry v. Cox, supra.

It is an abuse of judicial discretion and of the privilege granted by this section to permit a party calling his adversary as a witness to inquire into the entire controversy and to examine him with respect to matters about which other evidence is readily available. Boeck v. Boeck, supra.

This statute was not intended to enable an adverse party to call an opposing party as an expert and seek to establish his side of the case by such expert evidence nor by irrelevant examination to create bias or prejudice. Osborn v. Carey (1913) 24 I. 158, 132 P. 967.

§ 8036. [6080] **Impeachment of party's own witness.** The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made, at other times, statements inconsistent with his present testimony. [R. S. § 6080.]

Hist. R. S. § 6080, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2049; Kerr's C. ib.

Showing contradictory statements: Where a witness for the state testifies contrary to his testimony at the coroner's inquest, such testimony may be introduced to contradict him. S. v. Corcoran (1900) 7 I. 220, 61 P. 1034.

While the party producing a witness may contradict him by other evidence and may show that he has made statements inconsistent with his testimony, yet the prosecutor in a criminal case should not ask a witness if he had made conflicting statements for the purpose of prejudicing him before the jury, and then fail to produce evidence of such statements, and if he does so, the court should specifically instruct the jury to disregard such questions. S. v. Fowler (1907) 13 I. 317, 89 P. 757.

§ 8037. [6081] **Reexamination and recalling of witnesses.** A witness once examined can not be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness can not be recalled

without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion. [R. S. § 6081.]

Hist. R. S. § 6081, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2050; Kerr's C. ib.

Recalling witnesses: Upon a proper showing, the court may permit the recall of a witness for further examination. S. v. Anthony (1899) 6 I. 383, 55 P. 884.

§ 8038. [6082] **Impeachment by adverse party.** A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony. [R. S. § 6082.]

Hist. R. S. § 6082, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2051; Kerr's C. ib. S. v. Fong Loon (1916) 29 I. 248, 158 P. 233 (dis. op.).

Cited: S. v. Harness (1904) 10 I. 18, 76 P. 788; S. v. Trego, (1914) 25 I. 625, 138 P. 1124.

Statute strictly construed: The right to impeach a witness and the methods of impeachment are statutory and if a witness is to be discredited in this manner the statute must be conformed to. Boeck v. Boeck (1916) 29 I. 639, 161 P. 576.

Particular acts: A witness can not be impeached by evidence of particular wrongful acts having no connection with the matter on trial. S. v. Anthony (1899) 6 I. 383, 55 P. 884. Labonte v. Davidson, 31 I. 644, 175 P. 588.

Unchastity: While a lewd woman is less likely to be truthful than a chaste woman, still there is not such an immediate connection between unchastity and untruthfulness as to permit a woman's chastity to be called in question every time she goes on the witness stand. S. v. Hammock (1910) 18 I. 424, 110 P. 169.

In a prosecution for statutory rape it is not permissible for the defendant to impeach the evidence of the prosecutrix by introducing in evidence particular acts of her unchastity with other persons. S. v. Henderson (1911) 19 I. 524, 114 P. 30.

Improper question: Questions may be asked to show business, occupation, manner and place of living, though not for impeachment or to show commission of another offense. (Morgan, J. dissents) S. v. Fong Loon, supra.

§ 8039. [6083] **Same.** A witness may also be impeached by evidence, that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them. [R. S. § 6083.]

Hist. R. S. § 6083, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2052; Kerr's C. ib.

Cited: S. v. Harness (1904) 10 I. 18, 76 P. 788; Keane v. Pittsburg etc. Co. (1909) 17 I. 179, 189, 105 P. 60.

Statute mandatory: The requirements of this section must be complied with before an impeaching question can be put to a witness. Hilbert v. Spokane etc. Rr. Co. (1911) 20 I. 54, 116 P. 1116.

Impeaching statements: A witness can not be impeached by testimony that he previously had stated that the shooting for which the defendant was on trial "was as cold blooded a murder as could be," as such a statement is merely an opinion of the witness. S. v. Crea (1904) 10 I. 88, 76 P. 1013.

For the purpose of impeaching a witness by proof of contradictory statements they must have reference to some fact that has become material in the case. Hilbert v. Spokane etc. Rr. Co., supra.

§ 8040. [6084] **Evidence of good character.** Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character. [R. S. § 6084.]

Hist. R. S. § 6084, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2053; Kerr's C. ib.

§ 8041. [6085] **Inspection of writings.** Whenever a writing is shown to a witness it may be inspected by the opposite party, and if proved by

the witness must be read to the jury before his testimony is closed, or it can not be read except on recalling the witness. [R. S. § 6085.]

Hist. R. S. § 6085, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2054; Kerr's C. ib.

ARTICLE 6.

TAKING TESTIMONY OUT OF COURT.

§ 8042. [6086] **Taking testimony out of court.** In all actions in the district court which are triable by the court, or in which a jury is waived, where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby, the court, or the judge thereof at chambers, may at any time after the service is complete and the time for appearance has expired, order testimony taken at such time and place as shall be designated in such order, before the judge of said court or before a referee appointed by said court or the judge thereof, or before a special judge agreed upon by the parties to the action, and the testimony so taken shall be transcribed by the court reporter and transmitted, without findings, to the clerk of the court of the county where said action is pending, and shall be received in court as evidence in said action with the same force and effect as if taken upon a trial of said cause in open court.

A copy of said order, designating the time and place for taking such testimony, shall be mailed by the clerk to each of the attorneys who shall have appeared in the action, and shall be published for two consecutive weeks in some newspaper to be designated in such order.

The taking of testimony may be continued from day to day, and adjourned by order of the judge of the court, or by the referee or special judge before whom the testimony shall be taken; and the judge of said court shall make such order as he may deem proper as to payment of costs incurred in taking and transcribing such testimony. All objections made at the time to the relevancy or admissibility of evidence shall be noted, and the same may be renewed in the district court upon the final hearing. ['01, p. 132, § 1.]

Hist. '01, p. 132, § 1, reen. R. C. § 6086, reen. C. L. ib.

Referees: When appointed: This section authorizes the appointment of a referee in a suit to adjudicate water rights of a stream where the parties are numerous and the convenience of witnesses and ends of justice would be promoted thereby. It does not contemplate that a referee will be appointed, thus increasing the cost of the suit, unless it is necessary to do so. Boise Irr. etc. Co. v. Stewart (1904) 10 I. 38, 77 P. 25, 321.

Order of appointment: A part of an order appointing a referee, which directs the referee to report his conclusions of fact and law to the court, is not binding on the court but is only for its information and does not in any way invalidate the order. Ib.

CHAPTER 294.

RIGHTS AND DUTIES OF WITNESSES.

§ 8043. [6090] **Attendance of witnesses.** A witness, served with a subpoena, must attend at the time appointed, with any papers under his control, required by the subpoena, and answer all pertinent and legal questions, and, unless sooner discharged, must remain until the testimony is closed. [R. S. § 6090.]

Hist. C. C. P. '81, § 977; R. S. § 6090, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2064; Kerr's C. ib.

§ 8044. [6091] **Privilege of witnesses.** A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which

will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony. [R. S. § 6091.]

Hist. C. C. P. '81, § 978; R. S. § 6091, reen, R. C. ib., reen. C. L. ib.

Cross ref. Incriminating testimony may be required: § 8145. Not excused from testifying: § 8244. Self-incrimination no ground for refusal to testify: § 8313.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2065; Kerr's C. ib. S. v. Fong Loon (1916) 29 I. 248, 158 P. 233 (dis. op.).

Cited: (In dis. op.) S. v. Fong Loon (1916) 29 I. 248, 264, 158 P. 233.

§ 8045. [6092] **Same: Privilege from arrest.** Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee or other person in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom. [R. S. § 6092.]

Hist. C. C. P. '81, § 797; R. S. § 6092, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2067; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7880.

§ 8046. [6093] **Same: Arrest is void.** The arrest of a witness contrary to the preceding section is void, and, when wilfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with the subpoena, for the damages sustained by him in consequence of the arrest. [R. S. § 6093.]

Hist. C. C. P. '81, § 980, R. S. § 6093, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2068; Kerr's C. ib.

§ 8047. [6094] **Same: Liability of officer.** An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption, and make an affidavit stating:

1. That he has been served with a subpoena to attend as a witness before a court, officer or other person, specifying the same, the place of attendance and the action or proceeding in which the subpoena was issued; and,
2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest.
3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer and exonerates him from liability for discharging the witness when arrested. [R. S. § 6094.]

Hist. C. C. P. '81, § 981, R. S. § 6094, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2069; Kerr's C. ib.

§ 8048. [6095] **Same: Discharge from arrest.** The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of the provisions of this chapter. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court or a probate judge may grant the discharge. [R. S. § 6095.]

Hist. C. C. P. '81, § 982, R. S. § 6095, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2070; similar as amended: Kerr's C ib.

CHAPTER 295.

MISCELLANEOUS AND GENERAL PROVISIONS.

ARTICLE 1.

TENDER AND RECEIPT.

§ 8049. [6110] **Written offer equivalent to tender.** An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property. [R. S. § 6110.]

Hist. C. C. P. '81, § 983; R. S. § 6110, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2074; Kerr's C. ib.

Continuation of tender: To stop the running of interest, it is not only necessary to tender the whole amount due, but, if the money so tendered is not accepted, it must be kept on deposit subject to the demand of the person to whom the tender is made, or, a sufficient offer in writing must be made to avoid the necessity of keeping the money on deposit. Machold v. Farnan (1911) 20 I. 80, 117 P. 408.

§ 8050. [6111] **Debtor may demand receipt.** Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery. [R. S. § 6111.]

Hist. C. C. P. '81, § 984; R. S. § 6111, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2075; Kerr's C. ib.

ARTICLE 2.

PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 8051. [6116] **Testimony may be perpetuated.** The testimony of a witness may be taken and perpetuated as provided in this article. [R. S. § 6116.]

Hist. C. C. P. '81, § 985; R. S. § 6116, reen. R. C. ib., reen. C. L. ib. MacLane, Code Commissioner, adds the following note to the corresponding section of the R. C.: "This, and the following sections to and including § 6122 were probably intended to be superseded by the concluding sections of this chapter (§§ 6123-6126) which are taken from laws 1899, p. 215. But in view of the restrictive language of the repealing clause of that law, the commissioner did not feel justified in omitting these sections."

Comp. leg.—Cal. Same: C. C. P. 1872, § 2083; Kerr's C. ib.

§ 8052. [6117] **Application.** The applicant must produce to a district judge, or to a probate judge, a petition verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served, and if unknown, such notice must be served on the recorder of the county where the property to be affected by the evidence is situated, or the judge making the order resides, as may be directed by him, and by pub-

lication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the recorder of the county to whom the depositions must be returned when taken. [R. S. § 6117.]

Hist. C. C. P. '81, § 986; R. S. § 6117, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7927.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2084; similar as amended: Kerr's C. ib.

§ 8053. [6118] **Taking of deposition.** The person appointed by the judge to take the depositions is authorized, if a resident of this state, on receiving a copy of the order of the judge and of the notice prescribed in the last section, with proof of its personal service or publication; or, if a resident without the state, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice; to take the deposition of the witness named in the order of the judge, or in the commission, or if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time. [R. S. § 6118.]

Hist. C. C. P. '81, § 789; R. S. § 6118, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: C. C. P. 1872, § 2085; same as amended: Kerr's C. ib.

N. D. Similar: C. C. P. § 7928.

§ 8054. [6119] **Same: How taken.** The examination must be by question and answer, and if the testimony is to be taken in another state or territory, it must be taken upon a commission, to be issued by the judge, allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the recorder of the county designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the recorder the order for the examination, the petition on which the same was granted, with proof of service of the order and notice. [R. S. § 6119.]

Hist. C. C. P. '81, § 988; R. S. § 6119, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7929.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2086; same: Kerr's C. ib.

§ 8055. [6120] **Use of papers as evidence.** The petition and order, and papers filed by the judge, as provided in the last section, or a certified copy thereof, are prima facie evidence of the facts stated therein to show compliance with the provisions of this article. [R. S. § 6120.]

Hist. C. C. P. '81. § 989; R. S. § 6120; reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. 7930.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2087; same: Kerr's C. ib.

§ 8056. [6121] **Use of deposition as evidence.** If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death, or insanity of the witnesses, or that they can not be found, or are unable, by reason of age, or other infirmity, to give their

testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attend at the examination no objection to the form of an interrogatory can be made at the trial unless the same was stated at the examination. [R. S. § 6121.]

Hist. C. C. P. '81, § 990; R. S. § 6121, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. C. P. § 7931.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2088; same: Kerr's C. ib.

§ **8057.** [6122] **Same: Effect.** The deposition so taken and read in evidence has the same effect as the oral testimony of a witness, and no other, and every objection to the witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial. [R. S. § 6122.]

Hist. C. C. P. '81, § 991; R. S. § 6122, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. C. P. § 7932.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2089; Kerr's C. ib.

§ **8058.** [6123] **Affidavit for perpetuation of testimony.** Whenever any person shall make affidavit before any probate or district court or judge thereof, or clerk of the court, that such person expects to be made a party in any action thereafter to be commenced, and that the testimony of the affiant, or any other person, whether residing within or without the state, to be named in the affidavit, is material and necessary to the prosecution or defense thereof, the court or officer before whom the affidavit is made shall order notice as provided by section 8002 to be given to the party expected to be adverse to the applicant, or his attorney, that on the day and at the place in such notice to be expressed, the witness will be examined before such officer as shall be specified in the order. ['93, p. 132, § 23.]

Hist. '93, p. 132, § 23, reen. '99, p. 215. § 23, reen. R. C. § 6123, reen. C. L. ib.

§ **8059.** [6123a] **Officer to take deposition.** Upon proof that the notice has been given, either by personal service or by advertisement as provided by section 8004 being made to the officer, authorized to take the testimony, he shall proceed to take and certify, and seal up, and return the deposition according to the rules provided for other depositions in sections 8001 to 8025, inclusive, of this code. ['93, p. 132, § 24.]

Hist. '93, p. 132, § 24. reen. '99, p. 215. § 24, reen. R. C. § 6123a, reen. C. L. ib.

§ **8060. Deposition to be filed.** Every deposition so taken and certified shall, in due course, be filed in the office of the clerk of the proper court of the county where the subject matter of such expected suit may be situated. The clerk shall file such deposition, and it shall remain sealed until after commencement of such expected action and until published as provided by section 8061. [C. L. § 6124.]

Hist. '93, p. 132. § 25, reen. '99, p. 215, § 25, reen. R. C. § 6124; compiled and reen. C. L. ib.

§ **8061.** [6125] **Publication of deposition.** Any deposition which has heretofore been taken and filed for the purpose of perpetuating testimony in pursuance of any existing or former statutes of this state, as well as any deposition which may hereafter be taken and filed to perpetuate testimony may, at any time, either before or after the commencement of the action in anticipation of which such deposition may have been taken, be published by order of the court in the office of whose clerk the same may be filed, on the motion of any person or party interested in the

preservation of the testimony, and such deposition, with all the accompanying affidavits, orders, notices and other documents, shall be directed by such court to be entered of record in the order book of such court, at the cost of the party making such motion, and such record shall contain a statement or recital of the date of the filing of such deposition. ['93, p. 132, § 26.]

Hist. '93, p. 132. § 26, reen. '99, p. 215, § 26, reen. R. C. § 6125, reen. C. L. ib.

§ 8062. [6125a] **Use of recorded deposition as evidence.** The record of any deposition recorded under the provisions of the last section, and copies of such record, duly certified, may be used as evidence whenever and wherever the original deposition might be used. ['93, p. 132, § 27.]

Hist. '93, p. 132, § 27, reen. '99, p. 215. § 27, reen. R. C. § 6125a, reen. C. L. ib.

§ 8063. [6126] **Admissibility of deposition.** Upon the proof of death, insanity, or absence from the state, or distance more than 30 miles from the place of trial, or inability by reason of age or infirmity to attend, of such witness, the deposition, or a certified copy thereof by the clerk of the court where the same is filed, shall be admitted as evidence in any court in this state, in any cause between the parties named in the affidavit, or in any cause between persons claiming under either of said parties, and shall have like effect as if the witness had been personally present, and given oral testimony therein, saving the right of exception in all cases on account of the incompetency of the witness or any part of the testimony contained in the deposition. ['93, p. 132, § 28.]

Hist. '93, p. 132, § 28, reen. '99, p. 215, § 28, reen. R. C. § 6126, reen. C. L. ib.

ARTICLE 3.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

§ 8064. [6127] **Who may administer oaths.** Every court, every judge or clerk of any court, every justice and every notary public, the secretary of state, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations. [R. S. § 6127.]

Hist. C. C. P. '81, § 992, R. S. § 6127, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "the secretary of state" omitted: C. C. P. 1872, § 2093; Kerr's C. ib.

N. D. Similar: Pol. C. § 833.

§ 8065. [6128] **Form of oath.** An oath or affirmation in an action or proceeding, may be administered as follows, the person who swears or affirms, expressing his assent when addressed, in the following form:

> You do solemnly swear (or affirm, as the case may be), that the evidence you shall give in the issue (or matter), pending between .....and....., shall be the truth, the whole truth, and nothing but the truth, so help you God.

[R. S. § 6128.]

Hist. C. C. P. '81, § 993; R. S. § 6128, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: C. C. P. 1872, § 2094; same as amended except "this" for "the" before "issue": Kerr's C. ib.

N. D. Analogous: C. C. P. § 7882.

§ 8066. [6129] **Peculiar forms of oaths.** Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to, the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion, adopt that mode. [R. S. § 6129.]

Hist. C. C. P. '81, § 994; R. S. § 6129, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2095; Kerr's C. ib.

§ 8067. [6130] **Same: Different religions.** When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such. [R. S. § 6130.]

Hist. C. C. P. '81, § 995; R. S. § 6130, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2096; Kerr's C. ib.

§ 8068. [6131] **Affirmation in place of oath.** Any person who desires it, may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting when addressed, in the following form: "You do solemnly affirm (or declare), that," etc., as above provided. [R. S. § 6131.]

Hist. C. C. P. '81, § 996; R. S. § 6131, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 2097; Kerr's C. ib.

N. D. Analogous: Pol. C. § 834.

ARTICLE 4.

FEES OF WITNESSES.

§ 8069. [6139] **Witness fees in district court.** Witnesses in civil actions in the district court, or before any referee or commissioner thereof, are entitled to receive $3.00 per day for each day's actual attendance, and 25 cents per mile one way; to be taxed as costs against the losing party. [R. S. § 6139.]

Hist. R. S. § 6139, reen. R. C. ib.. reen. C. L. ib.

Cited: (In brief of counsel) C. M. & St. P. Ry. Co. v. Trueman (1910) 18 I. 687.

Who entitled to fees: A witness is entitled to fees and the same may be taxed as costs, although such witness is the wife or mother of the party calling her. Griffith v. Montandon (1894) 4 I. 75. 35 P. 704; Anderson v. Ferguson-Bach Sheep Co. (1906) 12 I. 418, 86 P. 41.

This section does not require, as a condition precedent to the recovery of mileage by a witness that he should have been obliged to attend, or that he should have been subpoenaed, but the only test is, was he a witness. and one who attends and testifies as a witness is entitled to mileage although he lives in another county from that of the trial, and more than 30 miles from the seat of trial. Anderson v. Ferguson-Bach Sheep Co., supra.

A witness is entitled to fees and mileage for the distance actually traveled within the state in going to the place of trial, although he resides out of the state and is not obliged to attend. S. v. Baird (1907) 13 I. 126, 89 P. 298.

Amount of compensation: Where a trial lasts more than one day. and a witness is subpoenaed to be present at the trial. and makes arrangements to be called when needed and actually attends only on the day he testifies, he is entitled to per diem compensation for one day only. Griffith v. Montandon, supra.

§ 8070. [6140] **Same: In probate and justices' courts.** Witnesses in civil actions in the probate and justices' courts are entitled to receive $2.00 per day for each day's actual attendance, and 25 cents per mile one way; to be taxed against the losing party. [R. S. § 6140.]

Hist. R. S. § 6140. reen. R. C. ib., reen. C. L. ib.

Cross ref. Fees of witnesses in police courts: § 3886.

§ 8071. [6141] **Interpreters' fees.** Interpreters are entitled to receive $3.00 per day for each day's actual attendance upon a court of justice under a subpoena, and 25 cents per mile one way for each mile actually traveled; to be taxed as costs in civil actions, and in criminal actions to be paid out of the county treasury on the certificate of the clerk, judge, or magistrate, but the amount may be included in the costs taxed against a defendant upon conviction. [R. S. § 6141.]

Hist. R. S. § 6141, reen. R. C. ib., reen. C. L. ib.

§ 8072. [6142] **Attorneys not entitled to witness fees.** No counselor or attorney at law in any case shall be allowed any fees for attendance as a witness in any such cause. [R. S. § 6142.]

Hist. R. S. § 6142, reen. R. C. ib., reen. C. L. ib.

§ 8073. [6143] **State need not prepay fees.** The attorney general or any prosecuting attorney is authorized to cause subpoenas to be issued, and to compel the attendance of witnesses on behalf of the state, without paying or tendering fees in advance to any witnesses; and any witness failing or neglecting to attend after being served with a subpoena, may be proceeded against and shall be liable in the same manner as provided by law in other cases when fees have been tendered or paid. [R. C. § 6143.]

Hist. R. S. § 2136, am. R. C. § 6143, reen. C. L. ib.

Cross ref. Witnesses before county commissioners are not entitled to prepayment of fees, but may be allowed a reasonable compensation by the board: § 3453.

PART IV. PENAL CODE.

CHAPTER 296.

PRELIMINARY PROVISIONS.

§ 8074. [6301] **Definition of terms.** The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

2. The words "neglect," "negligence," "negligent," and "negligently," import a want of such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

3. The word "corruptly," imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

4. The words "malice," and "maliciously," import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

5. The word "knowingly," imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

6. The word "bribe," signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote or opinion, in any public or official capacity.

7. Where the word "person" is used in this code to designate the party whose property may be the subject of any offense, it includes this state, any other state, any territory, government, or country, which may lawfully own property within this state, and all public and private corporations or joint associations, as well as individuals. [R. S. § 6301.]

Hist. R. S. § 6301, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar with additional provisions: Pen. C. 1872, § 7; as amended: Kerr's C. ib.

N. D. Similar: Pen. C. §§ 10357-62, 10372.

Cited: Subd. 1: S. v. Winter (1913) 24 I. 749, 135 P. 739; S. v. Churchill (1908) 15 I. 645, 655; 98 P. 853, 19 L. R. A. (N. S.) 835. 16 Ann. Cas. 947.

§ 8075. [6302] **Sufficiency of intent to defraud.** Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever. [R. S. § 6302.]

Hist. R. S. § 6302. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 8; Kerr's C. ib.

N. D. Identical: Pen. C. § 10376.

§ 8076. [6303] **Civil remedies preserved.** The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same. [R. S. § 6303.]

Hist. R. S. § 6303, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 9; Kerr's C. ib.

N. D. Identical: Pen. C. § 10377.

Cross ref. Civil and criminal remedies not merged: § 6439.

§ 8077. [6304] **Proceedings to remove officers preserved.** The omission to specify or affirm in this code any ground or forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to remove, depose, or suspend any public officer, or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such removal, deposition, or suspension. [R. S. § 6304.]

Hist. R. S. § 6304, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "impeach" inserted before "remove" and "impeachment" before "removal": Pen. C. 1872, § 10; Kerr's C. ib.

N. D. Similar: Pen. C. § 10378.

§ 8078. [6305] **Courts may punish for contempt.** This code does not affect any power conferred by law upon any public body, tribunal or officer, to impose or inflict punishment for a contempt. [R. S. § 6305.]

Hist. R. S. § 6305, reen. R. C. ib., reen. C. L. ib.

Cross ref. Acts also punishable as contempts: § 8603.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 11; Kerr's C. ib.

Power to punish inherent in court: The inherent power of the court to punish cannot be interfered with or abridged by the legislature, at least so far as courts of record are concerned. McDougall v. Sheridan (1913) 23 I. 191, 224. 128 P. 954.

§ 8079. [6306] **Court to impose punishment.** The several sections of this code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed. [R. S. § 6306.]

Hist. R. S. § 6306, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 12; Kerr's C. ib.

§ 8080. [6307] **Same: Determination of punishment.** Whenever, in this code, the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case, must be determined by the court authorized to pass sentence within such limits as may be prescribed by this code. [R. S. § 6307.]

Hist. R. S. § 6307. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 13; Kerr's C. ib.

Cited: (In brief of counsel) Re Chase (1910) 18 I. 561.

§ 8081. [6308] **Defendant's testimony may be used to prove perjury.** The various sections of this code which declare that evidence obtained upon the examination of a person as a witness can not be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination. [R. S. § 6308.]

Hist. R. S. § 6308, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 14; Kerr's C. ib.

§ 8082. [6309] **Definition of crime.** A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office; or
5. Disqualification to hold and enjoy any office of honor, trust or profit in this state. [R. S. § 6309.]

Hist. (See Cr. Prac. '64. § 1) R. S. § 6309, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 15; Kerr's C. ib.

N. D. Identical: Pen. C. § 9195.

§ 8083. [6310] **Grades of crime.** Crimes are divided into:
1. Felonies; and
2. Misdemeanors. [R. S. § 6310.]

Hist. Cr. Prac. '64, § 2; R. S. § 6310, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 16; Kerr's C. ib.

N. D. Identical: Pen. C. § 9196.

§ 8084. [6311] **Definitions of felony and misdemeanor.** A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the state prison is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. [R. S. § 6311.]

Hist. (See Cr. Prac. '64, §§ 3, 4) R. S. § 6311, reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Similar through first sentence, rest omitted: Pen C. 1872, § 17; same as amended. Kerr's C. ib.

N. D. Similar: Pen. C. § 9197.

Imprisonment in lieu of fine: The statute does not forbid incarceration in prison of felon sentenced either to pay fine or undergo imprisonment, upon default of such payment. T. v. Guthrie (1888) 2 I. 432. 17 P. 39.

§ 8085. [6312] **Punishment for felony.** Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding $5,000, or by both such fine and imprisonment. [R. S. § 6312.]

Hist. (See Cr. and P. '64, § 151, R. S. § 6312, reen. R. C. ib., reen. C. L. ib.

Cross ref. See indeterminate sentence law: § 9035 et seq.

Comp. leg.—Cal. Same through "five years," rest omitted: Pen. C. 1872, § 18; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9204.

Application: This is not a maximum penalty statute but prescribes the punishment for felonies only in cases where the punishment is not prescribed by other sections of the statutes. (Ailshie, C. J. dissents) Re Miller (1913) 23 I. 403, 129 P. 1075.

§ 8086. [6313] **Punishment for misdemeanor.** Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding $300, or by both. [R. S. § 6313.]

Hist. (See Cr. and P. '64, § 151) R. S. § 6313, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: Violations of prohibition punishable hereunder: § 2623.

Comp. leg.—Cal. Same except "$500" for "$300": Pen. C. 1872, § 19: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9205.

Maximum penalty. This section fixes the maximum penalty for a misdemeanor where it has not been otherwise fixed. S. v. Mulkey (1899) 6 I. 617, 59 P. 17: Re Rowland (1902) 8 I. 595, 70 P. 610; Re Burgess (1906) 12 I. 143, 84 P. 1059: Re Miller (1913) 23 I. 403, 129 P. 1075.

§ 8087. [6314] **Union of act and intent.** In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence. [R. S. § 6314.]

Hist. Cr. and P. '64, § 1; R. S. § 6314, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 20; Kerr's C. ib.

Cited: Re Baugh (1917) 30 I. 387, 164 P. 529. Omaechevviaria v. Idaho, 246 U. S. 343. 62 L. Ed. 763.

Instruction on intent: Where the question of criminal intent is raised by the facts, it is error for the court to refuse a requested instruction that if the jury believes the defendant had no felonious intent to steal the property at the time he took it. he should be acquitted, although he subsequently conceived the intent to appropriate it. S. v. Riggs (1902) 8 I. 630. 70 P. 947; S. v. Hines (1898) 5 I. 789, 51 P. 984.

Read into police regulations: This section must be construed as a part of police regulations. S. v. Omaechevviaria (1915) 27 I. 797, 152 P. 280 (referring to § 8333); Re Huston (1915) 27 I. 231, 258, 147 P. 1064 (dis. op.)

§ 8088. [6315] **Manifestation of intent.** The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots or lunatics, nor affected with insanity. [R. S. § 6315.]

Hist. (See Cr. and P. '64, §§ 2, 3) R. S. § 6315, reen. R. C. ib.. reen. C. L. ib

Comp. leg.—Cal. Same: Pen. C. 1872. § 21: Kerr's C. ib.

§ 8089. [6316] **Intoxication no excuse for crime.** No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act. [R. S. § 6316.]

Hist. (See Cr. and P. '64. § 7) R. S. § 6316. reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 22: Kerr's C. ib.

N. D. Identical: Pen. C. § 9208.

TITLE LIX. CRIMES AND PUNISHMENTS.

CHAPTER 297.

PERSONS LIABLE TO PUNISHMENT FOR CRIME.

§ 8090. [6330] **Persons capable of committing crimes.** All persons are capable of committing crimes, except those belonging to the following classes:

1. Children under the age of 14 years, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
2. Idiots.
3. Lunatics and insane persons.
4. Persons who committed the act or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent.
5. Persons who committed the act charged without being conscious thereof.
6. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.

7. Married women (unless the crime be punishable with death) acting under the threats, command, or coercion of their husbands.

8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged, under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused. [R. S. § 6330.]

Hist. (See Cr. and P. '64, §§ 4. 6. 8, 9) R. S. § 6330, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 26: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9207.

Cited: Subd. 4 (In brief of counsel) S. v. Winter (1913) 24 I. 749, 135 P. 739.

Insanity defined: (Subd. 3): Defendant is responsible for his acts, when he can distinguish right from wrong acts. Temporary mental derangement due to the influence of passion or revenge does not relieve from the consequences of a criminal act on the ground of mental irresponsibility. S. v. Fleming (1910) 17 I. 471, 490, 106 P. 305.

Proof of insanity: Where the defense of insanity is raised in a prosecution for murder, the burden is on the defendant to create a reasonable doubt as to his responsibility at the time of the homicide. S. v. Shuff (1903) 9 I. 115, 72 P. 664. An instruction that to establish the defense it must be "clearly proven" that the accused was insane is erroneous. S. v. Wetter (1905) 11 I. 433, 83 P. 341.

§ **8091.** [6331] **Persons liable to punishment.** The following persons are liable to punishment under the laws of this state:

1. All persons who commit, in whole or in part, any crime within this state.

2. All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state.

3. All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state and are afterwards found therein. [R. S. § 6331.]

Hist. R. S. § 6331, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 27: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9206.

Cited: Re Moyer (1906) 12 I. 250, 85 P. 897; (In brief of counsel) Re Mallon (1909) 16 I. 737.

§ **8092.** [6341] **Classification of parties.** The parties to crimes are classified as:

1. Principals; and
2. Accessories. [R. S. § 6341.]

Hist. R. S. § 6341, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 30: Kerr's C. ib.

N. D. Identical: Pen. C. § 9217.

§ **8093.** [6342] **Principals defined.** All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of 14 years, lunatics, or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command or coercion, compel another to commit any crime, are principals in any crime so committed. [R. S. § 6342.]

Hist. (See Cr. and P. '64, §§ 5, 7, 10) R. S. § 6342, reen. R. C. ib., reen. C. L. ib.

Cross. ref.—Distinction between accessories before fact and principals abolished: § 8845.

Comp. leg.—Cal. Same: Pen. C. 1872, § 31: Kerr's C. ib.

N. D. Identical: Pen. C. § 9218.

Cited: S. v. Curtis (1917) 30 I. 527, 165 P. 999.

§ **8094.** [6343] **Accessories defined.** All persons who, after full knowledge that a felony has been committed conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories. [R. S. § 6343.]

Hist. (See Cr. and P. '64, § 11) R. S. § 6343, reen. R. C. ib., reen. C. L. ib.

Cross ref. Accessories to misdemeanor: § 8605.

Comp. leg.—Cal. Same: Pen. C. 1872, § 32; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9219.

Cited: S. v. Nolan (1917) 31 I. 71, 169 P. 295.

§ 8095. [6344] **Punishment of accessories.** Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding two years, or by fine not exceeding $5,000. [R. S. § 6344.]

Hist. (See Cr. and P. '64, § 11) R. S. § 6344, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 33: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9221.

CHAPTER 298.

CRIMES AGAINST THE ELECTIVE FRANCHISE.

Cross ref. Other crimes against the elective franchise are as follows:

False swearing as to electoral qualifications: False swearing as to qualifications as a voter upon registration or at a primary election, or as to party affiliations, is perjury: § 558. False swearing as to qualifications to vote on challenge made is perjury: § 8171.

Prostitutes offering to vote: Any prostitute or inmate of a house of ill fame who offers to vote or register as an elector is guilty of a misdemeanor: § 505. Any prostitute or inmate of a house of ill fame who makes a false statement when challenged as to electoral qualifications is guilty of a misdemeanor: § 508.

Misconduct of election officers: Any judge of election assisting a physically incapacitated elector who divulges information as to how elector voted is guilty of a misdemeanor: § 592. A judge of election who deposits a ballot not bearing the official stamp in the ballot box is guilty of a misdemeanor: § 595.

Ascertaining count of election before close of polls: Persons ascertaining or disclosing the progress of the count at an election before the close of the polls in precincts having two sets of election officers are guilty of a felony: § 629.

Offenses against primary election law: False swearing as to qualifications as a voter upon registration or at a primary election, or as to party affiliations, or as to personal expenses, is perjury: § 558. Any person who signs the name of another to a nomination paper is guilty of forgery: § 559.

Penal provisions in relation to absent voting: Any person making a false affidavit is guilty of perjury: § 621. Any person falsely impersonating another is guilty of a misdemeanor: § 621. Any person failing to return ballots or wilfully violating absent voting law is guilty of a misdemeanor: § 621.

Corrupt practices at municipal elections: Corrupt practices at municipal elections under commission form of government constituting misdemeanors: §§ 4211, 4212.

§ 8096. [6354] **Official neglect or malfeasance.** Every person charged with the performance of any duty, under the provisions of any law of this state relating to elections, who wilfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment for such acts or omissions is prescribed by this code, punishable by fine not exceeding $1,000, or by imprisonment in the state prison not exceeding five years, or by both. [R. S. § 6354.]

Hist. (See '85, p. 106, § 33) R. S. § 6354, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: In relation to absent voting: § 621.

Comp. leg.—Cal. Same: Pen. C. 1872, § 41: Kerr's C. ib.

§ 8097. [6355] **Refusal to be sworn or to answer questions.** Every person who, after being required by the board of judges at any election, refuses to be sworn, or who, after being sworn, refuses to answer any pertinent question propounded by such board, touching his right, or the right of any other person, to vote, is guilty of a misdemeanor. [R. S. § 6355.]

Hist. R. S. § 6355, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 43: Kerr's C. ib.

§ 8098. [6356] **Illegal voting or interference with election.** Every person not entitled to vote, who fraudulently votes, and every person who votes more than once at any one election, or knowingly hands in two or more tickets folded together, or changes any ballot after the same has been deposited in the ballot box, or adds, or attempts to add, any ballot to those legally polled at any election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted, or adds to or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election; or carries away or destroys, or attempts to carry away or destroy, any poll list, or ballots, or ballot box, for the purpose of breaking up or invalidating such election, or wilfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly held and lawfully conducted, is guilty of a felony. [R. S. § 6356.]

Hist. (See '81, p. 257, § 2) R. S. § 6356, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 45: Kerr's C. ib.

§ 8099. [6357] **Attempting to vote when not qualified, or to repeat.** Every person not entitled to vote, who fraudulently attempts to vote, or who, after being entitled to vote, attempts to vote more than once at any election, is guilty of a misdemeanor. [R. S. § 6357.]

Hist. (See '81, p. 257, § 2) R. S. § 6357, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 46: Kerr's C. ib.

Cross ref. Prostitute offering to vote is guilty of misdemeanor: § 505.

N. D. Analogous: Pen. C. § 9258-9.

§ 8100. [6358] **Procuring illegal votes.** Every person who procures, aids, assists, counsels or advises another to give or offer his vote at any election, knowing that the person is not qualified to vote, is guilty of a misdemeanor. [R. S. § 6358.]

Hist. (See '81, p. 257, § 1) R. S. § 6358, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9260.

Comp. leg.—Cal. Same: Pen. C. 1872, § 47; Kerr's C. ib.

§ 8101. [6359] **Officers attempting to change result.** Every officer or clerk of election who aids in changing or destroying any poll list, or in placing any ballots in the ballot box, or taking any therefrom, or adds, or attempts to add, any ballots to those legally polled at such election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted or adds to or mixes with, or attempts to add to or mix with the ballots polled any other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election, or allows another to do so, when in his power to prevent it, or carries away or destroys, or knowingly allows another to carry away or destroy, any poll list, ballot box, or ballots lawfully polled, is guilty of a felony. [R. S. § 6359.]

Hist. (See '81, p. 257, § 4) R. S. § 6359, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 48: Kerr's C. ib.

§ 8102. [6360] **Attempt of officer to ascertain vote.** Every officer, judge, or clerk of an election, who, previous to putting the ballot of an elector in the ballot box, attempts to find out any name on such ballot, or who opens, or suffers the folded ballot of any elector which has been handed in, to be opened or examined previous to putting the same into the ballot box, or who makes, or places any mark or device on any folded

ballot, with a view to ascertain the name of any person for whom the elector has voted, or who, without the consent of the elector, discloses the name of any person which such officer, judge, or clerk has fraudulently or illegally discovered to have been voted for by such elector, is punishable by fine of not less than $50 nor more than $500. [R. S. § 6360.]

Hist. (See '81, p. 257, § 3) R. S. § 6360, reen. R. C. ib., reen. C. L. ib.

Cross ref.—Any judge of election assisting a physically incapacitated elector who divulges information as to how elector voted is guilty of a misdemeanor: § 592. Persons ascertaining or disclosing the progress of the count at an election before the close of the polls in precincts having two sets of election officers are guilty of a felony: § 629.

Comp. leg.—Cal. Same: Pen. C. 1872, § 49: Kerr's C. ib.

§ 8103. [6361] **Forging or counterfeiting returns.** Every person who forges or counterfeits returns of an election purporting to have been held at a precinct, town, or ward where no election was in fact held, or wilfully substitutes forged or counterfeit returns of election in the place of the true returns for a precinct, town, or ward where an election was actually held, is guilty of a felony. [R. S. § 6361.]

Hist. (See '81, p. 257, § 4) R. S. § 6361, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9383.

Comp. leg.—Cal. Same: Pen. C. 1872, § 50: Kerr's C. ib.

§ 8104. [6362] **Adding to or subtracting from votes.** Every person who wilfully adds to or subtracts from the votes actually cast at an election, in any returns, or who alters such returns, is guilty of a felony. [R. S. § 6362.]

Hist. (See '81, p. 257, § 4) R. S. § 6362, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 51: Kerr's C. ib.

§ 8105. [6363] **Aiding and abetting crimes.** Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sections, is punishable by imprisonment in the county jail for the period of six months, or in the state prison not exceeding two years. [R. S. § 6363.]

Hist. R. S. § 6363, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar with additional clauses: Pen. C. 1872, § 52; same as amended: Kerr's C. ib.

§ 8106. [6364] **Intimidation, corruption and frauds.** Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever, to awe, restrain, hinder or disturb any elector in the free exercise of the right of suffrage, or furnishes any elector wishing to vote, who cannot read, with a ticket, informing or giving such elector to understand that it contains a name written or printed thereon different from the name which is written or printed thereon, or defrauds any elector at any such election, by deceiving and causing such elector to vote for a different person, for any office, than he intended or deseired to vote for; or who, being officer, judge, or clerk of any election, while acting as such, induces, or attempts to induce, any elector, either by menace or reward, or promise thereof, to vote differently from what such elector intended or desired to vote, is guilty of a misdemeanor. [R. S. § 6364.]

Hist. (See '81, p. 257, § 1) R. S. § 6364, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9250.

Comp. leg.—Cal. Same: Pen. C. 1872, § 53: Kerr's C. ib.

§ 8107. [6365] **Riotous conduct and interference with election.** Any person who wilfully disturbs, or is guilty of any riotous conduct at or

near, any election place or voting precinct, with intent to disturb the same, or interferes with the access of the electors to the polling place, or in any manner, with the free exercise of the election franchise of the voters, or any voter there assembled, or disturbs or interferes with the canvassing of the votes, or with the making of the returns, is guilty of a misdemeanor. [R. S. § 6365.]

Hist. (See '81, p. 257, § 5) R. S. § 6365, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in part: Pen. C. 1872, § 59; different: Kerr's C. ib.

N. D. Similar: Pen. C. § 9275.

§ 8108. [6366] **Betting on elections.** Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor. [R. S. § 6366.]

Hist. R. S. § 6366, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 60: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9252.

§ 8109. [6367] **Offenses not otherwise provided for.** Every person who wilfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violation is prescribed by law, punishable by fine not exceeding $1000, or by imprisonment in the state prison not exceeding five years, or by both. [R. S. § 6367]

Hist. R. S. § 6367, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "code" for "law": Pen. C. 1872, § 61: Kerr's C. ib.

§ 8110. [6369] **Tampering with certificates of nomination or ballots.** No person shall falsely make, or make oath to, or fraudulenty deface, or fraudulently destroy, any certificate of nomination, or any part thereof, or file, or receive for filing, any certificate of nomination, or letter of withdrawal, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination which has been duly filed, or any part thereof, or wilfully delay the delivery of any ballots, or forge or falsely make the official endorsement on the ballot, or wilfully destroy any ballot. Every person violating any of the provisions of this section shall be deemed guilty of a felony, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by imprisonment in the penitentiary for a period of not less than one year nor more than five years. ['90-'91, p. 50, § 2.]

Hist. '90-91, p. 50, § 2, reen. '99, p. 27, § 2, reen. R. C. § 6369, reen. C. L. ib.

Cross ref. Any person who falsely swears to a material fact in a nomination paper or relative to his qualifications as a voter upon registration or at a primary is guilty of perjury: § 558. Any person who signs the name of another to a nomination paper is guilty of forgery: § 559.

§ 8111. [6370] **Destroying or defacing supplies.** No person shall, during the election, remove or destroy any of the supplies or conveniences placed in the booths or compartments for the purpose of enabling the voter to prepare his ballot, or prior to, or on the day of election, wilfully deface or destroy any list of candidates posted in accordance with the provisions of title 4 concerning elections. No person shall, during an election, tear down or deface the cards printed for the instruction of voters. Every person wilfully violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon convic-

tion thereof in any court of competent jurisdiction, shall be fined in any sum not exceeding $100. ['90-'91, p. 50, § 3.]

Hist. '90-91, p. 50, § 3, reen. '99, p. 27, § 3, reen. R. C. § 6370, reen. C. L. ib.

Cross ref. Elections: §§ 488, 668.

§ 8112. [6371] Electioneering. No officer of election shall do any electioneering on election day. No person shall do any electioneering on election day within any polling place, or any building in which an election is being held, or within 100 feet thereof, nor obstruct the door or entries thereto, or prevent free ingress to, and egress from, said building. Any election officer, sheriff, constable or other peace officer is hereby authorized, and it is hereby made the duty of any such officer, to arrest any person violating any of the provisions of this section, and such offender shall be punished by a fine not exceeding $100, or less than $25. ['90-'91, p. 50, § 4.]

Hist. '90-91, p. 50, § 4, reen. '99, p. 27, § 4, reen. R. C. § 6371, reen. C. L. ib.

Cross ref. Election judges may appoint constable: § 589.

§ 8113. [6372] Attempt to influence votes. No person shall attempt to influence the vote of any elector by means of a promise or a favor, or by means of violence or threats of violence, or threats of withdrawing custom or dealing in business or trade, or enforcing the payment of a debt, or discharging from employment, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him, or by any other means. ['90-'91, p. 50, § 5.]

Hist. '90-91, p. 50, § 5, reen. '99, p. 27, § 5, reen. R. C. § 6372, reen. C. L ib.

§ 8114. [6373] Bribery of electors. No person shall in any way offer a bribe to an elector to influence his vote. ['90-'91, p. 50, § 6.]

Hist. '90-91, p. 50, § 6, reen. '99, p. 27, § 6, reen. R. C. § 6373, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 9250.

§ 8115. [6374] Fraudulent permission of registration. Any registry agent, or other person, who in any manner shall wilfully or corruptly permit any person not entitled to registration or to a certificate of registration, to be registered or have a certificate of registration, or who delays or fails to deliver the certified copies of the official register and the check list to the judges of election as required by law, or who permits any person to register after the date on which the registration books close, or who shall otherwise wilfully or corruptly violate any of the provisions of the law governing elections, the penalty for which is not herein specially prescribed, shall be punished for each and every offense by imprisonment in the penitentiary for a term of not less than one year nor more than five years, or by a fine of not less than $100 nor more than $2000, or by both such fine and imprisonment in the discretion of the court. ['90-'91, p. 50, § 7.]

Hist. '90-91, p. 50, § 7, reen. '99, p. 27, § 7, reen. R. C. § 6374, reen. C. L. ib.

§ 8116. [6375] Illegal registration by voter. Any person who shall wilfully cause, or endeavor to cause, his name to be registered in any other election district than that in which he resides, or will reside prior to the day of the next ensuing election, except as herein otherwise provided, and any person who shall cause, or endeavor to cause, his name to be registered, knowing that he is not a qualified elector, and will not be a qualified elector on or before the day of the next ensuing election, in the election district in which he causes or endeavors to cause such registry to be made, and any person who shall induce, aid or abet any one in the commission of either of the acts in this section enumerated

and described, shall be fined not less than $50 nor more than $500, or be confined in the county jail for not less than one month nor more than six months, or both. ['90-'91, p. 50, § 8.]

Hist. '90-91, p. 50, § 8, reen. '99, p. 27, § 8, reen. R. C. § 6375, reen. C. L. ib.

Cross ref. Any person who swears falsely as to his qualifications as a voter upon registration is guilty of perjury: § 558. Any person making a false affidavit under absent voting law is guilty of perjury: § 621.

Comp. leg.—N. D. Analogous: Pen. C. § 9265.

§ 8117. [6376] **Placing placards in booths.** Any person or officer of election who shall put, or permit to be put, into a voting booth, any placard, notice or device, except the sample ballots and cards of instruction as by law provided, intended or likely to call the attention of the voter to any candidate, or to urge the voter to vote for any particular candidate, or shall put, or allow anything to be put, into such booths for the use or comfort of the voter whereby the claims of any candidate are urged upon the voter, either directly or indirectly, shall be imprisoned in the county jail not to exceed three months, or fined not to exceed $500, or both. ['90-'91, p. 50, § 9.]

Hist. '90-91, p. 50, § 9, reen. '99, p. 27, § 9, reen. R. C. § 6376, reen. C. L. ib.

CHAPTER 299.

CRIMES BY AND AGAINST THE EXECUTIVE POWER.

Cross ref. Other crimes by and against executive officers are as follows:

Crimes against the revenue and property of the state: § 8379 et seq.

Disclosure of confidential information received officially: By member dept. finance a misdemeanor: § 307; by member dept. agriculture a misdemeanor: § 2055; by public utilities commission a felony: § 2447; by land officers a felony: § 2891; by assessor in relation to transfer tax a felony: § 3366; by member dept. commerce and industry a felony: § 5207, a misdemeanor: § 6314.

Failure of officers to make reports: State officers failing to make reports as required by law are guilty of a misdemeanor: § 413.

Nepotism: Violations of the nepotism law are misdemeanors: §§ 416-7.

Obstructing inspectors: Obstructing state examiner a felony: §§ 297-8; dairy, food and sanitary inspector a misdemeanor: §§ 1679, 1696, 1785, 1815; horticultural inspector a misdemeanor: § 2083; bee inspector: § 2094; state sealer of weights and measures a misdemeanor: § 2580.

Official improprieties: Use of passes by public officials unlawful: § 2422. Officers entering Carey act land are guilty of a felony: §§ 3010-12. Municipal officers accepting free privileges from public utilities are guilty of a misdemeanor: § 4232.

Official oppression: Closing of bank by commissioner of finance and industry with criminal intent a misdemeanor: § 5298.

Officers letting printing contracts without the state: Officers letting contracts for state or county printing without the state or county are guilty of a misdemeanor: § 2338.

Officer accepting fee from pensioner: A judge or county officer who accepts a fee from a pensioner for administering an oath or giving a certificate in pension matters is guilty of a misdemeanor: § 3714.

Violations of militia law: Felonies: False swearing in matters pertaining to military service: § 716; embezzlement of military funds: § 762. Misdemeanors: Refusal or neglect of assessors to make military enrollment: § 681; advising against or endeavoring to persuade soldiers or officers not to go with the colors: § 746; unauthorized wearing of U. S. uniforms: § 759; unauthorized military organizations: § 760; unauthorized possession of military property: § 761; nonfeasance or malfeasance of peace officers as to process or military fines: § 778.

§ 8118. [6380] **Bribery of executive officers.** Every person who gives or offers any bribe to any executive offiicer of this state, with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as such officer, is guilty of a felony. [R. S. § 6380.]

Hist. (See Cr. and P. '64, § 93) R. S. 6380, reen. R. C. ib., reen. C. L. ib.

Cross ref. Bribery defined: § 8074; of county and municipal officers: § 8196. Incriminating testimony may be required: § 8145.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 67: Kerr's C. ib.

N. D. Similar: Pen. C. § 9303.

Bribery of state treasurer: Bribery of treasurer in order to secure the unlawful

deposit of state funds constitutes a felony: § 330.

Acceptance of bribe by state examiner: State examiner who receives a fee in the performance of the duties of his office is guilty of felony: § 300.

Bribery to evade prohibition law: Acceptance of bribe by officers enforcing prohibition laws felonious: § 2643.

Bribery of county treasury to secure deposits:. Bribery of the county treasurer by a bank or any one interested therein in order to secure a deposit of county funds contrary to law constitutes a felony: § 3593.

§ 8119. [6381] **Asking or receiving bribes.** Every executive officer or person elected or appointed to an executive office who asks, receives or agrees to receive, any bribe upon any agreement or understanding that his vote, opinion or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is guilty of a felony and forfeits his office. [R. S. § 6381.]

Hist. (See Cr. and P. '64, § 94) R. S. § 6381, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 68: Kerr's C. ib.

N. D. Similar: Pen. C. § 9304.

§ 8120. [6382] **Resisting officers.** Every person who attempts by means of any threat or violence to deter or prevent any executive officer from performing any duty imposed upon such officer by law, or who knowingly resists by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding $5000 or imprisonment in the state prison not exceeding five years, or both. [R. S. § 6382.]

Hist. (See Cr. and P. '64, § 100) R. S. § 6382, reen. R. C. ib., reen. C. L. ib.

Cross ref. Resisting and obstructing officers: § 8183.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 69: Kerr's C. ib.

N. D. Analogous: Pen. C. §§ 9305-6.

§ 8121. [6383] **Asking or receiving rewards.** Every executive officer who asks or receives any emolument, gratuity or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. [R. S. § 6383.]

Hist. (See Cr. and P. '64, § 113) R. S. § 6383, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 70; similar as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9307.

§ 8122. [6384] **Officers not to purchase scrip.** Every officer or person prohibited by the laws of this state from becoming a purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than $1000 or by imprisonment in the state prison not more than five years. [R. S. § 6384.]

Hist. (See '75, p. 667, § 5) R. S. § 6384, reen. R. C. ib., reen. C. L. ib.

Cross ref.—Prohibition against officers being interested in contracts: § 386 et seq. Dealings in warrants prohibited: § 389.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 71: Kerr's C. ib.

Application: County commissioner purchasing county warrants as agent for wife comes under provisions of this section. Libby v. Pelham (1917) 30 I. 620, 166 P. 575.

§ 8123. [6385] **Presentation of fraudulent bills.** Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher or writing, is guilty of a felony. [R. S. § 6385.]

Hist. R. S. § 6385, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: The making of a false certificate

to state voucher is punishable hereunder: § 241.

Comp. leg.—Cal. Same: Pen. C. 1872, § 72: Kerr's C. ib.

Presenting false bounty claims: A prosecution for presenting a false bounty claim to the board of county commissioners may be maintained under this section, although the accused might also be prosecuted for making a false affidavit to the claim under '01, p. 205, § 4, S. v. Adams (1905) 10 I. 591, 79 P. 398.

Consummation of offense: The offense defined by this section is consummated when a false or fraudulent claim is presented with intent to defraud; it is not necessary that the fraudulent claim be allowed or paid in order to procure a conviction. S. v. Adams (1905) 10 I. 591, 79 P. 398.

Information: Information under this section held sufficient. S. v. Adams (1904) 9 I. 582, 75 P. 258; S. v. Curtis (1916) 29 I. 724, 161 P. 578.

§ 8124. [6386] **Buying appointments.** Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor. [R. S. § 6386.]

Hist. R. S. § 6386, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 73: Kerr's C. ib.

N. D. Similar: Pen. C. § 9311.

§ 8125. [6387] **Making appointments for reward.** Every public officer who for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding $5000, and in addition thereto forfeits his office. [R. S. § 6387.]

Hist. (See Cr. and P. '64, § 115) R. S. § 6387, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same with additional provision: Pen. C. 1872, § 74: Kerr's C. ib.

N. D. Similar: Pen. C. § 9313.

§ 8126. [6388] **Intrusion into office and holding over.** Every person who wilfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, wilfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor. [R. S. § 6388.]

Hist. R. S. § 6388, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 75: Kerr's C. ib.

Cited: People v. Havird (1889) 2 I. 531, 25 P. 294.

§ 8127. [6389] **Withholding books and records from successor.** Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, wilfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents or other writings appertaining or belonging to his office, or mutilates, destroys or takes away the same, is guilty of a felony. [R. S. § 6389.]

Hist. (See Cr. and P. '64, § 97) R. S. § 6389, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 76; as amended: Kerr's C. ib.

§ 8128. [6390] **Application of preceding sections.** The various provisions of this chapter apply to administrative and ministerial officers, in the same manner as if they were mentioned therein. [R. S. § 6390.]

Hist. R. S. § 6390, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 77: Kerr's C. ib.

§ 8129. [6391] **Disqualified person holding office.** Every person not a legal voter and possessing all the qualifications prescribed for voters, or who is under any disqualification created by the laws of this state,

who holds or exercises any office, is guilty of a misdemeanor. [R. S. § 6391.]

Hist. (See '85, p. 106, § 44) R. S. § 6391, reen. R. C. ib., reen. C. L. ib.

§ 8130. [6392] **Violation of revenue laws.** Any officer who, at the same time, performs the duties of any two officers, in any manner connected with the public revenue, except in the manner expressly provided by law, or any collecting or disbursing officer who refuses or neglects the performance of the duties required of him by the title, Revenue, of these Compiled Statutes, is guilty of a felony, and on conviction thereof must be punished by imprisonment in the state prison for not more than one year, or by a fine of not less than $200 nor more than $1000, or by both such fine and imprisonment, and must forthwith be removed from office. [R. S. § 6392.]

Hist. (See '75, p. 475, § 99) R. S. § 6392, reen. R. C. ib., reen. C. L. ib.

Cross. ref.—Crimes against the revenue and property of this state: § 8379 et seq.

CHAPTER 300.

CRIMES AGAINST THE LEGISLATIVE POWER.

Cross ref. Member of the legislature who accepts an appointment to, and exercises the powers of, an office created by the legislature of which he is a member is guilty of a misdemeanor: § 382. Use of passes by legislator unlawful: § 2422. Disobedience of legislative subpoena or refusal to produce papers is a misdemeanor: §§ 89-90.

§ 8131. [6410] **Alteration of bills.** Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony. [R. S. § 6410.]

Hist. R. S. § 6410, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. 9325.

Comp. leg.—Cal. Same: Pen. C. 1872, § 83: Kerr's C. ib.

§ 8132. [6411] **Alteration of enrolled copies.** Every person who fraudulently alters the enrolled copy of any bill or resolution which has been passed or adopted by the legislature with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published by the printer of the statutes, in language different from that in which it was passed or adopted by the legislature, is guilty of felony. [R. S. § 6411.]

Hist. R. S. § 6411, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9326.

Comp. leg.—Cal. Same: Pen. C. 1872. § 84: Kerr's C. ib.

§ 8133. [6412] **Offering bribes to legislators.** Every person who gives or offers to give a bribe to any member of the legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is guilty of a felony. [R. S. § 6412.]

Hist. (See Cr. and P. '64, § 92) R. S. § 6412, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Penn. C. 1872, § 85: Kerr's C. ib.

Cross ref. Bribe defined: § 8074. Incriminating testimony may be required: § 8145.

N. D. Similar: Pen. C. § 9327.

§ 8134. [6413] **Legislators receiving bribes.** Every member of either of the houses composing the legislature of this state who asks, re-

ceives or agrees to receive, any bribe, upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give, any official vote in consideration that another member of the legislature shall give any such vote either upon the same or another question, is guilty of a felony. [R. S. § 6413.]

Hist. (See Cr. and P. '64, § 92) R. S. § 6413, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Penn. C. 1872, § 86; additional provision as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9328.

§ 8135. [6414] **Refusal to testify before legislature.** Every person who, being summoned to attend as witness before either house of the legislature or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before either house of the legislature or any committee thereof, wilfully refuses to be sworn or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor. [R. S. § 6414.]

Hist. R. S. § 6414, reen. R. C. ib., reen. C. L. ib.

Cross ref.—Witness refusing to attend and testify in a contested election of legislative officers, or to produce books and papers required to be produced, is guilty of a misdemeanor: §§ 89, 90. Perjury by witness before legislature: § 103.

Comp. leg.—Cal. Same: Pen. C. 1872, § 87: Kerr's C. ib.

N. D. Similar: Pen. C. § 9333.

§ 8136. [6415] **Disqualification to hold office on conviction.** Every member of the legislature convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this state. [R. S. § 6415.]

Hist. (See Cr. and P. '64, §§ 92, 93) R. S. § 6415, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 88: Kerr's C. ib.

N. D. Similar: Pen. C. § 9335.

§ 8137. [6416] **Lobbying.** It shall be unlawful for any person, employed for a pecuniary consideration, to attempt personally and directly to influence any member of the legislature to vote for or against any measure pending therein, otherwise than by appearing before the regular committees thereof, when in session, or by newspaper publication, by public addresses or by written or printed statements, arguments, or briefs, two copies whereof shall first be deposited with the secretary of state. No officer, agent, appointee or employee of the state of Idaho, or of the United States, shall attempt to influence any member of the legislature to vote for or against any measure pending therein, affecting the private interest of such person, except in the manner authorized herein. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not to exceed six months and by fine not to exceed $200: *Provided,* That this section shall not apply to persons representing or appearing for any municipality in this state. ['07, p. 4, §§ 1, 2.]

Hist. '07, p. 4, §§ 1, 2, reen. R. C. § 6416, reen. C. L. ib.

Comp. leg.—N. D. Analogous: § 9336.

CHAPTER 301.

CRIMES AGAINST PUBLIC JUSTICE.

ARTICLE 1.

BRIBERY AND CORRUPTION.

§ 8138. [6430] **Bribery of judicial officers.** Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator or umpire, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion or decision upon any matter or question which is or may be brought before him for decision, is guilty of a felony. [R. S. § 6430.]

Hist. (See Cr. and P. '64, § 92) R. S. § 6430, reen. R. C. ib., reen. C. L. ib.

Cross ref. Bribe defined: § 8074. Acceptance of bribe by appraiser under inheritance tax law is a misdemeanor: § 3385.

Cross ref. Penalty for acceptance of bribe by officer under prohibition law: § 2643.

Comp. leg.—Cal. Similar: Penn. C. 1872, § 92: Kerr's C. ib.

N. D. Similar: Pen. C. § 9339.

§ 8139. [6431] **Receipt of bribe by officer.** Every judicial officer, juror, referee, arbitrator or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion or decision upon any matters or question which is or may be brought before him for decision, shall be influenced thereby, is guilty of a felony. [R. S. § 6431.]

Hist. (See Cr. and P. '64, § 92) R. S. § 6431, reen. R. C. ib., reen. C. L. ib.

Cross ref. Acceptance of bribe by officer enforcing prohibition law: § 2643.

Comp. leg.—Cal. Similar: Penn. C. 1872, § 93: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9340.

§ 8140. [6432] **Acceptance of rewards.** Every judicial officer who asks or receives any emolument, gratuity or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. [R. S. § 6432.]

Hist. (See Cr. and P. '64, § 113) R. S. § 6432, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 94; additional provisions as amended: Kerr's C. ib.

§ 8141. [6433] **Attempt to influence jurors and arbitrators.** Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed a referee, in respect to his verdict in, or decision of, any cause pending, or about to be brought before him, either:

1. By means of any communication, oral or written, had with him, except in the regular course or proceedings;
2. By means of any book, paper or instrument exhibited, otherwise than in the regular course of proceedings;
3. By means of any threat, intimidation, persuasion or entreaty; or,
4. By means of any promise or assurance of any pecuniary or other advantage; is guilty of a felony. [R. S. § 6433.]

Hist. (See Cr. and P. '64, § 112) R. S. § 6433, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 95; as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9345.

§ 8142. [6434] **Misconduct of jurors and arbitrators.** Every juror or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who either:

1. Makes any promise or agreement to give a verdict or decision for or against any party; or,

2. Wilfully and corruptly permits any communication to be made to him, or receive any book, paper, instrument or information relating to any cause or matter pending before him, except according to the regular course of proceedings, is guilty of a felony. [R. S. § 6434.]

Hist. (See Cr. and P. '64, § 112) R. S. § 6434, reen. R. C. ib., reen. C. L. ib. 1872, § 96; similar as amended: Kerr's C. ib.

Comp. leg.—Cal. Similar: Pen. C. **N. D.** Similar: Pen. C. § 9342.

§ 8143. [6435] **Purchase of judgment by justices and constables.** Every justice of the peace or constable of the same precinct who purchases, or is interested in the purchase of, any judgment or part thereof on the docket of, or on any docket in possession of, such justice, is guilty of a misdemeanor. [R. S. § 6435.]

Hist. (See Cr. and P. '64, § 114) R. S. § 6435, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Pen. C. § 9413.

Comp. leg.—Cal. Same: Pen. C. 1872, § 97: Kerr's C. ib.

§ 8144. [6436] **Forfeiture of office on conviction.** Every officer convicted of any crime defined in this article, in addition to the punishment prescribed, forfeits his office. [R. S. § 6436.]

Hist. R. S. § 6436, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: Pen. C. § 9415.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 98: Kerr's C. ib.

§ 8145. [6437] **Incriminating testimony may be required.** No person shall be excused from testifying or producing documents, at the instance of the state, in any criminal cause or proceeding touching any offense relating to bribery, on the ground that the testimony required of him may incriminate him. But no person shall be prosecuted or punished on account of any transaction, manner or thing concerning which he may be so required to testify or produce evidence: *Provided,* That no person so testifying shall be exempt from proseuction and punishment for perjury in so testifying. ['05, p. 416, § 1.]

Hist. '05, p. 416, § 1, reen. R. C. § 6437, reen. C. L. ib. **N. D.** Similar: Pen. C. § 9418.

Comp. leg.—Cal. Same: Pen. C. 1872, § 102: Kerr's C. ib.

ARTICLE 2.

RESCUES AND RECAPTURES.

Cross ref. Officers or employees of the industrial training school or other persons who procure or suffer the escape of an inmate are guilty of a felony: § 1153.

§ 8146. [6446] **Rescuing prisoners.** Every person who rescues, or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable with death, by imprisonment in the state prison not less than one nor more than 14 years.
2. If such prisoner was in custody upon a conviction of any other felony, by imprisonment in the state prison not less than six months nor more than five years.
3. If such prisoner was in custody upon a charge of felony, by a fine not exceeding $1000 and imprisonment in the county jail not exceeding one year.
4. If such prisoner was in custody, otherwise than upon a charge or conviction of felony, by fine not exceeding $500 and imprisonment in the county jail not exceeding six months. [R. S. § 6446.]

Hist. (See Cr. and P. '64, §§ 101, 102) R. S. § 6446, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 101; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9348.

§ 8147. [6447] **Recapture of goods from legal custody.** Every person who wilfully injures or destroys, or takes, or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor. [R. S. § 6447.]

Hist. R. S. § 6447, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—N. D. Identical: Pen. C. § 9349.

ARTICLE 3.

ESCAPES AND AIDING THEREIN.

§ 8148. Escapes from state prison. Every person confined in the state prison for a term of less than life who escapes therefrom, shall be guilty of a felony, and upon conviction thereof, any such second term of imprisonment shall commence at the time he would otherwise have been discharged from the prison. [C. L. § 6452.]

Hist. R. S. § 6452, reen. R. C. ib., held unconstitutional as in violation of the due process requirement. Re Mallon (1909) 16 I. 737, 102 P. 374, 22 L. R. A. (N. S.) 1123. Enacted '11, c. 21, p. 46; am. '11, c. 61, § 1, p. 171; compiled and reen. C. L. § 6452.

Comp. leg.—Cal. Analogous: Pen. C. 1872, § 105; amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9351.

Trial for escape: A prisoner who escapes while serving a term in the state prison may, before the expiration of his term, be tried for such escape and the trial of the defendant on the charge of such escape in no way interferes with the judgment of conviction under which he is imprisoned. Hays v. Stewart (1900) 7 I. 193, 61 P. 591.

Due process and second jeopardy: R. C. § 6452 did deny due process of law to persons charged with its violation but did not put them in jeopardy the second time. Re Mallon, supra.

§ 8149. [6453] **Same: Attempted escapes.** Every prisoner confined in the state prison for a term less than for life, who attempts to escape from such prison, is guilty of a felony, and on conviction thereof the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison. [R. S. § 6453.]

Hist. R. S. § 6453, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same through "felony": Pen. C. 1872, § 106; same as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9352.

§ 8150. [6454] **Same: From other prisons.** Every prisoner confined in any other prison than the state prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor. [R. S. § 6454.]

Hist. R. S. § 6454, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 107; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9351.

§ 8151. [6455] **Officers assisting in escape.** Every keeper of a prison, sheriff, deputy sheriff, constable or jailor, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in the state prison not exceeding 10 years, and fine not exceeding $10,000. Every such officer or person who negligently suffers such escape is guilty of a misdemeanor. [R. S. § 6455.]

Hist. (See Cr. and P. '64, §§ 103, 107) R. S. § 6455, reen. R. C. ib., reen. C. L. ib.

Cross ref. Prisoner must be actually confined: § 9418.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 108; Kerr's C. ib.

N. D. Similar: Pen. C. § 9357.

§ 8152. [6456] **Private persons assisting in escape.** Every person who wilfully assists any prisoner confined in any prison, or in the lawful

custody of any officer or person, to escape, or in an attempt to escape, from such prison or custody, is guilty of a felony. [R. S. § 6456.]

Hist. (See Cr. and P. '64, § 106) R. S. § 6456, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 109; as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9354.

Juvenile delinquent not a prisoner: This section is not applicable to one charged with assisting a juvenile delinquent to escape from custody under juvenile delinquent law (§ 1010 et seq). Re Small (1910) 19 I. 1, 116 P. 118.

§ 8153. [6457] **Carrying prisoner things to aid escape.** Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is guilty of a felony. [R. S. § 6457.]

Hist. (See Cr. and P. '64, § 104) R. S. § 6457, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 110; as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9355.

§ 8154. [6458] **Expense of trials.** Whenever a trial shall be had of any person under any of the provisions of the first two sections of this article, and whenever a state convict in the state prison shall be tried for any crime committed therein, the clerk of the district court shall make out a statement of all the costs incurred by the county for the trial of such case, and for the guarding and keeping of such convict, and when certified by the judge who tried the case, such statement shall be audited by the board of examiners and paid by the state treasurer to the treasurer of the county where the trial was had. [R. S. § 6458.]

Hist. R. S. § 6458, modified by Const. IV. 18, reen. R. C. § 6458, reen. C. L. ib.

Comp. leg.—Cal. No such provision in Pen. C. 1872; similar as amended: Kerr's C. § 111.

ARTICLE 4.

TAMPERING WITH PUBLIC RECORDS AND DOCUMENTS.

§ 8155. [6464] **Officer stealing, mutilating or falsifying records.** Every officer having the custody of any record, map or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting, the whole or any part of such record, map, book, paper or proceeding, or who permits any other person so to do, is punishable by imprisonment in the state prison not less than one or more than 14 years. [R. S. § 6464.]

Hist. (See Cr. and P. '64, § 95) R. S. § 6464, reen. R. C. ib., reen. C. L. ib.

Cross ref. Alteration of vital statistics certificates a misdemeanor: § 1645.

Comp. leg.—Cal. Same: Pen. C. 1872, § 113; Kerr's C. ib.

N. D. Similar: Pen. C. § 9363.

§ 8156. [6465] **Same: Private person.** Every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding $100, or by both. [R. S. § 6465.]

Hist. (See Cr. and P. '64, § 95) R. S. § 6465, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 114; Kerr's C. ib.

N. D. Similar: Pen. C. § 9364.

§ 8157. [6466] **Offering forged instrument for record.** Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under

any law of this state, or of the United States, is guilty of a felony. [R. S. § 6466.]

Hist. R. S. § 6466, reen. R. C ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 115; Kerr's C. ib.

N. D. Identical: Pen. C. § 9365.

§ 8158. [6467] **Tampering with jury list.** Every person who adds any names to the list of persons selected to serve as jurors, either by placing the same in the jury box or otherwise, or extracts any name therefrom, or destroys the jury box or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same can not be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony. [R. S. § 6467.]

Hist. R. S. § 6467, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "by a board of supervisors" inserted after "selected": Pen. C. 1872, § 116; similar as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9366.

§ 8159. [6468] **Certifying to false jury lists.** Every officer or person required by law to certify to the list of persons selected as jurors, who maliciously, corruptly or wilfully certifies to a false or incorrect list, or a list containing other names than those selected, or who, being required by law to write down the names placed on the certified lists on separate pieces of paper, does not write down and place in the jury box the same names that are on the certified list, and no more and no less than are on such list, is guilty of a felony. [R. S. § 6468.]

Hist. R. S. § 6468, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 117; Kerr's C. ib.

ARTICLE 5.

PERJURY AND SUBORNATION OF PERJURY.

§ 8160. [6478] **Definition of perjury.** Every person who, having taken an oath that he will testify, declare, depose, or certify truly, before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury. [R. S. § 6478.]

Hist. (See Cr. and P. '64, § 90) R. S. § 6478, reen. R. C. ib., reen. C. L. ib.

Cross ref. The following are defined as perjury: Making false statements or returns to the department of finance: § 296. False swearing as to qualifications as a voter upon registration or at a primary election, or as to personal expenses: § 558. Making false affidavits under absent voting law: § 621. Swearing falsely in matters pertaining to military service: § 716. Falsely swearing as to age of children in violation of child labor law: § 1028. Making a false affidavit in an application for a pharmacist's license: § 2182. False reports or returns under antitrust law: § 2547. The making of a false oath by state land selectors and appraisers: § 2891. The making of a false taxpayer's statement: § 3117. The making of a false affidavit to secure tax deed: § 3259. False statement in relation to assessment of migratory live stock: § 3292. Making a false statement in giving the net profits of mines for purposes of taxation: § 3364. Making a false statement for relief of needy blind: § 3747. Swearing falsely as to competency to marry: § 4612. Making of false sworn statement in claim for fraternal benefit insurance: § 5195. Swearing falsely by bank officers: § 5277. Swearing falsely by bank officers to the dept. of commerce and industry during an examination of the bank: § 5299. Swearing falsely as to electoral qualifications after challenge: § 8171. Making a false statement on application for a pardon: § 9202.

A witness before the legislature may be prosecuted for perjury: § 103. Perjury must be proven by more than one witness: § 7972. Informer in bribery cases may be prosecuted for perjury: § 8145.

Comp. leg.—Cal. Same: Pen. C. 1872, § 118; Kerr's C. ib.

Indictment held sufficient: An indictment for perjury which states that the defendant on his oath "falsely, wickedly and feloniously did say, swear, etc." is sufficient without the word "knowingly." Territory v. Anderson (1889) 2 I. 573, 21 P. 417.

§ 8161. [6479] **Definition of oath.** The term "oath" as used in the last section includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated. [R. S. § 6479.]

Hist. (See Cr. and P. '64, § 90) R. S. § 6479, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9367.

Comp. leg.—Cal. Same: Pen. C. 1872, § 119; Kerr's C. ib.

§ 8162. [6480] **Same: Oath of office.** So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two preceding sections. [R. S. § 6480.]

Hist. R. S. § 6480, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 9368.

Comp. leg.—Cal. Same: Pen. C. 1872, § 120; Kerr's C. ib.

§ 8163. [6481] **Irregularity in administering oath no defense.** It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. [R. S. § 6481.]

Hist. R. S. § 6481, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 121; additional provision as amended: Kerr's C. ib.

N. D. Identical: Pen. C. § 9369.

§ 8164. [6482] **Incompetency of witness no defense.** It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate. [R. S. § 6482.]

Hist. R. S. § 6482, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9370.

Comp. leg.—Cal. Same: Pen. C. 1872, § 122; Kerr's C. ib.

§ 8165. [6483] **Ignorance of materiality no defense.** It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding. [R. S. § 6483.]

Hist. R. S. § 6483, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 9371.

Comp. leg.—Cal. Same: Pen. C. 1872, § 123; Kerr's C. ib.

§ 8166. [6484] **Deposition: When complete.** The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true. [R. S. § 6484.]

Hist. R. S. § 6484, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 9372.

Comp. leg.—Cal. Same: Pen. C. 1872, § 124; similar as amended: Kerr's C. ib.

§ 8167. [6485] **Unqualified statement of unknown fact.** An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. [R. S. § 6485.]

Hist. R. S. § 6485, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 9373.

Comp. leg.—Cal. Same: Pen. C. 1872, § 125; Kerr's C. ib.

§ 8168. [6486] **Punishment for perjury.** Perjury is punishable by imprisonment in the state prison not less than one or more than 14 years. [R. S. § 6486.]

Hist. (See Cr. and P. '64, § 90) R. S. § 6486, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 126; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9375.

§ 8169. [6487] **Subornation of perjury.** Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured. [R. S. § 6487.]

Hist. (See Cr. and P. '64, § 90) R. S. § 6487, reen. R. C. ib., reen. C. L. ib.

Cross ref. Knowingly preparing or causing to be prepared a false return or report under antitrust law is subornation of perjury: § 2547. Suborning the making of false statement in application for pardon: § 9202.

Comp. leg.—Cal. Same: Pen. C. 1872, § 127; Kerr's C. ib.

N. D. Analogous: Pen. C. §§ 9379-80.

§ 8170. [6488] **Perjury resulting in execution of innocent person.** Every person who, by wilful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death. [R. S. § 6488.]

Hist. (See Cr. and P. '64, § 90) R. S. § 6488, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 128; Kerr's C. ib.

§ 8171. [6489] **False swearing as to qualifications as voter.** Every person who, upon his right to vote being challenged at any election held under the laws of this state, wilfully, corruptly and falsely swears touching his qualifications as a voter, is guilty of perjury. [R. S. § 6489.]

Hist. (See '85, p. 106, § 43) R. S. § 6489, reen. R. C. ib., reen. C. L. ib.

ARTICLE 6.

FALSIFYING EVIDENCE.

Cross ref. Tampering with public records: § 8155 et seq.

§ 8172. [6500] **Offering forged or fraudulent documents in evidence.** Every person who, upon any trial, proceeding, inquiry or investigation whatever authorized or permitted by law, offers in evidence as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of felony. [R. S. § 6500.]

Hist. R. S. § 6500, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 132; Kerr's C. ib.

N. D. Similar: Pen. C. § 9382.

§ 8173. [6501] **Preparing false evidence.** Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced, for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding or inquiry whatever, authorized by law, is guilty of felony. [R. S. § 6501.]

Hist. R. S. § 6501, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 134; Kerr's C. ib.

N. D. Similar: Pen. C. § 9384.

§ 8174. [6502] **Destruction or concealment of evidence.** Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, wilfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor. [R. S. § 6502.]

Hist. R. S. § 6502, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 135; Kerr's C. ib.

N. D. Similar: Pen. C. § 9385.

§ 8175. [6503] **Preventing attendance of witness.** Every person who wilfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding or inquiry, authorized by law, is guilty of a misdemeanor. [R. S. § 6503.]

Hist. R. S. § 6503, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 136; Kerr's C. ib.

N. D. Identical: Pen. C. § 9387.

Conspiracy: For a case of conspiracy to secure absence of a witness, see S. v. Roe (1911) 19 I. 416, 419-20, 113 P. 461.

§ 8176. [6504] **Bribing witnesses.** Every person who gives or offers, or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false or to withhold true testimony, is guilty of a misdemeanor. [R. S. § 6504.]

Hist. R. S. § 6504, reen. R. C. ib., reen. C. L. ib.

Cross ref. Incriminating testimony may be required in bribery case: § 8145.

Comp. leg.—Cal. Same: Pen. C. 1872, § 137; similar as amended: Kerr's C. ib.

N. D. Identical: Pen. C. § 9388.

§ 8177. [6505] **Receiving of bribe by witness.** Every person who is a witness, or is about to be called as such, who receives or offers to receive any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a misdemeanor. [R. S. § 6505.]

Hist. R. S. § 6505, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 138; same except "felony" for "misdemeanor," as amended: Kerr's C. ib.

ARTICLE 7.

MISCELLANEOUS OFFENSES AGAINST PUBLIC JUSTICE.

§ 8178. [6510] **Refusal of officer to make arrest.** Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who wilfully refuses to receive or arrest any person charged with criminal offense, is punishable by fine not exceeding $5000, and imprisonment in the county jail not exceeding one year. [R. S. § 6510.]

Hist. (See Cr. and P. '64, § 108) R. S. § 6510, reen. R. C. ib., reen. C. L. ib.

Cross ref. Criminal offenses: §§ 6108-14.

Comp. leg.—Cal. Same: Pen. C. 1872, § 142; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9396.

§ 8179. [6511] **Neglect of duty by public administrator.** Every person holding the office of public administrator, who wilfully refuses or neglects to perform the duties thereof, or who violates any provision of law relating to his duties or the duties of his office, for which some other punishment is not prescribed, is punishable by fine not exceeding $5000. or imprisonment in the county jail not exceeding one year, or both. [R. S. § 6511.]

Hist. (See '81, p. 292, § 5) R. S. § 6511, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 143; Kerr's C. ib.

§ 8180. [6512] **Delay in taking person arrested before magistrate.** Every public officer, or other person, having arrested any person upon a criminal charge, who wilfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor. [R. S. § 6512.]

Hist. R. S. § 6512, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 145; Kerr's C. ib.

N. D. Similar: Pen. C. § 9392.

§ 8181. [6513] **Illegal arrests and seizures.** Every public officer, or person pretending to be a public officer, who, under the pretense or color

of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor. [R. S. § 6513.]

Hist. R. S. § 6513, reen. R. C. ib., reen. C. L. ib.

Cross ref. Searches without warrant under prohibition law: § 2644; under fish and game law: § 2806.

Comp. leg.—Cal. Same: Pen. C. 1872, § 146; Kerr's C. ib.

N. D. Similar: Pen. C. § 9393.

§ **8182.** [6514] **Inhuman treatment of prisoners.** Every officer who is guilty of wilful inhumanity or oppression toward any prisoner under his care or in his custody is punishable by fine not exceeding $5000, and removal from office. [R. S. § 6514.]

Hist. (See Cr. and P. '64, § 96) R. S. § 6514, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 147; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11338.

§ **8183.** [6515] **Resisting and obstructing officers.** Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding $5000, and imprisonment in the county jail not exceeding one year. [R. S. § 6515.]

Hist. (See Cr. and P. '64, § 100) R. S. § 6515, reen. R. C. ib., reen. C. L. ib.

Cross ref. Resisting executive officers: § 8120.

Comp. leg.—Cal. Same: Pen. C. 1872, § 148; Kerr's C. ib.

N. D. Similar: Pen. C. § 9398.

Essentials of crime: No special intent is necessary, but defendant must have had knowledge that person resisted was an officer, engaged in the discharge or attempted discharge of his duty. S. v. Winter (1913) 24 I. 749, 135 P. 739.

Defense: It is no defense for defendant to show that threats had been made against him by other parties, or that he was in fear as to his person or property. Ib.

§ **8184.** [6516] **Unnecessary assaults by officers.** Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding $5000 and imprisonment in the county jail not exceeding one year. [R. S. § 6516.]

Hist. R. S. § 6516, reen. R. C. ib., reen. C. L. ib.

Cross ref. Use of unnecessary force by trainmen in ejecting passenger a misdemeanor: § 4821.

Comp. leg.—Cal. Same except "five years" for "one year": Pen. C. 1872, § 149; Kerr's C. ib.

§ **8185.** [6517] **Refusing assistance to officers.** Every male person above 18 years of age who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge or justice of the peace, or other officer concerned in the administration of justice, is punishable by fine of not less than $50 nor more than $1000. [R. S. § 6517.]

Hist. (See Cr. Prac. '64, § 36) R. S. § 6517, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 150; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9395.

§ **8186.** [6518] **Compounding crimes.** Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or prom-

ise thereof, upon any agreement or understanding to compound or conceal, such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law, in which crimes may be compromised by leave of court, is punishable as follows:

1. By imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the state prison for life.

2. By imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months where the crime was punishable by imprisonment in the state prison for any other term than for life.

3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding $500, where the crime was a misdemeanor. [R. S. § 6518.]

Hist. (See Cr. and P. '64, § 109) R. S. § 6518, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 153; Kerr's C. ib.

N. D. Similar: Pen. C. § 9401.

§ 8187. [6519] **Fraudulent disposal of property by debtors.** Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns or conceals his property with intent to defraud, hinder or delay his creditors of their rights, claims or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $5000, or by both. [R. S. § 6519.]

Hist. (See Cr. and P. '64, § 135) R. S. § 6519, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 154; Kerr's C. ib.

N. D. See Pen. C. § 9999.

Erroneous instruction: In a prosecution against the seller and purchasers of goods, an instruction that a sale was not necessarily fraudulent because it is made with intent to hinder, delay and defraud creditors, is erroneous. Martin v. Steele (1901) 7 I. 497, 63 P. 1040.

§ 8188. [6520] **Same: After action or judgment.** Every person against whom an action is pending, or against whom a judgment has been rendered, for the recovery of any personal property, who fraudulently conceals, sells or disposes of such property, with intent to hinder, delay or defraud the person bringing such action or recovering such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the preceding section. [R. S. § 6520.]

Hist. (See Cr. and P. '64, § 135) R. S. § 6520, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 155; Kerr's C. ib.

§ 8189. [6521] **Common barratry.** Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months and by fine not exceeding $500. [R. S. § 6521.]

Hist. R. S. § 6521, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 158; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9408.

§ 8190. [6522] **Same: Proof.** No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy. [R. S. § 6522.]

Hist. R. S. § 6522, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 159; Kerr's C. ib.

N. D. Identical: Pen. C. § 9410.

§ 8191. [6523] **Refusal of attorney or collector to pay over money.** Every attorney at law, agent, collector or other person who collects or receives any money or property on any debt, claim or demand due to another person, and, upon demand made by said person to whom such debt, claim or demand is due, for the space of 20 days refuses or neglects to pay over said money, or deliver up said property, so received, to such person making said demand, is guilty of grand or petit larceny according to the amount of the money or value of the property so refused to be delivered over. [R. S. § 6523.]

Hist. R. S. § 6523, reen. R. C. ib., reen. C. L. ib.

§ 8192. [6524] **Purchase of evidence of debt.** Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor. [R. S. § 6524.]

Hist. R. S. § 6524, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 161; Kerr's C. ib. Merchants' Protective Assn. v. Jacobsen (1912) 22 I. 636, 127 P. 315.

N. D. Identical: Pen. C. § 9412.

Cited: Bryan v. Montandon (1898) 6 I. 352, 55 P. 650.

Collection agency buying claim: A collection agency is not prohibited from buying a part interest in a claim to compensate itself for collecting the same, even though suit is instituted. Merchants' Protective Assn. v. Jacobsen, supra.

§ 8193. [6525] **Attorney defending when partner prosecutes.** Every attorney who directly or indirectly advises in relation to, or aids, or promotes the defense of, any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by any person as prosecuting attorney, or other public prosecutor, with whom such person is directly or indirectly connected as a partner, or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as prosecuting attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from, or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and in dition to the punishment prescribed therefor, forfeits his license to practice law. [R. S. § 6525.]

Hist. R. S. § 6525, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 162; Kerr's C. ib.

N. D. Similar: Pen. C. § 10237.

§ 8194. [6526] **Same: Defense of one's self.** The preceding section does not prohibit an attorney from defending himself in person as attorney or counsel, when prosecuted either civilly or criminally. [R. S. § 6526.]

Hist. R. S. § 6526, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 163; Kerr's C. ib.

N. D. Similar: Pen. C. § 10239.

§ 8195. [6527] **Grand juror acting after challenge against him.** Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part, or attempts to take part, in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor. [R. S. § 6527.]

Hist. R. S. § 6527, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 164; Kerr's C. ib.

N. D. Identical: Pen. C. § 9420.

§ 8196. Bribery of public officers. Every person who gives or offers a bribe to any member of any common council, board of county commissioners or board of trustees of any county, city or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before a body of which he is a member and every member of either of the bodies mentioned in this section who receives or offers to receive any such bribe and every person who gives or offers a bribe to any sheriff, deputy sheriff, policeman, constable, prosecuting attorney, or other officer charged with the enforcement of the laws of this state to receive or secure immunity from arrest, prosecution or punishment for a violation or contemplated violation of the laws of this state or any such officer who receives or offers to receive any such bribe is punishable by imprisonment in the state prison for a term not less than one nor more than 14 years. ['19, c. 148, p. 443.]

Hist. (See Cr. and P. '64, § 93) R. S. § 6528, reen. R. C. ib., reen. C. L. ib.; am. '19, c. 148, p. 443.

Comp. leg.—Cal. See Pen. C. 1872, § 165; as amended: Kerr's C. ib.

Cross ref. Incriminating testimony may be required in bribery case: § 8145.

§ 8197. [6529] **Criminal contempts.** Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court and directly tending to interrupt its proceedings or to impair the respect due to its authority.

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury, while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

4. Wilful disobedience of any process or order lawfully issued by any court.

5. Resistance wilfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question.

7. The publication of a false or grossly inaccurate report of the proceedings of any court. [R. S. § 6529.]

Hist. R. S. § 6529, reen R. C. ib., reen. C. L. ib.

Cross ref. Criminal acts punishable as crimes though also punishable as contempts: § 8603.

Comp. leg.—Cal. Same with additional subd.: Pen. C. 1872, § 166; Kerr's C. ib.

N. D. Similar: Pen. C. § 9419.

Power inherent in court: The inherent power of a court of record to punish contempts can not be abridged by the legislature. McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954.

Jurisdiction: Probate courts have jurisdiction of criminal contempts, but the jurisdiction must be exercised in accordance with the provisions of the statute. Where the alleged contempt is not committed in the immediate view and presence of the court or judge, no jurisdiction is acquired until an affidavit has been presented as required by § 7385. Harkness v. Hyde, 31 I. 784, 176 P. 885.

§ **8198.** [6530] **False certificates by officers.** Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor. [R. S. § 6530.]

Hist. R. S. § 6530, reen. R. C. ib., reen. C. L. ib.

Cross ref. False certificate of death by physicians: § 1645. False return of marriage: § 4618.

Comp. leg.—Cal. Same: Pen. C. 1872, § 167; Kerr's C. ib.

N. D. Similar: Pen. C. § 9440.

Cited: Christensen v. Hollingsworth (1898) 6 I. 94, 53 P. 211.

§ **8199.** [6531] **Disclosing indictment before arrest.** Every grand juror, prosecuting attorney, clerk, judge or other officer who, except by issuing or in executing a warrant of arrest, wilfully discloses the fact of a presentment or indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor. [R. S. § 6531.]

Hist. (See Cr. Prac. '64, § 218) R. S. § 6531, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 168; Kerr's C. ib.

N. D. Similar: Pen. C. § 9434.

§ **8200.** [6532] **Disclosing proceedings before grand jury.** Every grand juror who, except when required by a court, wilfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury may have said, or in what manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor. [R. S. § 6532.]

Hist. R. S. § 6532, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 169; Kerr's C. ib.

N. D. Identical: Pen. C. § 9435.

§ **8201.** [6533] **Maliciously procuring warrant.** Every person who, maliciously and without probable cause, procures a search warrant or warrant of arrest to be issued and executed is guilty of a misdemeanor. [R. S. § 6533.]

Hist. R. S. § 6533, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 170; Kerr's C. ib.

N. D. Similar: Pen. C. § 9437.

§ **8202.** [6534] **Omission of public duty.** Every wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor. [R. S. § 6534.]

Hist. R. S. § 6534, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 176; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9432.

§ **8203.** [6535] **Punishment of offenses for which no penalty is fixed.** When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor. [R. S. § 6535.]

Hist. R. S. § 6535, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 177; same as amended: Kerr's C. ib.

ARTICLE 8.

CONSPIRACY.

§ **8204.** [6540] **Criminal conspiracy defined.** If two or more persons conspire:

1. To commit any crime;

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;

3. Falsely to move or maintain any suit, action or proceeding;

4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses; or,

5. To commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice or the due administration of the laws;

They are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1000, or both. [R. S. § 6540.]

Hist. (See Cr. and P. '64, § 110) R. S. § 6540, reen. R. C. ib., reen. C. L. ib.

Cross ref. Evidence necessary in conspiracy: § 8951.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 182; same as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9441.

Cited: Dearing v. Hockersmith (1913) 25 I. 140, 162, 136 P. 994.

Fraudulent sales: Under § 8187 it is a crime for a debtor to sell or dispose of his property with intent to defraud, hinder or delay his creditors, and under this section it is a crime for other parties to conspire with him and to aid and assist him in accomplishing such result. Martin v. Steele (1901) 7 I. 497, 63 P. 1040.

Spiriting away witness: Conspiracy to secure absence of a witness. See S. v. Roe (1911) 19 I. 416, 419-20, 113 P. 461.

§ 8205. [6541] **Same: Regarding mining claims.** In all cases where two or more persons associate themselves together for the purpose of obtaining the possession of any lode, gulch or placer claim, then in the actual possession of another, by force and violence, or by stealth, and proceed to carry out such purpose by making threats against the party or parties in possession, or enter upon such lode or mining claim for the purpose aforesaid, or enter upon or into any lode, gulch, placer claim, quartz mill or other mining property, or, not being upon such property, make any threats, or make use of any language, signs or gestures calculated to intimidate any person or persons at work on said property from continuing to work thereon or therein, or to intimidate others from engaging to work thereon or therein, every such person so offending is guilty of misdemeanor. [R. C. § 6541.]

Hist. (See '85, p. 30, § 3) R. S. § 6541; am. R. C. ib., reen. C. L. ib.

Cited: Pettibone v. U. S. (1893) 148 U. S. 197, 37 L. ed. 419, 13 S. C. R. 542.

ARTICLE 9.

UNLAWFUL EXERCISE OF THE DUTIES OF PEACE OFFICERS.

§ 8206. Restrictions on appointment of peace officers. The governor, the sheriff of any county, any United States marshal or deputy United States marshal, mayor of a city or other person authorized by law to appoint special deputy sheriffs, special constables, marshals, policemen or other peace officers in this state to preserve the public peace and prevent or quell public disturbance, shall not appoint as such special deputy sheriff, special constable, marshal, policeman or other peace officer any person who is not a citizen of the state of Idaho. [C. L. § 6545.]

Hist. '90-91, p. '15, § 1, reen. '99, p. 9, § 1, reen. R. C. § 6545; compiled and reen. C. L. ib.

§ 8207. [6546] **Unlawful exercise of functions or importation of detectives, etc.** Any person who shall in this state unlawfully exercise or attempt to exercise the functions of, or hold himself out to any one as, a deputy sheriff, marshal, policeman, constable or peace officer, or any person, whether acting in his own behalf or as an officer of the law, or as the authorized or unauthorized agent or representative of another,

or of any association, corporation or company, who shall bring or cause to be brought, or aid in bringing into this state any armed or unarmed police force or detective agency or force, or any armed or unarmed body of men for the suppression of domestic violence, shall be guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state prison for not less than two years and not more than five years: *Provided,* That the legislature, or the executive when the legislature can not be convened, may call upon the lawfully constituted authorities of the United States for the protection against invasion and domestic violence, as provided in section 4 of article 4 of the constitution of the United States. ['90-'91, p. 15, § 2.]

Hist. '90-91, p. 15, § 2, reen. '99, p. 9, § 2, reen. R. C. § 6546, reen. C. L. ib.

Cross ref. No armed police force or detective agency, or armed body of men shall be brought into the state for the suppression of domestic violence, except on the application of the legislature, or of the executive when the legislature can not be convened: Const. XIV, 6.

Importing detectives: For an apparent violation of this section, special detectives being brought to Moscow from Washington, see Moore v. Hupp (1909) 17 I. 232, 105 P. 209.

§ 8208. [6547] **Civil liability for importing detectives, etc.** Any person, officer, company, association or corporation who shall knowingly bring, or cause to be brought, or aid in bringing, into this state any armed or unarmed police force, detective agency or force, or armed or unarmed body of men for the suppression of domestic violence, shall be liable in a civil action to any person for any injury to person or property through the action, or as the result of the coming or bringing into the state of such body of men, or any of them, whether acting together or separately in carrying out the purpose for which they were brought or came into the state. ['90-91, p. 15, § 3.]

Hist '90-91, p. 15, § 3, reen. '99, p. 9, § 3, reen. R. C. § 6547, reen. C. L. ib.

CHAPTER 302.

CRIMES AGAINST THE PERSON.

ARTICLE 1.

HOMICIDE.

§ 8209. [6560] **Murder defined.** Murder is the unlawful killing of a human being with malice aforethought. [R. S. § 6560.]

Hist. (See Cr. and P. '64, § 15) R. S. § 6560, reen. R. C. ib., reen. C. L. ib.

Cross ref. Homicide caused by stealing of car parts is murder: § 8514. Homicide caused by placing obstruction on railroad track is murder: § 8525.

Comp. leg.—Cal. Pen. C. 1872, § 187: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9462.

Cited: S. v. Fleming (1910) 17 I. 471, 106 P. 305.

Malice aforethought necessary: The element of malice aforethought required by this section must be found to exist in order to sustain a conviction of murder in the first degree accomplished by the administration of poison. S. v. Phinney (1907) 13 I. 307, 89 P. 634, 12 Ann. Cas. 1079, 12 L. R. A. (N. S.) 935.

Sufficiency of indictments: Indictments for murder are set out and held sufficient in the following cases: S. v. Walters (1869) 1 I. 271; S. v. Perry (1894) 4 I. 224, 38 P. 655; S. v. Ellington (1895) 4 I. 529, 43 P. 60; S. v. Shuff (1903) 9 I. 115, 72 P. 664; S. v. Sly (1905) 11 I. 110, 80 P. 1125; S. v. Squires (1908) 15 I. 545, 98 P. 413; S. v. Gruber (1911) 19 I. 692, 115 P. 1; Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

Instructions: The giving of additional instructions which in no way modify the definitions contained in this and following sections is not error. S. v. Willis (1913) 24 I. 252, 132 P. 962.

§ 8210. [6561] **Express and implied malice.** Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the cir-

cumstances attending the killing show an abandoned and malignant heart. [R. S. § 6561.]

Hist. (See Cr. and P. '64, §§ 15, 16, 17) R. S. § 6561, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 188; Kerr's C. ib.

Cited: S. v. Fleming (1910) 17 I. 471, 493, 106 P. 305; S. v. Gruber (1911) 19 I. 692, 115 P. 1.

Instructions: Implied malice: An instruction that malice is to be implied when the circumstances show an abandoned and malignant heart but failing to state "or when no considerable provocation appears" is erroneous. P. v. McDonald (1881) 2 I. 10, 1 P. 345.

The failure of the court to follow the language of this section so as to include the word "all" before the words "circumstances of the killing show an abandoned and malignant heart" is not a reversible error. Ib.

An instruction that if the jury believe from the evidence beyond a reasonable doubt that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder, is proper. P. v. Pierson (1884) 2 I. 76, 3 P. 688.

An instruction "that if, without such provocation as is apparently sufficient to excite irresistible passion, a person shoots another, and by such shooting occasions death, although he had no previous malice or ill will toward the person shot, yet he is presumed to have had such malice at the time of the shooting, and the person shooting will be guilty of murder," will sustain a verdict of murder in the second degree. T. v. Evans (1888) 2 I. 425, 17 P. 139.

Malice is implied for any deliberate and cruel act against another, however sudden, which shows an abandoned and malignant heart. S. v. Willis (1913) 24 I. 252, 132 P. 962.

Threats made by accused are inadmissible when they were made generally and not directed against the deceased. S. v. Buster (1915) 28 I. 110, 152 P. 196.

§ 8211. [6562] Degrees of murder. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary or mayhem, is murder of the first degree. All other kinds of murder are of the second degree. [R. S. § 6562.]

Hist. (See Cr. and P. '64, § 17) R. S. § 6562, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jury to find degree of crime: § 8996. Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813.

Comp. leg.—Cal. Same: Pen. C. 1872, § 189; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9469.

Cited: S. v. Fleming (1910) 17 I. 471, 493, 106 P. 305; Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813; S. v. Willis (1913) 24 I. 252, 132 P. 962.

Conviction of second degree murder: S. v. Marren (1910) 17 I. 766, 107 P. 993.

Common law undistinguished: At common law all murder was of the first degree and no such distinction was recognized as that incorporated in this section, designating degrees. P. v. O'Callaghan (1886) 2 I. 156, 9 P. 414; S. v. Phinney (1907) 13 I. 307, 89 P. 634, 12 Ann. Cas. 1079, 12 L. R. A. (N. S.) 935.

Indictment: The failure of an indictment to allege that the killing was deliberate and premeditated is not fatal where it alleges the same to have been done with malice aforethought. P. v. Ah Choy (1870) 1 I. 317.

A premeditated killing must be charged in order to sustain a conviction of murder in the first degree. P. v. O'Callaghan, supra, overruling P. v. Ah Choy, above.

It is not requisite or essential that the words defining the degrees of murder should be set forth in the indictment to constitute a good indictment for murder in the first degree. S. v. Ellington (1895) 4 I. 529, 43 P. 60, overruling P. v. O'Callaghan, above.

An indictment charging a wounding done with felonious intent, in consequence of which death resulted, charges murder without charging an intent to kill. T. v. Evans (1888) 2 I. 425, 17 P. 139.

Instructions: On a trial for murder it is the duty of the court to give an instruction to the jury, if requested, that they can find the defendant guilty of a less grade of offense than murder in the first degree, if warranted by the evidence; and a refusal to give such instruction is error. P. v. Dunn (1866) 1 I. 74.

In a prosecution for murder this instruction was given: "It is claimed that this is murder in the first degree, as being unlawful, malicious, wilful, deliberate and premeditated. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other or how quickly they may be followed by the act of killing." Held, that the omission of the word "malice" in the last sentence did not vitiate the instruction. S. v. Shuff (1903) 9 I. 115, 72 P. 664.

Abortion: A criminal operation resulting in death, an abortion not being necessary to save the life of the woman, is murder in the second degree. An instruc-

tion that such act constitutes murder in the second degree or manslaughter is erroneous. S. v. Alcorn (1901) 7 I. 599, 64 P. 1014, 97 A. S. R. 252.

Deliberation and premeditation: To constitute murder in the first degree there must be deliberation and premeditation. (Dis. op.) P. v. Pierson (1884) 2 I. 76, 3 P. 688.

Attempt to rob: A killing in attempting to commit robbery is murder in the first degree. P. v. Mooney (1882) 2 I. 17, 2 P. 876.

Robbery in lieu of premeditation: Proof that the murder was committed in the perpetration of, or attempt to perpetrate, robbery brings the case within the definition of murder in the first degree, and such proof supplies the place of proof of deliberation and premeditation. S. v. Gruber (1911) 19 I. 692, 115 P. 1.

Poisoning: Construing this section with § 8209, murder committed by means of poison is not murder in the first degree unless the element of malice aforethought is present; the mere fact that the killing has been accomplished by means of poison does not of itself establish "malice aforethought." S. v. Phinney, supra.

§ 8212. Punishment for murder. Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than 10 years and the imprisonment may extend to life. ['11, c. 68, § 1, p. 190.]

Hist. (See Cr. and P. '64, § 17) R. S. § 6563, reen. R. C. ib.; am. '11, c. 68, § 1, p. 190, reen. C. L. § 6563.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 190; as amended, nearly identical: Kerr's C. ib.

N. D. Similar: Pen. C. §§ 9472, 9476.

§ 8213. [6564] **Petit treason abolished.** The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this article. [R. S. § 6564.]

Hist. R. S. § 6564, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 191; Kerr's C. ib.

N. D. Identical: Pen. C. § 9460.

§ 8214. [6565] **Manslaughter defined.** Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.
2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. [R. S. § 6565.]

Hist. (See Cr. and P. '64, § 18) R. S. § 6565, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 192; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9470. See also Pen. C. § 9488.

Cited: S. v. Phinney (1907) 13 I. 307, 89 P. 634, 12 Ann. Cas. 1079, 12 L. R. A. (N. S.) 935; Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813; (In brief of counsel) S. v. Rogers (1917) 30 I. 259, 163 P. 912.

Information held sufficient: S. v. Mickey (1915) 27 I. 626, 150 P. 39.

Insufficient information: Information insufficient because of its failure to state the means by which the death was accomplished (in this case by starving). S. v. Smith (1914) 25 I. 541, 138 P. 1107.

Erroneous instruction: It is error to instruct the jury that one who kills another while resisting an attempt to commit a serious injury on his person is guilty of manslaughter, such killing being justifiable under § 8219. S. v. Crea (1904) 10 I. 88, 76 P. 1013.

Means of death: The statute does not circumscribe the means or agency causing the death. A prosecution for manslaughter may be had where the death of a human being has been caused or accomplished through fright, fear, terror or nervous shock produced by the accused while in the commission of an unlawful act, even though the accused made no hostile demonstration and directed no overt act at the person of the deceased. In some instances force or violence may be applied to the mind or nervous system as effectually as to the body. Re Heigho (1910) 18 I. 566, 110 P. 1029, 32 L. R. A. (N. S.) 877, Ann. Cas. 1912A 138.

Abortion: A criminal operation resulting in death, an abortion not being necessary to save the woman's life, is murder in the second degree. An instruction that such act is murder in the second degree or manslaughter is erroneous. S. v. Alcorn (1901) 7 I. 599, 64 P. 1014, 97 A. S. R. 252.

§ 8215. [6566] **Punishment for manslaughter.** Manslaughter is punishable by imprisonment in the state prison not exceeding 10 years. [R. S. § 6566.]

Hist. (See Cr. and P. '64, § 22) R. S. § 6566, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 193; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9500.

Indictment: Allegation of death: Where an indictment charges that the defendant did "kill and murder" the deceased, it is good although it does not specifically allege that the person killed died within a year and a day after the firing of the shot which killed him. S. v. Sly (1905) 11 I. 110, 80 P. 1125.

§ 8216. [6567] **Death must occur when.** To make the killing either murder or manslaughter it is requisite that the party die within a year and a day after the stroke received or the cause of death administered; in the computation of which the whole of the day on which the act was done, shall be reckoned first. [R. S. § 6567.]

Hist. (See Cr. and P. '64, § 23) R. S. § 6567, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 194; Kerr's C. ib.

§ 8217. [6568] **Excusable homicide.** Homicide is excusable in the following cases:

1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat when no undue advantage is taken nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner. [R. S. § 6568.]

Hist. (See Cr. and P. '64, § 30) R. S. § 6568, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 195; Kerr's C. ib.

N. D. Similar: Pen. C. § 9501.

Cited: S. v. Willis (1913) 24 I. 252, 132 P. 962.

§ 8218. [6569] **Justifiable homicide by officer.** Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either:

1. In obedience to any judgment of a competent court; or

2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest. [R. S. § 6569.]

Hist. (See Cr. and P. '64, §§ 28, 29) R. S. § 6569, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 196; Kerr's C. ib.

N. D. Similar: Pen. C. § 9502.

Cited: S. v. Willis (1913) 24 I. 252, 132 P. 962.

§ 8219. [6570] **Same: By other person.** Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2. When committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit

a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

4. When necesarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace. [R. S. § 6570.]

Hist. (See Cr. and P. '64, § 25) R. S. § 6570, reen. R. C. ib., reen. C. L. ib.

Cross ref. Burden of proof of mitigating circumstances, justification or excuse is on the defendant: § 8952.

Comp. leg.—Cal. Same: Pen. C. 1872, § 197; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9503.

Cited: (Distinction between manslaughter and justifiable homicide) S. v. Crea (1904) 10 I. 88, 76 P. 1013. S. v. Fleming (1910) 17 I. 471, 106 P. 305; S. v. Willis (1913) 24 I. 252, 132 P. 962.

Applied: The law of self defense only requires that a person must act as a reasonable and prudent man would be likely to act under similar conditions and circumstances. S. v. McGreevey (1909) 17 I. 453, 467, 105 P. 1047.

Defense of wrongdoer: A private citizen can not interfere between two persons, both of whom are in the wrong, and slay one to save the other. T. v. Evans (1888) 2 I. 425, 17 P. 139.

Evidence: Under a plea of self defense character evidence for the defendant is admissible bearing on the question of his honest and conscientious belief that his acts were necessary to protect his life or person. S. v. McGreevey, supra.

Protection of property: A person has at least as much and possibly more protection in law in defending his property as he does in the protection of his person. (Dis. op.) P. v. Pierson (1884) 2 I. 76, 3 P. 688.

A mere civil trespass on land, unaccompanied by any act amounting to a crime, or any intention to commit a crime, will not justify the shooting of the trespasser. S. v. Dixon (1901) 7 I. 518, 63 P. 801.

Instructions approved: An instruction on self defense, that the conditions under which it may be asserted are "that the party himself was not the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before he struck the blow or fired the fatal shot; second, that the striking or shooting was necessary to prevent the infliction upon himself of a great bodily injury by the party stricken or shot," correctly states the law. S. v. Lyons (1901) 7 I. 530, 65 P. 236.

In a prosecution for murder in which the defendant pleaded self defense it was not error to instruct the jury that they could consider the fact of defendant's flight after the killing in determining the probabilities of his guilt or innocence. Ib.

The following instruction substantially states the correct rule of law and should ordinarily be given in a murder case where the plea is self defense: "The court instructs the jury as a matter of law that a person need not be in actual, imminent peril of his life or of great bodily harm before he may assault his assailant; it is sufficient if in good faith he has a good and reasonable belief from the facts as they appear to him at the time that he is in such imminent peril. S. v. Fondren (1913) 24 I. 663, 135 P. 265.

Instructions not approved: S. v. Schieler (1894) 4 I. 120, 37 P. 272; S. v. McGreevey, supra; S. v. Fleming, supra.

§ 8220. [6571] **Fear not sufficient justification.** A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone. [R. S. § 6571.]

Hist. (See Cr. and P. '64, § 26) R. S. § 6571, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 198; Kerr's C. ib.

Cited: S. v. Fleming (1910) 17 I. 471, 106 P. 305.

Danger of injury: An instruction that there must be danger of personal injury or fear of personal injury to that extent that the only means of avoiding loss of life or great personal injury is to kill the assailant, is proper. P. v. Bernard (1886) 2 I. 193, 10 P. 30.

§ 8221. [6572] **Discharge of defendant.** The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged. [R. S. § 6572.]

Hist. (See Cr. and P. '64, § 32) R. S. § 6572, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 199; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9504.

ARTICLE 2.

MAYHEM.

§ 8222. [6577] **Mayhem defined.** Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts out or disables the tongue, puts out an eye, slits the nose, ear or lip, is guilty of mayhem. [R. S. § 6577.]

Hist. (See Cr. and P. '64, § 43) R. S. § 6577, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 203; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9505.

§ 8223. [6578] **Punishment.** Mayhem is punishable by imprisonment in the state prison not exceeding 14 years. [R. S. § 6578.]

Hist. (See Cr. and P. '64, § 43) R. S. § 6578, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 204; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9513.

ARTICLE 3.

KIDNAPPING.

§ 8224. Kidnapping defined. Every person who wilfully:

1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of this state, or in any way held to service or kept or detained against his will; or,

2. Leads, takes, entices away or detains a child under the age of 16 years, with intent to keep or conceal it from its parent, guardian or other person having lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article upon the person of the child; or,

3. Abducts, entices or by force or fraud unlawfully takes or carries away another at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state, is guilty of kidnapping. ['19, c. 166, § 1, p. 534.]

Hist. (See Cr. and P. '64, § 51) R. S. § 6584, reen. R. C. ib., reen. C. L. ib.; am. '19, c. 166, § 1, p. 534.

Comp. leg.—Cal. Analogous: Pen. C. 1872, § 207; Kerr's C. ib.

N. D. Same except penalty: Pen. C. § 9514.

§ 8225. Punishment. Kidnapping is punishable by imprisonment in the state prison not less than one nor more than 25 years. ['19, c. 166, § 2, p. 534.]

Hist. (See Cr. and P. '64, § 51) R. S. § 6585, reen. R. C. ib., reen. C. L. ib.; am. '19, c. 166, § 2, p. 534.

Comp. leg.—Cal. Same except 10 for 25: Pen. C. 1872, § 208; Kerr's C. ib.

ARTICLE 4.

ROBBERY.

§ 8226. [6590] **Robbery defined.** Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. [R. S. § 6590.]

Hist. (See Cr. and P. '64, § 60) R. S. § 6590, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 211; Kerr's C. ib.

N. D. Similar: Pen. C. § 9521.

Indictment or information: In an indictment for robbery the words "felonious" and "rob" carry with them the intent, and

are sufficient. P. v. Butler (1869) 1 I. 231.

An information for robbery is sufficient if it charges the offense in the words of this section. An information for robbery is sufficient, though not in the exact language of the statute, if the words used convey the same idea. S. v. Brill (1912) 21 I. 269, 121 P. 79.

Instructions: An instruction that if a man stealthily filch the pocket of another the force necessary to remove the property is all the force that the statute requires, is erroneous as it ignores all distinction between robbery and larceny from the person. T. v. McKern (1891) 3 I. 15, 26 P. 123.

An instruction to the jury "that if they believe from the evidence that the defendants feloniously took possession of the United States mail, or any part thereof, by force or intimidation of or from a carrier of the mail, then the offense of robbery is complete," is not erroneous. U. S. v. Mays (1880) 1 I. 763.

Evidence of ownership: On a prosecution for robbery the fact that the money taken was in the possession of the prosecuting witness was sufficient evidence of ownership to sustain a conviction. S. v. Brill, supra.

Larceny: Although robbery includes larceny, defendant charged with robbery can not be convicted of larceny unless information is also sufficient under § 8426. (Per Ailshie, J.) S. v. Brill, supra.

§ 8227. [6591] **Fear which constitutes robbery.** The fear which constitutes robbery may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,

2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery. [R. S. § 6591.]

Hist. R. S. § 6591, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 212; Kerr's C. ib.

N. D. Similar: Pen. C. § 9524.

§ 8228. [6592] **Punishment.** Robbery is punishable by imprisonment in the state prison not less than five years, and the imprisonment may be extended to life. [R. S. § 6592.]

Hist. (See Cr. and P. '64, § 60) R. S. § 6592. reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Same except "one" for "five" years, and last clause omitted: Pen. C. 1872, § 213: Kerr's C. ib.

ARTICLE 5.

ATTEMPTS TO KILL.

§ 8229. [6597] **Administering poison.** Every person who, with intent to kill, administers or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than 10 years, and the imprisonment may be extended to life. [R. S. § 6597.]

Hist. (See Cr. and P. '64, § 42) R. S. § 6597, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 216; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9518.

§ 8230. [6598] **Assault with intent to murder.** Every person who assaults another with intent to commit murder, is punishable by imprisonment in the state prison not less than one nor more than 14 years. [R. S. § 6598.]

Hist. (See Cr. and P. '64. § 47) R. S. § 6598, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 217; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9519.

Cited: Ex parte Cox (1893) 3 I. 530, 32 P. 197. Re Chase (1910) 18 I. 561, 110 P. 1036.

Conviction sustained: S. v. Grigg (1914) 25 I. 405, 137 P. 371.

Information held sufficient: S. v. Dixon (1901) 7 I. 518, 63 P. 801.

ARTICLE 6.

FELONIOUS ASSAULTS AND AIMING FIREARMS.

§ 8231. [6703] **Assault with intent to commit certain felonies.** Every person who assaults another with intent to commit rape, the in-

famous crime against nature, mayhem, robbery, or grand larceny, is punishable by imprisonment in the state prison not less than one nor more than 14 years. [R. S. § 6703.]

Hist. (See Cr. and P. '64, § 47) R. S. § 6703, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 220; Kerr's C. ib.

Information held sufficient: S. v. Beard (1899) 6 I. 614, 57 P. 867. Same: Assault with intent to commit rape. S. v. Neil (1907) 13 I. 539, 90 P. 860.

§ **8232.** [6704] **Same: Other felonies.** Every person who is guilty of an assault with intent to commit any felony, except an assault with intent to commit murder, the punishment for which assault is not prescribed by the preceding section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding $500, or by both. [R. S. § 6704.]

Hist. R. S. § 6704, reen. R. C. ib., reen. C. L. ib.

Cross ref. Simple assault: § 8247. Assault with chemicals: § 8251. Assault with intent to murder: § 8230. Assault with deadly weapon: § 8252.

Comp. leg.—Cal. Same: Pen. C. 1872, § 221; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9532.

§ **8233.** [6705] **Administering drugs to aid in felony.** Every person guilty of administering to another any chloroform, ether, laudanum or other narcotic, anaesthetic or intoxicating agent, with intent thereby to enable or assist himself or any other person to commit a felony, is guilty of felony. [R. S. § 6705.]

Hist. R. S. § 6705, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 222; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9533.

§ **8234.** [6706] **Assaults and intimidation.** If any person assaults and beats another with a cowhide, stick or whip, having at the time in his possession, a pistol or other deadly weapon, with intent to intimidate and prevent the person assaulted from defending himself, such person is punishable by imprisonment in the state prison not less than one nor more than four years. [R. S. § 6706.]

Hist. (See Cr. and P. '64, § 41) R. S. § 6706, reen. R. C. ib., reen. C. L. ib.

§ **8235.** [6707] **Aiming firearms at others.** Any person who shall intentionally, without malice, point or aim any firearm at or toward any other person shall be guilty of a misdemeanor and shall be subject to a fine of not more than $50 and not less than $5. ['07, p. 29, § 1.]

Hist. '07, p. 29, § 1, reen. R. C. § 6707, reen. C. L. ib.

§ **8236.** [6708] **Same: Discharge of arms.** Any person who shall discharge, without injury to any person, any firearm, while intentionally, without malice, aimed at or toward any person, shall be guilty of a misdemeanor, and shall be liable to a fine of not less than $100, or imprisonment in the county jail not to exceed six months, or both, at the discretion of the court. ['07, p. 29, § 2.]

Hist. '07, p. 29, § 2, reen. R. C. § 6708, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 9825.

§ **8237.** [6709] **Same: Resulting injury.** Any person who shall maim or injure any other person by the discharge of any firearm pointed or aimed, intentionally but without malice, at any such person, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than $50, or imprisonment in the county jail for a period of not more than one year; and if death ensue from such wounding or maiming,

such person so offending shall be deemed guilty of the crime of manslaughter. ['07, p. 29, § 3.]

Hist. '07, p. 29, § 3, reen. R. C. § 6709, reen. C. L. ib.

§ 8238. [6710] **Same: Civil liability.** Any party maimed or wounded by the discharge of any firearm aforesaid, or the heirs or representatives of any person who may be killed by such discharge, may have an action against the party offending, for damages, which shall be found by a jury, and such damages, when found, may in the discretion of the court before which such action is brought, be doubled. ['07, p. 29, § 4.]

Hist. '07, p. 29, § 4, reen. R. C. § 6710, reen. C. L. ib.

ARTICLE 7.

DUELS AND CHALLENGES.

§ 8239. [6711] **Duel defined.** A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel. [R. S. § 6711.]

Hist. (See Cr. and P. '64, § 35) R. S. § 6711, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9534.

Comp. leg.—Cal. Same: Pen. C. 1872, § 225; Kerr's C. ib.

§ 8240. [6712] **Punishment if death ensues.** Every person guilty of fighting any duel, from which death ensues within a year and a day, is punishable by imprisonment in the state prison not less than one nor more than seven years. [R. S. § 6712.]

Hist. (See Cr. and P. '64, § 35) R. S. § 6712, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9482.

Comp. leg.—Cal. Same: Pen. C. 1872, § 226; Kerr's C. ib.

§ 8241. [6713] **Same: If no death or wound ensue.** Every person who fights a duel, although no death or wound ensue, or who sends or accepts a challenge to fight a duel, is punishable by imprisonment in the state prison or in a county jail not exceeding one year. [R. S. § 6713.]

Hist. (See Cr. and P. '64, § 36) R. S. § 6713, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 227; same as amended except "although no death or wound ensue" omitted: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9535.

§ 8242. [6714] **Taunts for not fighting duel.** Every person who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written, or printed, to or concerning another, for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor. [R. S. § 6714.]

Hist. (See Cr. and P. '64, § 38) R. S. § 6714, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 9541.

Comp. leg.—Cal. Same: Pen. C. 1872, § 229; Kerr's C. ib.

§ 8243. [6715] **Failure of officers to prevent duels.** Every judge, justice of the peace, sheriff or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any persons to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by a fine not exceeding $1,000. [R. S. § 6715.]

Hist. (See Cr. and P. '64, § 125) R. S. § 6715, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 230; Kerr's C. ib.

§ 8244. [6716] **Witness not excused from testifying.** No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of either of the provisions of this chapter, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding. [R. S. § 6716.]

Hist. (See Cr. and P. '64, § 37) R. S. § 6716, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 232; Kerr's C. ib.

N. D. Identical: Pen. C. § 9544.

ARTICLE 8.

FALSE IMPRISONMENT.

§ 8245. [6721] **False imprisonment defined.** False imprisonment is the unlawful violation of the personal liberty of another. [R. S. § 6721.]

Hist. (See Cr. and P. '64, § 49) R. S. § 6721, reen. R. C. ib., reen. C. L. ib.

Cross ref. Refusal to obey writ of habeas corpus is misdemeanor: § 9306. Restraint of person discharged on writ a misdemeanor: § 9307. Concealment of person entitled to writ is misdemeanor: § 8375.

Comp. leg.—Cal. Same: Pen. C. 1872, § 236; Kerr's C. ib.

Cited: Ludwig v. Ellis (1912) 22 I. 475, 126 P. 769.

Want of jurisdiction: Where the magistrate who issues a warrant of arrest has no jurisdiction of the person or subject matter, he is liable in an action in damages for false imprisonment. Harkness v. Hyde, 31 I. 784, 176 P. 885.

§ 8246. [6722] **Punishment.** False imprisonment is punishable by fine not exceeding $5,000, or by imprisonment in the county jail not more than one year, or both. [R. S. § 6722.]

Hist. (See Cr. and P. '64, § 49) R. S. § 6722, reen. R. C. ib., reen. C. L. ib.

ARTICLE 9.

ASSAULT AND BATTERY.

§ 8247. [6727] **Assault defined.** An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. [R. S. § 6727.]

Hist. (See Cr. and P. '64, § 46) R. S. § 6727, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 240; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9545. See also Pen. C. § 9547.

Cited: Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813.

Instruction approved: The following instruction is correct: "A mere threat or menace to do violence, without any overt attempt to do violence is not an assault; an apparent effort to do violence, without the existence of a present ability at the time to do the violence apparently attempted, would not be an assault; and a gun is not a deadly weapon, within the meaning of this statute, unless it is loaded; consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, within a distance at which the gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant unlawfully attempted to commit such injury by means of such gun." S. v. Yturaspe (1912) 22 I. 360, 125 P. 802.

Information defective: Information held defective as not charging the statutory elements. S. v. Crawford, 32 I. —, 179 P. 511 (dis. op. by Budge, J.)

§ 8248. [6728] **Punishment.** An assault is punishable by fine not exceeding $100, or by imprisonment in the county jail not exceeding three months. [R. S. § 6728.]

Hist. (See Cr. and P. '64, § 46) R. S. § 6728, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 241; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9548.

§ 8249. [6729] **Battery defined.** A battery is any wilful and unlawful use of force or violence upon the person of another. [R. S. § 6729.]

Hist. (See Cr. and P. '64, § 48) R. S. § 6729, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 242; Kerr's C. ib.

N. D. Identical: Pen. C. § 9546.

Cited: S. v. Crawford, 32 I. —, 179 P. 511.

§ 8250. [6730] **Same: Punishment.** A battery is punishable by fine not exceeding $300, or by imprisonment in the county jail not exceeding six months, or both. [R. S. § 6730.]

Hist. (See Cr. and P. '64, § 48) R. S. § 6730, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "one thousand" for "three hundred," "one year" for "six months," and "or both" omitted: Pen. C. 1872, § 243; see as amended: Kerr's C. ib.

§ 8251. [6731] **Assault with chemical.** Every person who wilfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one or more than 14 years. [R. S. § 6731.]

Hist. R. S. § 6731, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 244; Kerr's C. ib.

Cited: (Erroneously for R. C. § 6732 [§ 8252)] Re McLeod (1913) 23 I. 257, 267, 128 P. 1106, 1109.

§ 8252. [6732] **Assault with deadly weapon.** Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the state prison not exceeding two years, or by fine not exceeding $5,000, or by both. [R. S. § 6732.]

Hist. (See Cr. and P. '64, § 47) R. S. § 6732, reen. R. C. ib., reen. C. L. ib.

Cross ref. Aiming firearms: §§ 8235-6. Exhibition of deadly weapons: § 8375.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 245; same as amended except "or in a county jail" inserted after "prison": Kerr's C. ib.

N. D. Analogous: Pen. C. § 9531. See also Pen. C. § 9549.

Cited: T. v. Guthrie (1888) 2 I. 432, 17 P. 39; Re Chase (1910) 18 I. 561, 566, 110 P. 1036; Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813.

Maximum punishment: Where the verdict finds the defendant guilty of assault with a deadly weapon, the maximum punishment which may be imposed is two years, and the court is not authorized to impose a greater penalty on the theory that the defendant is guilty of assault with intent to kill, the punishment for which is prescribed by § 8230. Ex parte Cox (1893) 3 I. 530, 32 P. 197, 95 A. S. R. 29.

Information defective: Held that the charging part of the information does not mention the elements of an assault found in the statutory definition, but does charge battery. S. v. Crawford, 32 I.—, 179, P. 511 (dis. op. by Budge J.)

ARTICLE 10.

LIBEL.

§ 8253. [6737] **Libel defined.** A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt or ridicule. [R. S. § 6737.]

Hist. (See Cr. and P. '64, § 126) R. S. § 6737, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 248: Kerr's C. ib.

N. D. Similar: Pen. C. § 9550.

Information held sufficient: An information which sets forth the libelous matter in haec verba, prefacing with the words "that is to say," is good upon demurrer. Bonney v. S. (1892) 3 I. 288, 29 P. 185.

Libelous matter: Under this section it is not necessary that the alleged libelous matter charge the person named with a crime. Coupling a public official's name with the word "graft" is libelous per se. S. v. Sheridan (1908) 14 I. 222, 93 P. 656, 15 L. R. A. (N. S.) 497.

In a libel case words will be construed

according to their plain, popular, natural and ordinary sense and as they would naturally be understood by persons hearing or reading them, unless it affirmatively appears that they were used and understood in some other sense. Ib.

A written publication charging one with wilful falsehood in the matter of a serious business transaction must necessarily expose him to contempt and lower him in the common estimation of citizens and is therefore actionable per se. Dwyer v. Libert (1917) 30 I. 576, 167 P. 661.

Privilege: The ends of justice and the public good can be best served by allowing litigants to freely plead any pertinent or material matter, in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter that is neither pertinent nor material to the subject under inquiry. Carpenter v. Grimes Pass. P. Min. Co. (1911) 19 I. 384, 114 P. 42.

Complaint against public officer filed with the body having right of his discharge is conditionally privileged upon good faith and in the absence of malice. Dwyer v. Libert, supra.

§ 8254. [6738] **Punishment.** Every person who wilfully, and with a malicious intent to injure another, publishes, or procures to be published, any libel, is punishable by fine not exceeding $5000, or imprisonment in the county jail not exceeding six months. [R. S. § 6738.]

Hist (See Cr. and P. '64, § 126) R. S. § 6738, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 249: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9551.

§ 8255. [6739] **Malice presumed.** An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown. [R. S. § 6739.]

Hist. R. S. § 6739, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 250: Kerr's C. ib.

Privilege in judicial procedure: Whatever a litigant may properly plead he may plead with or without malice, and in such case the intent with which he pleaded the same can not be inquired into or become an issue in an action for libel. Carpenter v. Grimes Pass M. Co. (1911) 19 I. 384, 114 P. 42.

§ 8256. [6740] **Truth may be proved.** In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact. [R. S. § 6740.]

Hist. (See Cr. and P. '64, § 126) R. S. § 6740, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 251: Kerr's C. ib.

N. D. Similar: Pen. C. § 9552.

Burden of proof: Where an article is libelous per se, the proof of the publication makes a prima facie case. The prosecution is not required to prove the untruth of the article or that the same was published with bad faith, the truth or good faith of the publication being matter of defense. S. v. Sheridan (1908) 14 I. 222, 93 P. 656, 15 L. R. A. (N. S.) 497.

§ 8257. [6741] **Sufficiency of publication.** To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself. [R. S. § 6741.]

Hist. R. S. § 6741, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 252: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9554.

§ 8258. [6742] **Liability of authors, editors and proprietors.** Each author, editor and proprietor of any book, newspaper or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial. [R. S. § 6742.]

Hist. R. S. § 6742, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 253: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9555.

§ 8259. [6743] **Report of public proceeding.** No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication. [R. S. § 6743.]

Hist. R. S. § 6743, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 254: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9556.

Cited: Carpenter v. Grimes Pass. P. M. Co. (1911) 19 I. 384, 114 P. 42.

Opinion not privileged: An article which gives the opinion of a reporter as to proceedings of a judicial, legislative or other public official body, is not privileged under this section. S. v. Sheridan (1908) 14 I. 222, 93 P. 656, 15 L. R. A. (N. S.) 497.

§ 8260. [6744] **Limitation on privilege.** Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected. [R. S. § 6744.]

Hist. R. S. § 6744, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 255: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9557. See also: Pen. C. § 9558.

§ 8261. [6745] **Threats to publish libel.** Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort any money or other valuable consideration from any person, is guilty of a misdemeanor. [R. S. § 6745.]

Hist. R. S. § 6745, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 257: Kerr's C. ib.

N. D. Similar: Pen. C. § 9559.

CHAPTER 303.

CRIMES AGAINST THE PERSON AND AGAINST THE PUBLIC DECENCY AND GOOD MORALS.

Cross ref. Other provisions which might be classified under this chapter are:

Liquor prohibition: Offenses against the prohibition law are: Drinking in public a misdemeanor: § 2622. Maintaining a liquor nuisance a misdemeanor: § 2631. Violation of an injunction abating liquor nuisance a misdemeanor: § 2636. Refusal of witness to testify at inquisition a misdemeanor: § 2638. Advertising intoxicating liquor: § 2649. Violation of other provisions of law a misdemeanor: § 2624. Second violation a felony: § 2643. Acceptance of bribes by officers charged with enforcing prohibition law a felony: § 2643. Furnishing liquor to Indian is a misdemeanor: § 8355. Common drunkards are vagrants: § 8587.

Narcotic traffic: Unlawful traffic in narcotics a felony: § 2186. Procuring narcotics unlawfully is a misdemeanor: § 2187. Physicians and other licensed professionals who furnish narcotics unlawfully are subject to fine: § 2188.

Offenses against children: Offenses in relation to the treatment of children are: Employing or permitting the employment of child in violation of child labor law is a misdemeanor: § 1028. Falsely swearing to child's age is perjury: Ib. Employing or permitting the employment of a child under 16 years in theatrical performance a misdemeanor: § 1029. Sending minor to an immoral place or employing minor therein a misdemeanor: § 1030. Causing or contributing to juvenile delinquency a misdemeanor: § 1017. Disposing of cigarettes to minors a misdemeanor: §§ 8362-3.

Violation of marriage regulations: Officer failing to perform duties imposed upon him by marriage registration law is guilty of a misdemeanor: § 1654. Officer solemnizing marriage and neglecting to make return thereof is guilty of a misdemeanor: § 4610. Recorder issuing a license to parties not competent to marry is guilty of a misdemeanor: § 4611. Officer solemnizing marriages between unlicensed or incompetent parties is guilty of a misdemeanor: § 4614. Officer making false return of marriage is guilty of a misdemeanor: § 4618. A person who falsely personates another in marriage is guilty of a felony: § 8469. A person not authorized who pretends to perform marriage ceremony is guilty of a misdemeanor: § 8470.

ARTICLE 1.

RAPE, ABDUCTION AND SEDUCTION.

§ 8262. [6765] **Rape defined.** Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

1. Where the female is under the age of 18 years.
2. Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.
3. Where she resists, but her resistance is overcome by force or violence.
4. Where she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating narcotic, or anaesthetic substance administered by or with the privity of the accused.
5. Where she is at the time unconscious of the nature of the act, and this is known to the accused.
6. Where she submits under the belief that the person committing the act is her husband, and the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief. ['95, p. 19, § 1.]

Hist. R. S. § 6795; am. '95, p. 19, § 1, reen. '99, p. 167, § 1, reen. R. C. § 6765, reen. C. L. ib.

Comp. leg.—Cal. Same except "ten" for "eighteen," first subd.: Pen. C. 1872, § 261; "sixteen" for "ten" as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9563.

Constitutionality: The amendment of 1895 was constitutionally passed. S. v. McGraw (1899) 6 I. 635, 59 P. 178.

Cited: S. v. Irwin (1903) 9 I. 35, 71 P. 608, 60 L. R. A. 716; S. v. Simes (1906) 12 I. 310, 85 P. 914.

Force must be shown: There is no rape unless it is shown that the acts complained of were committed by force or violence and the state must prove such force or violence; it is error for the court to charge that, the acts being committed, the burden is on the defendant to prove the absence of force or violence. S. v. Fowler (1907) 13 I. 317, 89 P. 757.

Unchastity immaterial: It is as much a crime to have sexual intercourse with an unchaste female under the age of consent as with a chaste one. S. v. Anthony (1899) 6 I. 383, 55 P. 884. S. v. Hammock (1910) 18 I. 424, 110 P. 169; S. v. Henderson (1911) 19 I. 524, 114 P. 30.

Corroboration: Conviction for rape may be had upon the uncorroborated evidence of the prosecutrix, but when the evidence of such prosecutrix is of a contradictory nature or her chastity or her reputation for truthfulness is impeached, her testimony must be corroborated or the judgment will be set aside. S. v. Anderson (1899) 6 I. 706, 59 P. 180; S. v. Trego (1914) 25 I. 625, 138 P. 1124.

Assault with intent to rape: Informations held sufficient: S. v. Beard (1899) 6 I. 614, 57 P. 867. S. v. Neil (1907) 13 I. 539, 90 P. 860.

In a prosecution for assault with intent to commit rape it is essential that the state prove every fact necessary to constitute rape, except penetration. S. v. Neil, supra.

Voluntary desistance by defendant is complete defense. S. v. Johnson (1914) 26 I. 609, 144 P. 784.

§ 8263. [6766] **Proof of physical ability.** No conviction for rape can be had against one who was under the age of 14 years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt. [R. S. §6766.]

Hist. R. S. § 6766, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 262: Kerr's C. ib.

N. D. Identical: Pen. C. § 9564.

§ 8264. [6767] **Penetration.** The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime. [R. S. § 6767.]

Hist. (See Cr. Prac. '64, § 363) R. S. § 6767, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 263: Kerr's C. ib.

N. D. Identical: Pen. C. § 9565.

Cited: (In brief of counsel) S. v. Suttles (1907) 13 I. 88.

§ 8265. [6768] **Punishment.** Rape is punishable by imprisonment in the state prison not less than five years, and the imprisonment may be extended to life. [R. S. § 6768.]

Hist. (See Cr. and P. '64, § 44) R. S. § 6768, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 264; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9568.

Cited: Re Chase (1910) 18 I. 561, 110 P. 1036. Re Setters (1913) 23 I. 270, 128 P. 1111.

§ 8266. [6769] **Abduction for marriage or defilement.** Every person who takes any woman unlawfully, against her will, and by force, menace, or duress, compels her to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in the state prison not less than two nor more than 14 years. [R. S. § 6769.]

Hist. (See Cr. and P. '64, § 53) R. S. § 6769, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 265: Kerr's C. ib.

N. D. Similar: Pen. C. § 9570.

§ 8267. [6770] **Seduction for prostitution.** Every person who inveigles or entices any unmarried female of previous chaste character, under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding $1,000, or by both such fine and imprisonment. [R. S. § 6770.]

Hist. R. S. § 6770, reen. R. C. ib., reen. C. L. ib. This section is in part affected by '11, c. 205, p. 673, now § 8270 et seq. below.

Comp. leg.—Cal. Similar but "twenty-five" for "eighteen" years: Pen. C. 1872, § 226; similar and age same as Idaho as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 8572.

§ 8268. [6771] **Abduction for prostitution.** Every person who takes away any female under the age of 18 years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison not exceeding five years, and a fine not exceeding $1,000. [R. S. § 6771.]

Hist. R. S. § 6771, reen. R. C. ib., reen. C. L. ib.

Cross ref. Procurement .defined: § 8271.

Comp. leg.—Cal. Same: Pen. C. 1872, § 267: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9574.

§ 8269. [6772] **Admission of minors into houses of prostitution.** Any proprietor, keeper, manager, conductor, or person having the control of any house of prostitution, or any house or room resorted to for the purpose of prostitution, who shall admit or keep any minor of either sex therein, or any parent or guardian of any such minor who shall admit or keep such minor, or sanction, or connive at the admission or keeping thereof, into or in any such house or room, shall be guilty of a misdemeanor. [R. S. § 6772.]

Hist. R. S. § 6772, reen. R. C. ib., reen. C. L. ib.

Cross ref. Sending a minor to house of prostitution or employing minor therein a misdemeanor: § 1030. Keeping a house of prostitution a misdemeanor: § 8305.

ARTICLE 2.

PROCUREMENT FOR PROSTITUTION.

Cross ref. Keeping of a house of prostitution or assignation a misdemeanor: § 8305. Prostitutes and their associates are vagrants: § 8587.

§ 8270. Interstate white slave traffic. The importation of women and girls into this state or the exportation of women and girls from this

state for immoral purposes is prohibited, and whoever shall induce, entice or procure, or attempt to induce, entice or procure, to come into this state or to go from the state any woman or girl for the purpose of prostitution or concubinage, or for any other immoral purpose, or to enter any house of prostitution in this state, or anyone who shall aid any such woman or girl in obtaining transportation to or within this state, shall be deemed guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by fine of not less than $1,000, nor more than $5,000, or by both such fine and imprisonment. ['11, c. 205, § 1, p. 673.]

Hist. '11, c. 205, § 1, p. 673, reen. C. L. § 6773.

Note: This section is apparently based on the federal white slave traffic act of June 25, 1910, 36 St. at L. 825, c. 395. Transportation of women from one state to another for immoral purposes being interstate commerce, and congress having legislated with reference thereto, the Montana supreme court held a state statute similar to ours void. S. v. Harper (1914) 138 P. 495. But in S. v. Wood (La. 1915) 67 So. 541, it is held that the state law making it an offense to induce women to travel from one state to another for immoral purposes is not included in the federal act.

§ 8271. Procurement defined. Any person who shall place any female in the charge or custody of any other person for immoral purposes or in a house of prostitution or elsewhere with intent that she shall live a life of prostitution; or any person who shall compel or shall induce, entice, or procure, or attempt to induce, entice or procure or compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel or attempt to induce, entice, procure or compel any such female to reside in a house of prostitution, or compel or attempt to induce, entice, procure or compel her to live a life of prostitution, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1,000 nor more than $5,000, or by both such fine and imprisonment.

Any person who shall induce, entice or procure, or attempt to induce, entice or procure any woman or girl for the purpose of prostitution or concubinage, or for any other immoral purpose, or to enter any house of prostitution in this state, shall be deemed guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1,000 nor more than $5,000, or by both such fine and imprisonment. ['11, c. 205, §§ 2, 3, p. 674.]

Hist. '11, c. 205, §§ 2, 3, p. 674, reen. C. L. § 6774.

§ 8272. Receiving pay for procurement. Any person who shall receive any money or other valuable thing for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons to whom she is not married shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1,000 nor more than $5,000, or by both such fine and imprisonment.

Any person who shall knowingly receive any money or other valuable thing for or on account of procurement and placing in the custody of another person for immoral purposes any woman or girl, with or without her consent, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not

less than two years nor more than 20 years, or by a fine of not less than $1,000 nor more than $5,000, or by both such fine and imprisonment. ['11, c. 205, § 4, p. 674, § 6, p. 675.]

Hist. '11, c. 205, § 4, p. 674, § 6, p. 675, reen. C. L. § 6775.

§ 8273. Paying for procurement. Any person who shall pay any money or other valuable thing to procure any female for the purpose of placing her for immoral purposes in any house of prostitution or elsewhere, with or without her consent, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1,000 nor more than $5,000, or by both such fine and imprisonment. ['11, c. 205, § 5, p. 675.]

Hist. '11, c. 205, § 5, p. 675, reen. C. L. § 6776.

§ 8274. Peonage for prostitution. Any person who shall hold, detain, restrain, or attempt to hold, detain or restrain in any house of prostitution or other place, any female for the purpose of compelling such female, directly or indirectly, by her voluntary or involuntary service or labor to pay, liquidate or cancel any debt, dues or obligations incurred or said to have been incurred in such house of prostitution or in any other place, shall be deemed guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1000 nor more than $5000, or by both such fine and imprisonment. ['11, c. 205, § 7, p. 675.]

Hist. '11, c. 205, § 7, p. 675, reen. C. L. § 6777.

§ 8275. Accepting earnings of prostitute. Any person who shall knowingly accept, receive, levy, or appropriate any money or other valuable thing without consideration, from the proceeds or earnings of any woman engaged in prostitution, shall be deemed guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1000 nor more than $5000, or by both such fine and imprisonment. Any such acceptance, receipt, levy or appropriation of such money or valuable thing shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration. ['11, c. 205, § 8, p. 675.]

Hist. '11, c. 205, § 8, p. 675, reen. C. L. § 6778.

§ 8276. Pimping defined. Any person who shall live with, or depend in whole or in part, upon the earnings of a common prostitute or woman of bad repute, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than one nor more than 20 years. [C. L. § 6779.]

Hist. '11, c. 205, § 9, p. 676; compiled and reen. C. L. § 6779.

Cross ref. Living in a house of prostitution is vagrancy: § 8587. A prostitute or inmate of a house of prostitution who votes or attempts to vote is guilty of a misdemeanor: § 505. Such a person falsely answering as to his electoral qualifications is guilty of a misdemeanor: § 508.

§ 8277. Harboring prostitutes. Any person who shall keep, maintain, control, support or harbor in any house or other place, or aids or abets in the same, for the purpose of prostitution, or for any other immoral purpose, any woman or girl, within three years after she shall have entered the state, shall be deemed guilty of a felony, and, upon

conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than 20 years, or by a fine of not less than $1000 nor more than $5000, or by both such fine and imprisonment. ['11, c. 205, § 10, p. 676.]

Hist. '11, c. 205, § 10, p. 676, reen. C. L. § 6780

Cross ref. Keeping a house of assignation or prostitution a misdemeanor: § 8305; admitting or keeping minor therein a misdemeanor: § 8269; sending a minor thereto or employing minor therein a misdemeanor: § 1030.

ARTICLE 3.

ABANDONMENT AND NEGLECT OF WIFE AND CHILDREN.

§ 8278. Desertion and nonsupport of family. Any husband who shall, without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any parent who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her minor child or children, in destitute or necessitous circumstances, shall be guilty of a misdemeanor. Any violation of this section shall be considered as a crime subject to extradition. ['15, c. 83, p. 201.]

Hist. '07, p. 303, §§ 1, 2, reen. R. C. § 6781; am. '15, c. 83, p. 201, reen. C. L. § 6781.

Cross ref. Wife may testify against husband: § 9130.

Comp. leg.—N. D. Analogous: Pen. C. § 9594.

§ 8279. Alternative reformatory penalty. In case of a conviction for any offense defined in the foregoing section, the court before which the conviction is had, may, in lieu of the penalty herein provided, accept from the defendant a bond to the board of county commissioners of the county in which such conviction is had, with or without good and sufficient surety, conditioned for the support of the wife, child or children, as the case may be, for the term of six months after the date of such conviction and order the release of the person so convicted. ['15, c. 83, p. 202.]

Hist. R. S. § 6782, reen. R. C. ib.; am. '15, c. 83, p. 202, reen. C. L. § 6782.

Comp. leg.—Cal. Same: Pen. C. 1872, § 270: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9594.

§ 8280. [6783] **Desertion of children under six years.** Every parent of any child under the age of six years, and every person to whom any such child has been confided for nurture or education, who deserts such child in any place whatever, with intent wholly to abandon it, is punishable by imprisonment in the state prison not exceeding seven years or in a county jail not exceeding one year. [R. S. § 6783.]

Hist. R. S. § 6783, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 271: Kerr's C. ib.

N. D. Similar: Pen. C. § 9589.

ARTICLE 4.

ABORTIONS.

§ 8281. [6794] **Procurement of abortion.** Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years. [R. S. § 6794.]

Hist. (See Cr. and P. '64, § 42) R. S. § 6794, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 274: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9604.

Proof of quickening not required: At common law an abortion could not be committed prior to the quickening of the foetus, but such rule does not prevail in this state. S. v. Alcorn (1901) 7 I. 599, 64 P. 1014, 97 A. S. R. 252.

§ 8282. [6795] **Submitting to abortion.** Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years. [R. S. § 6795.]

Hist. R. S. § 6795, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 275: Kerr's C. ib.

N. D. Similar: Pen. C. § 9605.

ARTICLE 5.

BIGAMY, ADULTERY, INCEST AND THE CRIME AGAINST NATURE.

§ 8283. [6806] **Polygamy.** Every person who has a husband or wife living who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be punished by a fine of not less than $200 and six months' imprisonment in the county jail, or by fine not exceeding $2000 and by imprisonment in the state penitentiary for a term of not more than five years.

But this section shall not extend to any person who by reason of a former marriage, whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of a former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract. ['05, p. 293, § 1.]

Hist. '05, p. 293, § 1, reen. R. C. § 6806, reen. C. L. ib.

Cross ref. Polygamous marriages void: § 4597.

Comp. leg.—N. D. Analogous: Pen. C. §§ 9610-11.

Indictment: In an indictment under act of congress, March 22, 1882, c. 47, § 3, entitled "An act to amend U. S. Rev. Stats. 5352, in reference to bigamy and for other purposes," the use of the word "cohabit" is sufficient, and it is not necessary to set out at large in the indictment the meaning or definition of the word itself. U. S. v. Kuntze (1889) 2 I. 480, 21 P. 407; U. S. v. Cozzens (1889) 2 I. 486, 21 P. 409.

General repute not sufficient: In a prosecution for bigamy, it was improper to permit evidence as to the general repute in the community as to the relation existing between defendant and one of the women with whom it was claimed he cohabitated, since the facts themselves should be proven and the jury permitted to draw their inference therefrom. U. S. v. Langford (1889) 2 I. 561, 21 P. 409.

Celestial marriages: Celestial and patriarchal marriages to be participated in in the next world or the future life are not crimes here, but where under such designation or name, a man marries or has more than one wife during the same period of time, such marriages become bigamous or polygamous and are prohibited by the organic law of the state. Toncray v. Budge (1908) 14 I. 621, 95 P. 26.

Complaint: A complaint is fatally defective which charges a violation of the provisions of sec. 4597 by marriage of a divorced person within the six months' inhibited period, without alleging that the other party to such marriage was not the former spouse of the defendant. S. v. Cole, 31 I. 603, 174 P. 131.

§ 8284. [6807] **Adultery.** A married man who has sexual intercourse with a woman not his wife, an unmarried man who has sexual intercourse with a married woman, a married woman who has sexual intercourse with a man not her husband, and an unmarried woman who has sexual intercourse with a married man, shall be guilty of adultery,

and shall be punished by a fine of not less than $100, or by imprisonment in the county jail for not less than three months, or by imprisonment in the state penitentiary for a period not exceeding three years, or in the county jail for a period not exceeding one year, or by fine not exceeding $1000. ['05, p. 294, §1.]

Hist. '05, p. 294, § 1, reen. R. C. § 6807, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 9579.

Cited: S. v. Andrus (1916) 29 I. 1, 156 P. 421.

§ **8285.** [6808] **Marrying spouse of another.** Every person who knowingly and wilfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this article, is punishable by fine not less than $2000, or by imprisonment in the state prison not exceeding three years. [R. S. § 6808.]

Hist. (See Cr. and P. '64, § 128) R. S. § 6808, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 284; same as amended except "five" for "two" thousand dollars, and "ten" for "three" years: Kerr's C. ib.

N. D. Similar: Pen. C. § 9613.

§ **8286.** [6809] **Incest.** Persons being within the degrees of consanguinity within which marriages are declared by law to be incestous and void, who intermarry with each other, or who permit fornication or adultery with each other, are punishable by imprisonment in the state prison not exceeding 10 years. [R. S. § 6809.]

Hist. (See Cr. and P. '64, § 129) R. S. § 6809, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 285: Kerr's C. ib.

N. D. Similar: Pen. C. § 9614.

Indictment: Held sufficient: S. v. Andrus (1916) 29 I, 1, 156 P. 421.

Consanguinity: The degrees of consanguinity mentioned herein are defined by § 4595. S. v. Andrus, supra.

Consent unnecessary: The crime of incest is committed where other elements exist, although the female is by want of age incapable of consenting thereto. P. v. Barnes (1886) 2 I. 161, 9 P. 532.

Evidence: Prosecutrix if over age is an accomplice, and conviction can not be had on her uncorroborated testimony. S. v. Clark (1915) 27 I. 48, 146 P. 1107.

Where the evidence of the prosecutrix is contradictory or her truthfulness is impeached and the defendant denies her testimony and his testimony is corroborated, the testimony of the prosecutrix, alone and without corroboration, will not warrant a conviction. S. v. Clark, supra. S. v. Andrus, supra.

§ **8287.** [6810] **Crime against nature.** Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years. [R. S. § 6810.]

Hist. (See Cr. and P. ' 64, § 45) R. S. § 6810, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 286: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9615.

Scope: Not only the common law crime of sodomy is included but all unnatural carnal copulations, whether with man or beast, committed per os or per anum. S. v. Altwater (1916) 29 I. 107, 157 P. 256.

Information: Information examined and held sufficient. S. v. Altwater, supra.

Sentence: The length of imprisonment in excess of five years is left to the discretion of the court. (Ailshie, C. J., dissents.) Re Miller (1913) 23 I. 403, 129 P. 1075.

As this section prescribes the punishment, § 8085 has no application and does not fix the maximum punishment. (Ailshie, C. J., dissents.) Ib.

§ **8288.** [6811] **Same: Penetration.** Any sexual penetration, however slight, is sufficient to complete the crime against nature. [R. S. § 6811.]

Hist. (See Cr. and P. '64, § 363) R. S. § 6811, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 287: Kerr's C. ib.

N. D. Similar: Pen. C. § 9616.

§ **8289.** [6812] **Lewd cohabitation.** If any man and woman, not being married to each other, shall live and cohabit together as man and

wife, or shall lewdly and notoriously associate together, such man or woman is guilty of a misdemeanor. [R. S. § 6812.]

Hist. (Act. Feb. 10, '87) R. S. § 6812, reen. R. C. ib., reen. C. L. ib.

Cross ref. Persons lewdly cohabiting together prohibited from voting: §§ 505, 508.

Comp. leg.—N. D. Analogous: Pen. C. § 9581.

Complaint insufficient: There is no offense unless the parties either live and cohabit together as man and wife, or lewdly and notoriously associate together, and the omission to allege one or the other of these acts is fatal. S. v. Cole, 31 I. 603, 174, P. 131.

ARTICLE 6.

DISTURBING RELIGIOUS MEETINGS AND SUNDAY REST.

§ 8290. [6820] Disturbing religious meetings. Every person who wilfully disturbs or disquiets any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor. [R. S. § 6820.]

Hist. (See Cr. and P. '64, § 123) R. S. § 6820, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 302: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9247.

§ 8291. [6823] Sunday rest. The first day of the week, commonly called Sunday, is hereby set apart as a day of public rest. ['07, p. 223, § 1.]

Hist. '07, p. 223, § 1, reen. R. C. § 6823, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 9232.

Constitutionality: This section (with the four sections following) does not violate the bill of rights, is not special or local legislation, does not discriminate between different persons, and is not in violation of any provision of the constitution. S. v. Dolan (1907) 13 I. 693, 92 P. 995, 14 L. R. A. (N. S.) 1259; Re Jacobs (1907) 13 I. 720, 92 P. 1003.

§ 8292. Business to be suspended. It shall be unlawful for any person or persons in this state to keep open on Sunday for the purpose of any business, trade, or sale of goods, wares, or merchandise, any shop, store, building, or place of business, whatever: *Provided,* That hotels and restaurants may furnish lodging and meals; and *Provided,* That this section shall not apply to livery stables, or stores in so far as the sale of medicines or sick room supplies is concerned, or to undertakers while providing for the dead, or to newstands in so far as the quiet sale and delivery of daily papers and magazines is concerned, nor to the sale of nonintoxicating refreshments, when the same are not sold or dispensed over a saloon bar, nor to candies, fresh fruits and cigars, nor to bakeries in so far as the quiet sale of their products is concerned, or shoe shining stands. Any person or persons violating this section shall be guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not less than $25 nor more than $100, or shall be imprisoned in the county jail not to exceed 30 days, and, upon a second conviction, shall be punished by both such fine and imprisonment. ['11, c. 101, p. 344.]

Hist. '07, p. 223, § 2; R. C. § 6824; am. '11, c. 101, p. 344, reen. C. L. § 6824.

Comp. leg.—N. D. See: Pen. C. §§ 9232, 9235, 9236.

Wash. See Bal. Ann. Codes and Stat. Vol. 2, § 7251.

Cited: S. v. Dolan (1907) 13 I. 693, 92 P. 995, 14 L. R. A. (N. S.) 1259; Re Bossner (1910) 18 I. 519, 110 P. 502.

§ 8293. Public amusements. It shall be unlawful for any person or persons in this state to keep open [on Sunday] any theater, moving picture show, play house, dance house, race track, merry-go-round, circus or

show, concert saloon, billiard or pool room, bowling alley or variety hall. *Provided, however,* That if a number of the qualified electors residing within the limits of any incorporated city or village equal to a majority of the votes cast at the last general election therein shall petition the council or board of trustees of such city or village to permit theaters and moving picture shows to keep open on Sunday therein, such council or board of trustees may pass an ordinance permitting theaters and moving picture shows to keep open on Sunday in such city or village during such hours and subject to such regulations as may be prescribed in such ordinance. Any person or persons violating this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than $30 nor more than $250 for each offense and shall be punished by imprisonment in the county jail not to exceed 90 days and upon a second conviction any license which may have been granted for opening and maintaining any such place of business shall also be rendered void and shall not be renewed within two years next thereafter. [C. L. § 6825.]

Hist. '07, p. 223, § 3; am. R. C. § 6825; am. '11, c. 99, p. 342; modified by '15, c. 28, p. 83; compiled and reen. C. L. § 6825. Bracketed words inserted to supply obvious omission as shown by original enactment of law.

Cross ref. Further regulation of pool and billiard halls: § 8297, et seq. Screens prohibited in soft drink establishments, card rooms, pool and billiard halls: § 8298.

Comp. leg.—Wash. See Bal. Ann. Codes and Stat. Vol. 2, § 7251.

Cited: S. v. Dolan (1907) 13 I. 693, 92 P. 995, 14 L. R. A. (N. S.) 1259.

Applies to commission cities: When a proper petition under this section has been acted upon by a city council by the passage of an appropriate ordinance, the referendum provision (§ 4242) of the commission form of government law does not apply thereto. Perrault v. Robinson (1916) 29 I. 267, 158 P. 1074, Ann. Cas. 1916 E. 89.

Moving picture show defined: The phrase "moving picture show" as used in this section, means a place where motion pictures are exhibited for the purpose of public amusement and entertainment. S. v. Morris (1916) 28 I. 599, 155 P. 296, L. R. A. 1916 D. 575; Re Bossner (1910) 18 I. 519, 110 P. 502.

Illustrating religious lecture: Section does not apply to the use of a moving picture machine on Sunday for the purpose of illustrating a sermon, or religious lecture. S. v. Morris, supra.

Scenic railway: A scenic railway is not such place of public amusement as a merry-go-round, and not prohibited from being kept open on Sunday. Re Hull (1910) 18 I. 475, 110 P. 256, 30 L. R. A. (N. S.) 465.

§ **8294.** [6826] **Horse racing on Sunday.** It shall be unlawful for any person or persons in this state to engage on Sunday in horse racing. Any person or persons violating this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than $5 nor more than $100, or shall be imprisoned in the county jail not to exceed 30 days, or shall suffer both such fine and imprisonment. [R. C. § 6826.]

Hist. '07, p. 223, § 4; am. R. C. § 6826, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 9235.

Cited: S. v. Dolan (1907) 13 I. 693, 92 P. 995, 14 L. R. A. (N. S.) 1259.

§ **8295.** [6827] **Public officers to enforce act.** It shall be the duty of each prosecuting attorney, sheriff, constable, city or town marshal, or any and all other public officers in this state, to inform against and diligently prosecute any and all persons guilty of the violations of the provisions of the four preceding sections, either upon credible information as to any such violation, or upon reasonable cause to believe that there has been any such violation. Any said officer who shall refuse or wilfully neglect to inform against and prosecute said offenders against the four preceding sections, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not less than $50 nor more than $500 and the court before which said officer shall be

tried shall declare the office or appointment held by said officer vacant for the remainder of his term. [R. C. § 6827.]

Hist. '07, p. 223, § 5; am. R. C. § 6827, reen. C. L. ib.

Cited: S. v. Dolan (1907) 13 I. 693, 92 P. 995, 14 L. R. A. (N. S.) 1259.

Comp. leg.—Wash. See Bal. Ann. C. and Stat. Vol. 2, § 7251.

§ 8296. [6828] **Disposal of fines.** All fines collected from the violation of the five preceding sections shall be paid into the common school fund of the county. [R. C. § 6828.]

Hist. '07, p. 223, § 6; am. R. C. § 6828, reen. C. L. ib.

Comp. leg.—Wash. See Bal. Ann C. and Stat. Vol. 2, § 7250, last clause.

ARTICLE 7.

REGULATION OF BILLIARD AND POOL HALLS.

§ 8297. Pool and billiard halls: Sunday rest and midnight closing. It shall be unlawful for any proprietor, keeper, manager, conductor, clerk or person having control or charge of any table pool or billiard room or hall conducted for profit, or pleasure, or any room, building or place where card games are conducted to conduct or permit to be conducted any such pool, billiard or card games on the first day of the week, commonly called Sunday, or on any day between the hours of 12 o'clock midnight and six o'clock a. m., *Provided, however.* That in unincorporated villages, towns, or precincts, the board of county commissioners of the county in which said unincorporated village, town or precinct is located, may prescribe an earlier hour of closing: *Provided,* That nothing contained in this section shall apply to bona fide private residences, nor to regularly incorporated societies, when such incorporation is not primarily nor principally for purposes of amusement or pleasure.

Every person violating the provisions of this section is guilty of a misdemeanor and punishable by a fine of not less than $50, or imprisonment in the county jail for a term not less than one month, or by both such fine and imprisonment. ['15, c. 119, §§ 1, 2, p. 264.]

Hist. '15, c. 119, §§ 1, 2, p. 264, reen. C. L. § 6829.

Cross ref. Billiard and pool rooms not permitted to be open on Sunday: § 8293.

§ 8298. Use of screens on pool and card rooms. All owners of property used as soft drink establishments, card rooms, pool or billiard halls, must remove all blinds or screens or other obstructions which would interfere with the free inspection of such establishment by the passers by. Every person violating this section is guilty of a misdemeanor and is punishable by a fine of not less than $25 nor more than $100, or by imprisonment in the county jail for a period not less than 12 days nor more than 50 days, or by both such fine and imprisonment. [C. L. § 6829a.]

Hist. '11, c. 94, p. 339; compiled and reen. C. L. § 6829a.

§ 8299. Loitering about pool halls by minor prohibited. It shall be unlawful for any minor under the age of 20 years to frequent or loiter in or about table pool or billiard rooms or halls conducted for profit in the state of Idaho. Every proprietor, keeper, manager, conductor, clerk or person, having control of any table pool or billiard room or hall conducted for profit in the state of Idaho, who allows any minor under the age of 20 years to frequent or loiter in or about such table pool or billiard room or hall is deemed guilty of a misdemeanor. Every minor under the age of 20 years who frequents or loiters in or about any table pool or billiard room or hall conducted for profit in the

state of Idaho is deemed guilty of a misdemeanor. ['13, c. 123, § 1, p. 469.]

Hist. '13, c. 123, § 1, p. 469, reen. C. L. § 6329b.

ARTICLE 8.

OPIUM SMOKING.

§ 8300. [6830] **Resorts for smoking and sales of opium.** Every person who opens, maintains or keeps any house or place as a resort for the purpose of smoking opium, or any preparation containing opium, or who barters, sells, vends or gives away opium, or any preparation containing opium for the purpose of being smoked, or that is smoked upon the premises, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine not exceeding $300, or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment, and in case any such fine and the costs of prosecution are not paid, any person or persons convicted under this section and sentenced to pay a fine, may be held by the sheriff and compelled to work at hard labor in a chain gang or otherwise, in charge of a keeper, upon the public highways, or elsewhere, or for any person who may contract with the sheriff for such labor, until such fine and costs are fully paid, at the rate of $1 a day for each day of 10 hours of hard labor, and any money so received shall be applied to the payment of the fine and costs. And upon any conviction under this section, the court before which such conviction is had, may direct the sheriff, or arresting officer, to destroy any opium, or preparation containing opium, or all pipes, utensils, implements and other things used, had or kept for use, or designed or adapted for use in smoking opium, or any such preparation that may have been used in evidence on the trial of any person convicted under this chapter or that may be found upon his person or premises. ['93, p. 22, § 1.]

Hist. R. S. § 6830, '93, p. 22, § 1, reen. '99, p. 172, § 1, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Analogous: Kerr's C. § 307.

N. D. Analogous: Pen. C. § 10178.

Cross ref. Regulation of traffic in narcotics: § 2184, et seq.

§ 8301. [6831] **Purchasing opium for smoking.** Every person who bargains for, buys, takes or accepts any opium or preparation containing opium in any house or place to be smoked upon the premises, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $100 or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment. ['93, p. 22, § 2.]

Hist. R. S. § 6831, '93, p. 22, § 2, reen. '99, p. 172, § 2, reen. R. C. § 6831, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 10178.

§ 8302. [6832] **Frequenting resorts.** Every person who is found in any house or place kept as a resort or place for the purpose of smoking opium, or any preparation containing opium, without any lawful business, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $50, or by imprisonment, not exceeding three months, or by both such fine and imprisonment. ['93, p. 22, § 3.]

Hist. R. S. § 6832, '93, p. 22, § 3, reen. '99, p. 172, § 3, reen. R. C. § 6832, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 10178.

ARTICLE 9.

INDECENT EXPOSURE, OBSCENE BOOKS AND PRINTS AND DISORDERLY HOUSES.

§ 8303. [6840] **Indecent exposure and obscenity.** Every person who wilfully and lewdly either:

1. Exposes his person or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels or assists any person so to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits, any obscene or indecent writing, paper, or book, or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or moulds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or

5. Sings any lewd or obscene song, ballad, or other words, in any public place, or in any place where there are persons present to be annoyed thereby;

Is guilty of a misdemeanor. [R. S. § 6840.]

Hist. R. S. § 6840, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 311: Kerr's C. ib.

N. D. Similar: Pen. C. § 9635.

§ 8304. [6841] **Seizure of indecent articles.** Every person who is authorized or enjoined to arrest any person for a violation of subdivision 3 of the last section, is equally authorized and enjoined to seize any obscene or indecent writing, papers, book, picture, print, or figure found in possession of or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken. [R. S. § 6841.]

Hist. R. S. § 6841, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 312: Kerr's C. ib.

N. D. Identical: Pen. C. § 9636.

§ 8305. [6842] **Disorderly houses.** Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor. [R. S. § 6842.]

Hist. R. S. § 6842, reen. R. C. ib., reen. C. L. ib.

Cross ref. Admission of minor to house of prostitution a misdemeanor: § 8269. Employing minor therein a misdemeanor: § 1030. Harboring imported prostitutes a felony: § 8277. Prostitutes and their associates are vagrants: § 8587.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 316; as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. §§ 9639-9640.

Evidence of reputation: To establish that a house is of the character referred to in this section, evidence of the general reputation of the house is competent. T. v. Bowen (1890) 2 I. 640, 23 P. 82; P. v. Buchanan (1878) 1 I. 681.

Residing in bawdy house: Residing in a bawdy house is not an offense at common law (nor under this section). P. v. Ah Ho (1878) 1 I. 691. But see § 8276.

§ 8306. [6843] **Indecent advertisements.** Every person who wilfully publishes any notice or advertisement of any medicine or means for

producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise to assist in the accomplishment of any such purpose, is guilty of a felony. [R. S. § 6843.]

Hist. R. S. § 6843, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9656.

Comp. leg.—Cal. Same: Kerr's C. § 317.

ARTICLE 10.

GAMING.

§ 8307. [6850] **Gambling: Punishment.** Every person who deals, plays or carries on, opens or causes to be opened, or who conducts, either as owner, employee, or lessee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards, dice, or any other device, for money, checks, credit or any other representative of values, is guilty of a misdemeanor and is punishable by fine not less than $200 or imprisonment in the county jail not less than four months. ['99, p. 389, § 1.]

Hist. '97, p. 53, § 1; am. '99, p. 389, § 1, reen. R. C. § 6850, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 330; as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9675.

Cited: S. v. Ridenbaugh (1897) 5 I. 710, 51 P. 750; Mullen & Co. v. Moseley (1907) 12 I. 457, 90 P. 986, 121 A. S. R. 277, 13 Ann. Cas. 450, 12 L. R. A. (N. S.) 394.

Application: This section is directed not only against the owners and operators of games, but makes a participant who bets money on the game guilty of a misdemeanor. Re Rowland (1902) 8 I. 595, 70 P. 610.

Repeal: This general law prohibiting gambling, repeals the authority of Boise City under its charter to license gambling. Re Ridenbaugh (1897) 5 I. 371, 49 P. 12.

Punishment: This act declares violations thereof to constitute a misdemeanor and fixes the minimum penalty, but prescribes no maximum, consequently R. S. § 6313, prescribing the penalty for misdemeanors generally, governs as to the maximum penalty. S. v. Mulkey (1899) 6 I. 617, 59 P. 17; Re Rowland, supra. One convicted of gambling may be sentenced both to pay a fine and to undergo imprisonment. Re Burgess (1906) 12 I. 143, 84 P. 1059.

§ 8308. [6851] **Proprietor of house punishable.** Every person who knowingly permits any of the games prohibited by the preceding section to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, is punishable as provided in the preceding section. ['99, p. 389, § 2.]

Hist. '97, p. 53, § 2; am. '99, p. 389, § 2, reen. R. C. § 6851, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 331: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9680.

Cited: S. v. Mulkey (1899) 6 I. 617, 59 P. 17.

Application limited to express inhibitions: The common law relating to the offense of keeping a gaming house was superseded by act of January 13, 1871, specifying certain inhibited games: P. v. Goldman (1878) 1 I. 714.

§ 8309. [6852] **Cheating at games.** Every person who, by any practice, cheat, or device, or false pretense whatsoever, while playing at any game of chance, or while bearing any share in wagers played for, or while betting on sides or hands of such playing, wins or acquires to himself or another any sum of money or anything of value or representative of value, is guilty of a misdemeanor. ['99, p. 389, § 3.]

Hist. '97, p. 53, § 3; am. '99, p. 389, § 3, reen. R. C. § 6852, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 332; as amended: Kerr's C. ib.

§ 8310. [6853] **Judge to issue warrant: Seizure of articles.** Whenever any judge or justice of the peace shall have knowledge or shall receive satisfactory information, that there is any gambling table or gambling device, adopted or devised and designed for the purpose of playing any of the games of chance prohibited in section 8307, within

his district or county, it shall be his duty to forthwith issue his warrant, directed to the sheriff or constable, to seize and bring before him such gambling table or other device, and cause the same to be publicly destroyed, by burning or otherwise. ['99, p. 389, § 4.]

Hist. '97, p. 53, § 4; am. '99, p. 389, § 4, reen. R. C. § 6853, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 9682.

Cited: S. v. Mulkey (1899) 6 I. 617, 59 P. 17.

Constitutionality: This section is a constitutional exercise of the police power of the state for the suppression and prevention of crime, and for the protection of the public morals and welfare, and does not deprive any person of property without due process of law in violation of Const. I, 13; Mullen & Co. v. Moseley (1907) 13 I. 457, 90 P. 987, 121 A. S. R. 277, 13 Ann. Cas. 450, 12 L. R. A. (N. S.) 394.

The provision of this section which requires a justice to have "knowledge or satisfactory information" of the existence of gambling devices before issuing his warrant, and the provision of the following section which vests in the officer executing the warrant all the powers granted in the case of a search warrant, should be read in connection with Const. I, § 17, prohibiting the issuance of a search warrant without probable cause shown by affidavit, and should be consequently construed to require an affidavit as a basis for the warrant. Ib.

§ 8311. [6854] **Execution of warrant.** The officer who shall be charged with the execution of any warrant specified in the preceding section shall have like power of execution thereof, as is provided in the cases of search warrants. ['99, p. 389, § 5.]

Hist. '97, p. 53, § 5; am. '99, p. 389, § 5, reen. R. C. § 6854, reen. C. L. ib.

Cross ref.— Powers of officer under search warrant: §§ 9327-8.

Cited: S. v. Mulkey (1899) 6 I. 617, 59 P. 17; Mullen & Co. v. Moseley (1907) 13 I. 457, 90 P. 987, 121 A. S. R. 277, 13 Ann. Cas. 450, 12 L. R. A. (N. S.) 394.

§ 8312. [6855] **Refusal of witness to testify.** Every person duly summoned as a witness for the prosecution, on any proceedings had under this chapter who neglects or refuses to attend as required, is guilty of a misdemeanor. ['99, p. 389, § 6.]

Hist. '97, p. 53, § 6; am. '99, p. 389, § 6, reen. R. C. § 6855, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 333: Kerr's C. ib.

Cited: S. v. Mulkey (1899) 6 I. 617, 59 P. 17.

§ 8313. [6856] **Self-incrimination no ground for refusal to testify.** No person otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gambling, on the ground that such testimony may criminate himself, but no prosecution can afterward be had against him for any offense concerning which he testified. ['99, p. 389, § 7.]

Hist. '97, p. 53, § 7; am. '99, p. 389, § 7, reen. R. C. § 6856, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 334: Kerr's C. ib.

N. D. Analogous: Pen. C. § § 9679.

Cited: S. v. Mulkey (1899) 6 I. 617, 59 P. 17.

§ 8314. [6857] **Officers to enforce law.** Every prosecuting or county attorney, sheriff, constable or police officer, must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor. ['99, p. 389, §8.]

Hist. '97, p. 53, § 8, reen. '99, p. 389, § 8, reen. R. C. § 6857, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 335: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9686.

Cited: S. v. Mulkey (1899) 6 I. 617, 59 P. 17.

§ 8315. Book making and pool selling. Any person who for gain, hire or profit engages in pool selling or book making at any time or place within this state; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or any part

thereof, or who ocupies any place or stand of any kind, upon any public or private grounds within this state, with books, papers, paraphernalia, or mechanical device, for the purpose of engaging in pool selling or book making, or recording or registering bets or wagers; or who sells pools or makes books upon the result of any trial or contest of skill, speed or power of endurance of man or beast for gain, hire or reward; or any person who, for gain, hire or reward, receives, registers, records and forwards to any other place, within or without this state, any money, consideration or thing of value for the purpose of having it there bet or wagered by or for any person, who at such place sells pools or makes books upon any such event, or any person who, being the owner, lessee or occupant of any such room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or any grounds within this state, knowingly and wilfully permits the same to be occupied and used for any of the purposes aforesaid, unless unable to legally prevent the same; or any person who aids, assists or abets in any manner in any of said acts which are hereby forbidden, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $300 or by imprisonment in the county jail for a period of not more than six months or by both such fine and imprisonment. ['13, c. 76, § 1, p. 327.]

Hist. '13, c. 76, § 1, p. 327, reen. C. L. § 6858. **Cited:** S. v. Baird (1916) 29 I. 47, 156 P. 1140.

ARTICLE 11.

LOTTERIES.

§ 8316. Lottery defined. A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. ['11, c. 147, § 1, p. 451.]

Hist. '11, c. 147, § 1, p. 451, reen. C. L. § 6859. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 319: Kerr's C. ib.

§ 8317. Same: Exceptions. The provisions of this article shall not apply to government land drawings, or to Carey act land drawings, or to the partitioning or division of real property and improvements thereon between joint owners or tenants in common by lot or any other method that such joint owners or tenants in common or their representative may agree upon. ['11, c. 147, § 9, p. 453.]

Hist. '11, c. 147, § 9, p. 453, reen. C. L. § 6859a.

§ 8318. Engaging in lottery. Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor. ['11, c. 147, § 2, p. 451.]

Hist. '11, c. 147, § 2, p. 451, reen. C. L. § 6859b. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 320: Kerr's C. ib.

§ 8319. Traffic in lottery tickets. Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument, purporting, or understood to be, or to represent any ticket, chance, share or interest in, or depending upon the event any lottery, is guilty of a misdemeanor. ['11, c. 147, § 3, p. 451.]

Hist. '11, c. 147, § 3, p. 451, reen. C. L. § 6859c. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 322: Kerr's C. ib.

§ 8320. Assisting in lottery. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise, in setting up, managing or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor. ['11, c. 147, § 4, p. 452.]

Hist. '11, c. 147, § 4, p. 452, reen. C. L. § 6859d. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 321: Kerr's C. ib.

§ 8321. Maintaining lottery office. Every person who opens, sets up, or keeps by himself or any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing or otherwise, advertises or publishes the setting up, opening or using of any such office, is guilty of a misdemeanor. ['11, c. 147, § 5, p. 452.]

Hist. '11, c. 147, § 5, p. 452, reen. C. L. § 6859e. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 323: Kerr's C. ib.

§ 8322. Lottery insurance. Every person who insures or receives consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn, or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to pay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not drawn, at any particular time, in any particular order, or who promises or agrees to pay any sum of money, or deliver any goods, things in action, or property, or forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor. ['11, c. 147, § 6, p. 452.]

Hist. '11, c. 147, § 6, p. 452, reen. C. L. § 6859f. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 324: Kerr's C. ib.

§ 8323. Permitting lottery. Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor. ['11, c. 147, § 8, p. 452.]

Hist. '11, c. 147, § 8, p. 452, reen. C. L. § 6859g. **Comp. leg.—Cal.** Identical: Pen. C. 1872, § 326; Kerr's C. ib.

§ 8324. Search, seizure and confiscation. All moneys and property offered for sale or distribution in violation of any of the provisions of this article are forfeited to the state. And whenever any judge or justice of the peace shall have knowledge or receive satisfactory information of the violation of any of the provisions of this article within his district or county, it shall be his duty forthwith to issue his warrant, directed to the sheriff or constable, to seize and bring before him such moneys and property offered for sale or distribution. And, upon the conviction of any person or persons for violation of any of the provisions of this article, any property so seized as above provided in this section, shall be sold by the sheriff or constable at public auction and the proceeds thereof paid over to the county treasurer of said county for the county school fund. ['11, c. 147, § 7, p. 452.]

Hist. '11, c. 147, § 7, p. 452, reen. C. L. § 6859h. **Comp. leg.—Cal.** Analogous: Pen. C. 1872, § 325: Kerr's C. ib.

ARTICLE 12.

OTHER INJURIES TO PERSONS.

Cross ref. Refusal to obey and evasion of writ of habeas corpus constitute misdemeanors: §§ 9306-8. Parents and others insulting or abusing school teacher are guilty of a misdemeanor: § 8590.

§ 8325. [6860] **Acting as physician while intoxicated.** Every physician who, in a state of intoxication, does any act as such physician to another person by which the life of such other person is endangered, is guilty of a misdemeanor. [R. S. § 6860.]

Hist. R. S. § 6860, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Pen. C. § 9705.

Comp. leg.—Cal. Same: Pen. C. 1872, § 346: Kerr's C. ib.

§ 8326. [6861] **Poisoning food, medicine and wells.** Every person who wilfully mingles any poison with any food, drink or medicine, with intent that the same shall be taken by any human being, to his injury, and every person who wilfully poisons any spring, well, or reservoir of water, is punishable by imprisonment in the state prison for a term of not less than one nor more than 10 years. [R. S. § 6861.]

Hist. (See Cr. and P. '64, § 56) R. S. § 6861, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: Pen. C. § 9706.

Comp. leg.—Cal. Same: Pen. C. 1872, § 347: Kerr's C. ib.

§ 8327. Cruel treatment of lunatics. Every person guilty of any harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic, or insane peron, is guilty of a misdemeanor. [R. S. § 6875.]

Hist. R. S. § 6875, reen. R. C. ib., reen. C. L. § 6861a. **Comp. leg.—Cal.** Same: Pen. C. 1872, § 361: Kerr's C. ib.

CHAPTER 304.

CRIMES RELATING TO LIVE STOCK.

Cross ref. Regulation of livestock industry: §§ 1840-77. Among the offenses therein enumerated are: Carriers transporting animals without constable's certificate as to marks and brands are guilty of a misdemeanor: § 1940. Persons driving animals out of the state without a certificate from the constable authorizing them so to do are guilty of a misdemeanor: § 1942. Persons offering animals for shipment without authority of the owner are guilty of a misdemeanor: § 1945. Constables or justices of the peace who fail to perform any duties relative to the inspection of animals for shipment are guilty of a misdemeanor: § 1946. Slaughtering without making a record or preserving hides is a misdemeanor: § 1949. An auctioneer failing to keep a register describing live stock sold is guilty of a misdemeanor: § 1954. Failure to provide registered bulls on range is misdemeanor: § 1985.

Regulation of slaughter houses and meat products: §§ 1755-82, 8343, 8345.

Stealing of live stock defined as grand larceny: § 8429. Poisoning of animals: § 8541. Cruelty to animals: § 8542 et seq.

§ 8328. [6867] **Altering marks and brands.** Every person who marks or brands, alters, or defaces the mark or brand of any horse, mare, colt, jack, jennet, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat or pig belonging to another, with intent thereby to steal the same or to prevent indentification thereof by the true owner, is punishable by fine not less than $25 nor more than $300, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [R. S. § 6867.]

Hist. (See '81, p. 295, §§ 10, 17) R. S. § 6867, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Similar: Pen. C. 1872, § 357; as amended: Kerr's C. ib.

Cross ref. Mutilating and counterfeiting brands or mark on animal a misdemeanor: § 1931. Also see § 8330.

§ 8329. [6868] **Use or possession of running iron.** Any person who uses, or has, or keeps in his possession, any running branding iron, tool,

or instrument used by him for running a brand on any live stock, or who changes or disfigures any brand with such instrument, is guilty of grand larceny and punishable as provided by law. The possession of such iron or instrument is prima facie evidence of guilt. [R. S. § 6868.]

Hist. '85, p. 61, § 1, R. S. § 6868, reen. R. C. ib., reen. C. L. ib.

§ 8330. [6869] **Slaughtering cattle in remote places.** Every person who slaughters any head of cattle at any place more than one-half mile from a house or corral then in actual use is guilty of a misdemeanor. [R. S. § 6869.]

Hist. R. S. § 6869, reen. R. C. ib., reen. C. L. ib.

§ 8331. [6870] **Removal of hides from carcasses.** Any person other than the owner, his servant or agent who skins or removes from the carcass, the skin, hide, or pelt of any neat cattle or sheep found dead or perished, is guilty of a misdemeanor. [R. S. § 6870.]

Hist. (See '83, p. 126, § 1) R. S. § 6870, reen. R. C. ib., reen. C. L. ib.

§ 8332. [6871] **Slaughtering unbranded cattle.** Any person who slaughters any head of neat cattle, before the same is distinctly marked or branded, is guilty of a misdemeanor. [R. S. § 6871.]

Hist. '83, p. 126, § 2, R. S. § 6871, reen. R. C. ib., reen. C. L. ib.

§ 8333. [6872] **Grazing sheep on cattle range.** Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range. [R. S. § 6872.]

Hist. '83, p. 126, § 3, R. S. § 6872, reen. R. C. ib., reen. C. L. ib.

Constitutionality: This section is constitutional. S. v. Horn (1915) 27 I. 782, 152 P. 275; S. v. Omaechevviaria (1915) 27 I. 797, 152 P. 280; aff. 38 S. C. R. 323, 246 U. S. 343, 62 L. ed. 763. S. v. Butterfield (1917) 30 I, 415, 165 P. 218.

This section is not void for uncertainty. S. v. Omaechevviaria, supra.

Police regulation: The lands constituting the public domain of the United States within the jurisdiction of this state are subject to the police regulations of the state; the statute is a police regulation for the avoidance of range wars possible to arise in case of the invasion of cattle ranges by sheep herders. S. v. Horn (1915) 27 I. 782, 152 P. 275; S. v. Omaechevviaria, supra.

Intent: In order to warrant a conviction there must be an intent to violate this section, as well as the act of driving or herding sheep upon a cattle range. S. v. Omaechevviaria, supra.

Abandonment: Exclusive right of cattlemen as against sheepmen to the use of range first occupied by cattlemen may be abandoned by their ceasing to use it or by permitting use of it by sheep in common with cattle. Such joint use without protest of cattlemen for period long enough to create custom does not make use by sheep unlawful. S. v. Butterfield, supra.

If customary use of range has been for cattle, it is a cattle range. If customary use has been for both cattle and sheep, it is not a cattle range. Proof of customary use for both cattle and sheep is proper evidence in determining abandonment as cattle range. Ib.

Injunction not authorized: This section does not entitle one who has been accustomed to range cattle on the public land to enjoin another from herding sheep on the range. McGinnis v. Friedman (1888) 2 I. 393, 17 P. 635.

§ 8334. [6879] **Changing, defacing or counterfeiting marks and brands.** Every person who changes, conceals, defaces, disfigures, or obliterates any brand or mark previously branded, impressed, or marked on any head of live stock, or puts his own or any other brand upon or over any part of any brand previously branded upon any head of live

stock, or who makes, or uses any counterfeit of any brand or mark provided for by section 1933, is guilty of a misdemeanor. [R. S. § 6879.]

Hist. (See '81, p. 295, §§ 10, 17) R. S. § 6879; am. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 357; as amended: Kerr's C. ib.

Cross ref. Violation of stock drovers' brand law a misdemeanor: § 1938.

§ 8335. [6882] Grazing stock on improved land. Any owner or other person in charge of any herd or drove of live stock, who wilfully or negligently injures any resident of the state by driving or moving such herd or drove from any public highway, and herding or grazing the same on land occupied and improved by any settler in possession of the same, is guilty of a misdemeanor. [R. S. § 6882.]

Hist. (See '81, p. 295, § 15) R. S. § 6882, reen. R. C. ib., reen. C. L. ib.

§ 8336. Stealing services of bull. It shall be unlawful for any person, without the consent of the owner, to take possession of any bull found running at large upon the open range and to confine the same in any enclosure for the purpose of obtaining service therefrom. And in any trial for violation of the provisions of this section, upon proof on the part of the state that any person has taken possession of such bull, upon the open range, and has confined the said bull in any enclosure with cows, such fact may be considered by the jury as bearing upon the question of the intent of such person to secure unlawfully the service of such bull. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. ['11, c. 130, p. 417.]

Hist. '11, c. 130, 417, reen. C. L. § 6882a.

CHAPTER 305.

CRIMES AGAINST PUBLIC HEALTH AND SAFETY.

Cross ref. Other provisions which might be classed here are:

Food and Oil Regulations.

Foods and drugs generally: The following are misdemeanors: Refusal or neglect of dealers, etc., to furnish samples for analysis: § 1678. Obstruction of department of public welfare in its duties: §§ 1679, 1696. Manufacture of adulterated and misbranded articles: § 683. Sale of adulterated or misbranded articles: § 1684. Distribution of deleterious free samples: § 1694. Sale of tainted food: § 1699. Manufacture or sale of vinegars containing prohibited substances: § 1704.

Dairies and dairy products: The following are misdemeanors: The violation of general provisions regulating dairies and dairy products: § 1728. The making of false reports or the failure to make reports by proprietors of dairies, etc.: § 1729. The sale of incorrect milk testing tubes: § 1741. The violation of the Babcock test law: § 1744. The violation of provisions regulating labels and brands: § 1751.

Ice and water: The violation of any provision of the article providing for pure domestic ice and water is a misdemeanor: § 1754.

Slaughter houses and meat products: Operation of a slaughter house without a certificate from inspector is a misdemeanor: § 1781. The violation of any provisions of the article regulating slaughter houses is a misdemeanor: § 1782. The sale of meat from diseased animals is unlawful: § 1852.

Oils: Adulteration and sale of adulterated or misbranded oil is a misdemeanor: § 1783. Obstructing oil inspection is a misdemeanor: § 1785.

Sanitary Regulations.

Violation of hotel inspection law: Hotel proprietors interfering with inspection are guilty of a misdemeanor: § 1815. Noncompliance with hotel inspection law is a misdemeanor: § 1817.

Violation of barber shop inspection law: Violation of rules of sanitary inspector a misdemeanor: § 1819. Operation of barber shops, etc., without certificate of inspection or without compliance with regulations a misdemeanor: § 1820.

Safety Regulations.

Accident prevention among workmen: Mine owner or manager who neglects to comply with orders of the mine inspector looking to the safety of employees in mines is guilty of a misdemeanor: §§ 5473-5513. Neglect to provide or use dust prevention

apparatus in mines is a misdemeanor: § 5518. An employer failing to make report of accident is subject to fine: § 6317. A violation of the safety provisions prescribed by the industrial accident board is a misdemeanor: § 6339.

Barbed wire: The careless exposure of barbed wire is a misdemeanor: § 2600.

Explosives and fire arms: Persons violating the law relating to the keeping and sale of explosives are guilty of a misdemeanor: § 2595. Burglary with explosives: § 8404. Shipping loaded fire arms a misdemeanor: § 8599.

Fire escapes: Persons in charge of hotels who fail to provide fire escapes are guilty of a misdemeanor: §§ 1797-8, 1817. Persons failing to provide fire escapes for certain buildings over two stories in height are guilty of a misdemeanor: §§ 2586-9. Failure to cause doors on public buildings to swing outward a misdemeanor: § 2590.

Fire prevention: Persons violating the provisions of the chapter relating to forest and prairie fires are guilty of a misdemeanor: § 2843, 2946, 2947-8. Persons or corporations using locomotives or engines between May 1 and Oct. 1, without providing the same with spark arresters are guilty of a misdemeanor: § 2945. See also arson: § 8391 et seq.

Steamers' life saving equipment: Failure to provide life saving equipment on steamers is a misdemeanor: § 2603.

Health Regulations.

Violation of laws relating to contagious diseases: Persons violating the provisions of the article looking to the prevention of infectious diseases in school are guilty of a misdemeanor: § 990. Persons failing to obey rules and regulations of dept. public welfare in epidemics are guilty of a misdemeanor: § 1624. Persons neglecting to comply with the requirements of local boards of health with respect to nuisances are guilty of a misdemeanor: § 1657. Health officer neglecting to perform any duty required of him by law is guilty of a misdemeanor: § 1660. A physician or other person who fails to report an infectious or contagious disease is guilty of a misdemeanor: § 1661. A failure by officers to quarantine a contagious disease is a misdemeanor: § 1662. Persons suffering from contagious diseases who expose themselves, or other persons who expose persons so suffering, are guilty of a misdemeanor: § 1663. Midwives and nurses who fail to report affections of the eye in infants are guilty of a misdemeanor: § 1670.

Regulation of doctors, etc.: The practice of various occupations without a license is a misdemeanor: Medicine and surgery: § 2109; dentistry: § 2136; osteopathy: § 2139; chiropractic: § 2154; pharmacy: §2182; graduate nurses: § 2197; embalmers: § 2206; veterinarians: § 2217.

Vital statistics: The violation of the law for acquiring vital statistics is a misdemeanor: §§ 1645, 1654.

Horticultural and Animal Inspection.

Violation of bee inspection law: The following are misdemeanors: Failure to notify inspector of diseases: § 2093. Resisting or refusing inspection: § 2094. Failure to destroy sources of infection: § 2095. Exposing others to infection: § 2097. Sale of imported bees without inspection certificate: § 2098. Sale of bee appliances without disinfection: § 2101. Removal of bees without permit: § 1202.

Violation of horticultural inspection laws: Persons violating the horticultural inspection law are guilty of a misdemeanor: §§ 2082-5.

Violation of livestock inspection laws: Bringing into state animals affected with communicable diseases is unlawful: § 1853. Moving sheep from quarantined area except in accordance with rules and regulations of bureau of animal industry is unlawful: § 1862. Violation of any of the provisions of the livestock law is a misdemeanor: § 1876. Owners of sires who fail to secure license for their service or sale are guilty of a misdemeanor: §§ 1904-5.

§ 8337. [6908] **Permitting explosion causing death.** Every person having charge of any steam boiler or steam engine, or other apparatus for generating or employing steam, used in any manufactory, or on any railroad, or in any vessel, or in any kind of mechanical work, or for heating, who wilfully, or from ignorance or neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, engine or apparatus, or to cause any other accident whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than 10 years. [R. S. § 6908.]

Hist. R. S. § 6908, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or for heating" omitted. Pen. C. 1872, § 368: Kerr's C. ib.

N. D. Similar: Pen. C. § 9709.

§ 8338. [6909] **Permitting collision causing death.** Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad, car, locomotive or train, who wilfully or

negligently suffers or causes the same to collide with another car, locomotive or train, or with any other object or thing whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than 10 years. [R. S. § 6909.]

Hist. R. S. § 6909, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 369: Kerr's C. ib.

Federal employer's liability not affected: Violation of this section by an interstate employee has no bearing upon his right to recover under the federal employers' liability act of April 22, 1908 (35 U. S. St. at L. 65, c. 149). Spokane etc. Ry. Co. v. Campbell (1916) 241 U. S. 497, 36 S. C. R. 683, 60 L. ed. 1125.

§ 8339. [6910] **Public nuisance defined.** Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire commuity or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal or basin, or any public park, square, street, or highway, is a public nuisance. [R. S. § 6910.]

Hist. (See Cr. and P. '64, § 130) R. S. § 6910, reen. R. C. ib., reen. C. L. ib.

Cross ref. Public nuisance defined: § 6421. Failure to destroy weeds on rights of way subjects offender to a fine: § 3500. See cross references at beginning of this chapter.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 370; same as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9742.

§ 8340. [6911] **Same: Unequal damage.** An act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal. [R. S. § 6911.]

Hist. R. S. § 6911, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 371; same as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9743.

§ 8341. [6912] **Punishment for nuisance.** Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor. [R. S. § 6912.]

Hist. (See Cr. and P. '64, § 130) R. S. § 6912, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 372: Kerr's C. ib.

§ 8342. [6913] **Maintenance of pest house.** Every person who establishes or keeps, or causes to be established or kept, within the limits of any city, town or village, any pest house, hospital, or place for persons affected with contagious or infectious diseases, is guilty of a misdemeanor. [R. S. § 6913.]

Hist. R. S. § 6913, reen. R. C. ib. reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 373: Kerr's C. ib.

§ 8343. [6914] **Exposure of animal carcasses.** Every person who puts the carcass of any dead animal, or the offal of any slaughter pen, corral or butcher shop, into any river, creek, pond, street, alley, public highway or road in common use, or who attempts to destroy the same by fire within one-fourth of a mile of any city, town or village, is guilty of a misdemeanor. [R. S. § 6914.]

Hist. R. S. § 6914, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 374; additional provisions as amended: Kerr's C. ib.

§ 8344. [6915] **Keeping gunpowder in towns.** Every person who makes or keeps gunpowder, nitroglycerin, or other highly explosive substance, within any city or town, or who carries the same through the streets thereof, in any quantity or manner prohibited by law, or by any ordinance of such city or town, is guilty of a misdemeanor. [R. S. § 6915.]

Hist. R. S. § 6915, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9745.

Comp. leg.—Cal. Same: Pen. C. 1872, § 375: Kerr's C. ib.

§ 8345. [6920] **Slaughter and sale of famished animals.** Every person who slaughters, offers or exposes for sale to the public, any animal or animals that have been confined for 48 hours or more without proper food, or 20 hours without water, is guilty of a misdemeanor. [R. S. § 6920.]

Hist. (See '83, p. 63, § 2) R. S. § 6920, reen. R. C. ib., reen. C. L. ib.

§ 8346. [6921] **Firing timber or prairie lands.** Any person who shall wilfully or carelessly set on fire, or cause to be set on fire, any timber or prairie lands in this state, thereby destroying the timber, grass or grain on any such lands, or any person who shall build a camp fire in any woods, or on any prairie, and leave the same without totally extinguishing such fire, or any railway company which shall permit any fire to spread from its right of way to the adjoining lands, is guilty of a misdemeanor. [R. S. § 6921.]

Hist. (Act. Feb. 10,. '87) R. S. § 6921, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 384; as amended: Kerr's C. ib.

§ 8347. [6922] **Evasion of toll.** Every person not exempt from paying tolls who crosses on any ferry or toll bridge, or passes through any toll gate, lawfully kept, without paying the toll therefor and with intent to avoid such payment, is punishable by fine not exceeding $20. [R. S. § 6922.]

Hist. R. S. § 6922, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 389: Kerr's C. ib.

§ 8348. [6923] **Neglect to sound bell or whistle.** Every person in charge of a locomotive engine who, before crossing any traveled public way, omits to cause a bell to ring or steam whistle to sound at the distance of at least 80 rods from the crossing, and up to it, is guilty of a misdemeanor. [R. S. § 6923.]

Hist. R. S. § 6923, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9779.

Comp. leg.—Cal. Same: Pen. C. 1872, § 390; Kerr's C. ib.

§ 8349. [6924] **Intoxicated engineers or conductors.** Every person who is intoxicated while in charge of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, whether propelled by steam or drawn by horses, or while acting as train despatcher or as telegraph operator, receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor. [R. S. § 6924.]

Hist. R. S. § 6924, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. §9780.

Comp. leg.—Cal. Same: Pen. C. 1872, § 391: Kerr's C. ib.

§ 8350. [6925] **Placing passenger in front of freight cars.** Every person who, in making up or running railroad trains, places or runs, or

causes to be placed or run, any freight car in the rear of passenger cars, is guilty of a misdemeanor, and if loss of life or limb results from such placing or running, is guilty of felony. The term "freight car" as used in this section does not include a baggage, express or mail car. [R. S. § 6925.]

Hist. R. S. § 6925, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 392: Kerr's C. ib.

§ 8351 [6926] **Violation of duty by railroad employee.** Every engineer, conductor, brakeman, switchtender or other officer, agent or servant of any railroad company, who is guilty of any wilful violation or omission of his duty as such officer, agent or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor. [R. S. § 6926.]

Hist. R. S. § 6926, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. § 1872, § 393: Kerr's C. ib.

N. D. Identical: Pen. C. § 9781.

Federal employers' liability not affected: Violation of this section by an interstate employee has no bearing upon his right to recover under the federal employers' liability act of April 22, 1908 (35 U. S. St. at L. 65, c. 149). Spokane etc. Ry. Co. v. Campbell (1916) 241 U. S. 497, 36 S. C. R. 683, 60 L. ed. 1125.

§ 8352. Employment of illiterate trainmen. It shall be unlawful for any person, firm or corporation operating a railroad within the state of Idaho, whereon steam or electricity is used as motive power, to employ any conductor, engineer, fireman, brakeman, switchman or any other employee whose duty may require him to act as flagman who can not read, write and speak the English language. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor. ['11, c. 161, §§ 1, 2, p. 559.]

Hist. '11, c. 161, §§ 1, 2, p. 559, reen. C. L. § 6926a.

§ 8353. [6927] **Exposure of person with contagious disease.** Every person who wilfully exposes himself or another afflicted with any contagious or infectious disease, in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health, is guilty of a misdemeanor. [R. S. § 6927.]

Hist. R. S. § 6927, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 394: Kerr's C. ib.

§ 8354. [6928] **Racing on highways.** Every person driving any conveyance drawn by horses, upon any public road or way, who causes or suffers his horses to run, with intent to pass another conveyance, or prevent such other from passing his own, is guilty of a misdemeanor. [R. S. § 6928.]

Hist. R. S. § 6928, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 396: Kerr's C. ib.

§ 8355. [6929] **Selling liquor to Indians.** Every person who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian is guilty of a misdemeanor. [R. S. § 6929.]

Hist. (See '79, p. 31) R. S. § 6929, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 397; similar as amended but applies also to habitual drunkard: Kerr's C. ib.

N. D. Analogous: Pen. C. § 10140.

§ 8356. [6930] **Selling firearms or ammunition to Indians.** Every person who sells or furnishes to any Indian any firearm or ammunition therefor, is guilty of a misdemeanor. [R. S. § 6930.]

Hist. (See '79, p. 31) R. S. § 6930, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 398: Kerr's C. ib.

§ 8357. Selling explosives to minors. No person, firm, association or corporation shall sell or give to any minor under the age of 16 years

any powder, commonly called gunpowder, of any description, or any dynamite or other explosive, or any shells or fixed ammunition of any kind, or any firearms of any description, without the written consent of the parents or guardian of such minor first had and obtained. Any person, firm, association or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $25 nor more than $100, or be imprisoned in the county jail not less than 10 days nor more than 30 days, or be punished by both such fine and imprisonment in the discretion of the court. ['13, c. 177, §§ 1, 2, p. 553.]

Hist. '13, c. 177, §§ 1, 2, p. 553, reen. C. L. § 6930a.

§ **8358.** [6931] **Permitting mischievous animal at large.** If the owner of a mischievous animal, knowing its propensities, wilfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions which circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony. [R. S. § 6931.]

Hist. R. S. § 6931, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 399: Kerr's C. ib.

§ **8359.** [6932] **Sale of animal with glanders.** Any person who shall knowingly sell or offer for sale or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed, any horse, mule or other animal having the disease known as glanders or farcy, shall be guilty of a misdemeanor. [R. S. § 6932.]

Hist. R. S. § 6932, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9791.

Comp. leg.—Cal. Similar: Kerr's C. § 402.

§ **8360.** [6933] **Animal with glanders to be killed.** Every animal having glanders, or farcy, shall at once be deprived of life by the owner or person having charge thereof, upon discovery, or knowledge, of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor. [R. S. § 6933.]

Hist. R. S. § 6933, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Kerr's C. § 402b.

§ **8361.** [6934] **Leaving carcasses near highways, dwellings and streams.** Any person who shall knowingly leave the carcass of any animal within a quarter of a mile of any inhabited dwelling, or on, along or within a quarter of a mile of any public highway or stream of water, for a longer period than 24 hours, without burying the same, shall be guilty of a misdemeanor, and upon conviction shall be fined any sum not to exceed $100. ['05, p. 39, § 33.]

Hist. '05, p. 39, § 33, reen. R. C. § 6934, reen. C. L. ib.

§ **8362. Sale of cigarettes to minors.** It shall not be lawful for any merchant, trader, peddler, pharmacist, druggist, apothecary, or any other person or persons, male or female, in this state, with or without a license, to sell by wholesale or retail, or give away, directly or indirectly, to any person or persons, male or female, under the age of 21 years, cigarettes for smoking, or the compounds of tobacco used in the filling or makeup of cigarettes for the purpose of chewing or smoking. Any merchant, trader, peddler, pharmacist, druggist or apothecary, or

any other person or persons in this state violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in the sum of $100 and the cost of the prosecution. [C. L. § 6935.]

Hist. '88-89, p. 53, §§ 1, 2; am. R. C. § 6935; compiled and reen. C. L. ib.

§ 8363. Use of tobacco by minors. Every minor person and every minor pupil in any school, college or university, who shall smoke or use cigarettes, cigars or tobacco in any form, or in any public road, alley, street, park or other lands used for public purposes, or in any public place of business, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished for each offense by a fine of not more than $10, and every person who shall furnish any cigarettes, cigars or tobacco in any form, to such minor persons, or who shall permit such minor persons to frequent any premises owned, held or managed by him, for the purpose of indulging in the use of cigarettes, cigars or tobacco in any form, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $25 nor more than $100 for each offense. ['13, c. 150, p. 519.]

Hist. '13, c. 150, p. 519, reen. C. L. § 6936.

CHAPTER 306.

CRIMES AGAINST THE PUBLIC PEACE.

§ 8364. [6950] **Riot defined.** Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot. [R. S. § 6950.]

Hist. (See Cr. and P. '64, § 122) R. S. § 6950, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 404: Kerr's C. ib.

N. D. Similar: Pen. C. § 9807.

§ 8365. [6951] **Punishment for riot.** Every person who participates in any riot is guilty of a misdemeanor. [R. S. § 6951.]

Hist. (See Cr. and P. '64, § 122) R. S. § 6951, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 405: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9808.

§ 8366. [6952] **Rout defined.** Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout. [R. S. § 6952.]

Hist. R. S. § 6952, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 406: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9809.

§ 8367. [6953] **Unlawful assembly defined.** Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly. [R. S. § 6953.]

Hist. (See Cr. and P. '64, § 121) R. S. § 6953, reen. R. C. ib., reen. C. L. ib.

Cross ref. Criminal syndicalist assembly: §§ 8582-3. A person participating in an unauthorized military organization is guilty of a misdemeanor: 760.

Comp. leg.—Cal. Same: Pen. C. 1872, § 407; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9810.

§ **8368.** [6954] **Punishment for rout and unlawful assembly.** Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor. [R. S. § 6954.]

Hist. (See Cr. and P. '64, § 121) R. S. § 6954, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 408: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9811.

§ **8369.** [6955] **Persons present at riots and routs.** Every person remaining present at the place of any riot, rout or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor. [R. S. § 6955.]

Hist. (See Cr. and P. '64, § 119) R. S. § 6955, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 409: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9812.

§ **8370.** [6956] **Officers neglecting to suppress riots.** If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor. [R. S. § 6956.]

Hist. (See Cr. Prac. '64, § 41) R. S. § 6956, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 410: Kerr's C. ib.

§ **8371.** [6957] **Prize fights.** Every person who engages in, instigates, encourages or promotes any ring or prize fight, or any other premeditated fight or contention (without deadly weapons) either as principal, aid, second, umpire, surgeon or otherwise, is punishable by imprisonment in the state prison not exceeding two years. [R. S. § 6957.]

Hist. (See Cr. and P. '64, § 39) R. S. § 6957, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 412; similar in part as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9815.

§ **8372.** [6958] **Dog or cock fights.** Every person who participates in dog or cock fighting, or who aids or abets the same by his presence, is guilty of a misdemeanor. [R. S. § 6958.]

Hist. '83, p. 63, § 4; R. S. § 6958, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Kerr's Pen. C. § 597b.

§ **8373.** [6959] **Disturbing the peace.** Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood, family or person, by loud or unusual noise, or by tumultuous or offensive conduct, or by threatening, traducing, quarreling, challenging to fight or fighting, or who on the public streets of any unincorporated town or village, or upon the public highways in such unincorporated town or village, runs any horse race, either for a wager or for amusement, or fires any gun or pistol in such unincorporated town or village, or uses any vulgar, profane or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor. [R. S. § 6959.]

Hist. R. S. § 6959, reen. R. C. ib., reen. C. L. ib.

Cross ref. Any person disturbing the peace on a railway train is guilty of a misdemeanor: § 8591.

Comp. leg.—Cal. Similar in part: Pen. C. 1872, § 415; similar as amended: Kerr's C. ib.

§ **8374.** [6960] **Same: Refusal to disperse.** If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded

so to do by a public officer, the persons so offending are severally guilty of a misdemeanor. [R. S. § 6960.]

Hist. (See Cr. and P. '64, § 119) R. S. § 6960, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 416: Kerr's C. ib.

§ 8375. [6961] **Exhibition or use of deadly weapon.** Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor. [R. S. § 6961.]

Hist. (See Cr. and P. '64, § 40) R. S. § 6961, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 417: Kerr's C. ib.

Cross ref. Similar provision: § 8407.

§ 8376. [6962] **Forcible entry and detainer.** Every person using or procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of other, except in the cases and in the manner allowed by law, is guilty of a misdemeanor. [R. S. § 6962.]

Hist. (See '75, § 570) R. S. § 6962, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 418: Kerr's C. ib.

§ 8377. [6963] **Unlawful possession of land after ouster.** Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal or officer, and who afterward unlawfully returns to settle, reside upon or take possession of such lands, is guilty of a misdemeanor. [R. S. § 6963.]

Hist. R. S. § 6963, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9823.

Comp. leg.—Cal. Same: Pen. C. 1872, § 419: Kerr's C. ib.

§ 8378. Conduct at pleasure resorts. Any person violating the provisions of any rules or regulations adopted by the ownership or management for the orderly and healthful conduct of any park, picnic ground, dance hall, pleasure or health resort, sanitarium or building, or grounds of any kind or description to which the public has general access, whether owned or operated by the state, a county, a municipality, corporation, association, partnership or individual, shall be guilty of misdemeanor, and upon conviction thereof shall be fined in a sum not less than $10 and not exceeding $100, or imprisonment in the county jail not less than five days or more than 30 days, or both, in the discretion of the court.

It shall be the duty of the owners or managers of any park, picnic ground, dance hall, pleasure or health resort, sanitarium or building or grounds of any kind whatsoever, to which the public has general access, who desire to bring themselves under the provisions of this section, to adopt reasonable regulations for the orderly and healthful conduct of such place, and to keep copies of said rules and regulations printed in plain English type posted in conspicuous places upon or within the grounds and buildings governed by said rules and regulations. Unless copies of said rules and regulations are so posted, no conviction shall be had under the provisions of this section. ['17, c. 26, §§ 1, 2, p. 68.]

Hist. '17, c. 26, §§ 1, 2, p. 68, reen. C. L. § 6964.

CHAPTER 307.

CRIMES AGAINST THE REVENUE AND PROPERTY OF THE STATE.

Cross ref. Persons who mutilate or destroy any article of furniture or book belonging to the law library are guilty of a misdemeanor: § 1267.

ARTICLE 1.

OFFENSES RELATING TO CUSTODY OF PUBLIC MONEY.

Cross ref. Other offenses which might be properly classed here are:

Embezzlement of public funds: Embezzlement defined: § 8450. Neglect or refusal of any county officer or deputy to account for, and pay into the county treasury, any money received as fees, in excess of expenses, constitutes embezzlement of public funds: Const. XVIII, 9. See also Pol. C. § 3695. Embezzlement of military funds: § 762. Embezzlement of school funds: § 917. School trustees failing to pay into the county treasury money arising from the sale of school district bonds are guilty of felony: § 941. Fish and game wardens failing to account for funds are guilty of a sort of petit embezzlement, the offense being a misdemeanor: § 2678.

Obtaining public money under false pretenses: The making of a false certificate on a state voucher is a felony: §§ 241, 8123. False representations to secure state insurance is a misdemeanor: § 6312.

Irregular handling of public funds: The making of profit out of state, county, city, town, township, or school district money, or using the same for any purpose not authorized by law by any public officer shall be deemed a felony: Const. VII, 10. State treasurer making profit out of the unlawful deposit or loan of state funds is guilty of felony: § 328. The making of profit or the use, loan or deposit of county funds by the county treasurer in a manner other than is authorized by law constitutes a felony: § 3591.

Officers purchasing evidences of public indebtedness are guilty of a felony: § 8122. A county commissioner who is interested in a highway contract let by the board is guilty of a misdemeanor: § 1325. Likewise a highway district commissioner: § 1515. Directors or officers of irrigation districts becoming interested in contracts with the district are guilty of a misdemeanor: § 4353. Penitentiary officers who become interested in contracts for supplies to be furnished to, or buildings to be constructed for, the penitentiary are subject to fine: § 9383.

State treasurer who fails or refuses to do any act required by the law relating to the deposit of state funds is guilty of a misdemeanor: § 329. State treasurer neglecting to keep money in the treasury vault is guilty of felony: § 160. Bribery of state treasurer: § 330. Acceptance of bribe by officer in dept. of finance a felony: § 300. The failure of state officers to deposit public money as required by law is a misdemeanor: § 485. Any person violating the law governing the loan expense fund is guilty of a misdemeanor: § 2982.

Neglect of county treasurer to perform any act required by the county depository law constitutes a misdemeanor: § 3592. Bribery of county treasurer is a felony: § 3592. Noncompliance by municipal treasurer with requirements as to handling of municipal funds is a misdemeanor: § 4045. The misappropriation of bond proceeds by municipal officers is a misdemeanor: § 4119.

Officers refusing to make returns to the dept. of finance are guilty of a felony: § 295. Persons obstructing officer in dept. of finance or refusing access to books or papers or refusing to furnish information are guilty of felony: §§ 297-8. Officers who fail to keep an account of fees received by them are guilty of a misdemeanor: § 480. Officers violating the requirements of § 482 governing pamphlet publications of the constitution and laws are guilty of a misdemeanor: § 483. Officers accepting fees from pensioners for certain services are guilty of a misdemeanor: § 3714. An officer of a state institution violating the law prohibiting deficiencies is guilty of a misdemeanor: § 487. Members of school boards failing to give state the preference right to purchase bonds are guilty of a misdemeanor: § 2965. Acceptance of bribe by appraiser to reduce inheritance tax: § 3385.

§ 8379. [6975] **Misuse of public money by officers.** Each officer of this state, or of any county, city, town or district of this state, and every other person charged with the receipt, safe keeping, transfer or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another; or,

2. Loans the same or any portion thereof; or, having the possession or control of any public money, makes a profit out of, or uses the same for any purpose not authorized by law; or,

3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

4. Deposits the same or any portion thereof in any bank, or with any banker or other person, otherwise than on special deposit, or as otherwise authorized by law; or,

5. Changes or converts any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law; or,

6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

7. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or,

8. Wilfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order or warrant drawn upon such moneys by competent authority; or,

9. Wilfully omits to transfer the same when such transfer is required by law; or,

10. Wilfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same;

Is punishable by imprisonment in the state prison for not less than one nor more than 10 years, and is disqualified from holding any office in this state. [R. C. § 6975.]

Hist. (See Cr. and P. '64, § 70) R. S. § 6975; modified by depository laws of '03 and '05, R. C. § 6975, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 424; amended: Kerr's C. ib.

Ariz. Identical: R. C. '13, § 439; and **Ohio.** Similar: R. C. § 6841. Re Huston (1915) 27 I. 231, 240, 147 P. 1064.

N. D. Analogous: Pen. C. § 9827.

Cited: Comrs. Bingham Co. v. Woodin (1898) 6 I. 284, 55 P. 662; Blaine Co. v. Fuld (1918) 31 I. 358, 171 P. 1138.

Liability of bank: Where money is deposited in a bank generally by the state treasurer in violation of this section, the bank nevertheless receives the money on special deposit as a trust fund and can not commingle it with the money of the bank, nor have its creditors any interest therein in case of the insolvency of the bank. S. v. Thum (1898) 6 I. 323, 55 P. 858.

Moneys deposited by a treasurer of an irrigation district in a bank become a trust fund, not part of the estate of the bank, and must be so treated in case of insolvency of the bank. Re Bk. of Nampa (1916) 29 I. 166, 157 P. 117.

Auditor not affected. State auditor in official capacity is not the custodian of public moneys within the meaning of this section. (Morgan, J., dissents.) Re Huston (1915) 27 I. 231, 147 P. 1064.

Embezzlement: This section was intended for the punishment of that particular class of public officers who, being charged with the custody of public lands, embezzle the same in violation of their trust. Ib.

This section was enacted for the purpose of the better protection of public moneys and to keep them from being carelessly or dishonestly dealt with under circumstances not amounting to embezzlement. (Dis op.) Ib.

Intent: It is not necessary to establish guilt that there be any intent on the part of the defendant in making the prohibited deposit, to cheat, wrong or defraud the county. S. v. Browne (1896) 4 I. 723, 44 P. 552.

This section does not hold a public officer criminally responsible for an honest mistake in drawing warrants on public money. Re Huston, supra. This section must be construed in connection with § 8087. (Dis. op.) Ib.

§ 8380. [6976] **Same: Failure to keep and pay over money.** Every officer charged with the receipt, safe keeping or disbursement of public moneys who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony. [R. S. § 6976.]

Hist. (See Cr. and P. '64, § 71) R. S. § 6976, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 425: Kerr's C. ib.

Cited: S. v. Thum (1898) 6 I. 323, 55 P. 858. Re. Bk. of Nampa (1916) 29 I. 166, 157 P. 1117.

§ 8381. [6977] **Public moneys defined.** The phrase "public moneys" as used in the two preceding sections includes all bonds and evidences of indebtedness, and all moneys belonging to the state, or any city, county, town or district therein, and all moneys, bonds and evidences of

indebtedness received or held by state, county, district, city or town officers in their official capacity. [R. S. § 6977.]

Hist. (See Cr. and P. '64, § 71) R. S. § 6977, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 426: Kerr's C. ib.

Cited: S. v. Thum (1898) 6 I. 323, 55 P. 858.

Funds of irrigation district: An irrigation district is a public corporation, its treasurer is a public officer, and moneys of such district received by him as treasurer are public money. Re Bk. of Nampa, Ltd. (1916) 29 I. 166, 157 P. 1117.

§ 8382. [6978] **Failure of officer to account for fines or costs.** If any clerk, justice of the peace, sheriff or constable who receives any fine or forfeiture or costs arising out of a judgment in a criminal action, refuses or neglects to pay over the same according to law, and within 30 days after the receipt thereof, such officer is guilty of a misdemeanor. ['99, p. 379, § 5.]

Hist. R. S. § 6978; am. '99, p. 379, § 5, reen. R. C. § 6978, reen. C. L. ib.

Comp. leg.—Cal. Same except "or costs arising out of a judgment in a criminal action" omitted, and "he" for "such officer": Pen. C. 1872, § 427: Kerr's C. ib.

ARTICLE 2.

OFFENSES RELATING TO ASSESSMENT AND COLLECTION OF TAXES.

Cross ref. A person making a false statement to the assessor is guilty of perjury: § 3117. An assessor listing property at less than its cash value is guilty of a misdemeanor: § 3122. The failure of a prosecuting attorney to prosecute a delinquent assessor is a misdemeanor: § 3123. A member of the county board of equalization who knowingly permits the assessment of property at more or less than its full cash value is guilty of a misdemeanor: §§ 3161, 3309. Any person evading the payment of tax on live stock by removing same or refusing to make a statement is guilty of a misdemeanor: §§ 3287, 3292. Revenue officers disclosing information derived as to net profits of mines are guilty of a felony: § 3366. Persons appointed to appraise a taxable transfer who accept a reward from any person liable to pay the tax are guilty of a misdemeanor: § 3385. Refusal of county officers to levy, collect and apply taxes to meet the payment of interest and redemption of county bonds constitutes a misdemeanor: § 3526. Municipal officers who fail to levy and collect special bond taxes are guilty of a misdemeanor: § 4119. Highway officers who fail to take the necessary steps to secure the payment of bonds are guilty of a misdemeanor: § 1556. Violation of revenue laws by person who performs duties of two officers a felony: § 8130. The violation of the provisions of the law relating to the registration of motor vehicles is a misdemeanor: § 1619.

§ 8383. [6979] **Refusal to give assessor list of property.** Every person who unlawfully refuses upon demand to give to any county assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name, or fraudulently refuses to give his true name, to any assessor when demanded by such assessor in the discharge of his official duties, is guilty of a misdemeanor. [R. S. § 6979.]

Hist. (See '75, p. 475, § 68) R. S. § 6979, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 429: Kerr's C. ib.

§ 8383a. [6980] **Use of illegal receipts.** Every person who uses or gives any receipt except that prescribed by law, as evidence of the payment of any poll tax, road tax or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, or who inserts the name of more than one person therein, is guilty of a misdemeanor. [R. S. § 6980.]

Hist. (See '75, p. 475, §§ 61, 65) R. S. § 6980, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 431: Kerr's C. ib.

Cross ref. Official receipts are prescribed by the state auditor: § 144.

§ 8383b. [6981] **Unlawful possession of blank licenses or poll tax receipts.** Every person who has in his possession with intent to circulate or sell, any blank licenses or poll tax receipts other than those furnished by the proper officer, is guilty of felony. [R. S. § 6981.]

Hist. (See '75, p. 475, § 83) R. S. § 6981, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 432: Kerr's C. ib.

§ 8384. [6982] **Refusal to give tax collector names of employees.** Every person who, when requested by the collector of taxes or licenses, refuses to give to such collector the name and residence of each man in his employment, or to give such collector access to the building or place where such men are employed, is guilty of a misdemeanor. [R. S. § 6982.]

Hist. (See '75, p. 475, § 66) R. S. § 6982, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 434: Kerr's C. ib.

§ 8385. [6983] **Doing business without license.** Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor. [R. S. § 6983.]

Hist. (See '71, p. 21, § 150) R. S. § 6983, reen. R. C. ib., reen. C. L. ib.

Cross ref. Persons keeping a toll road, bridge or ferry, without being licensed so to do are subject to fine: § 1473. Peddlers selling goods without a license are guilty of a misdemeanor: § 2354. Violation of law governing licensing of motor vehicles is a misdemeanor: § 1619. A promoter of a creamery, cheese factory or condensery who fails to secure a license is guilty of a felony: § 2048. An officer of an express company failing to make statement on which license tax is computed is guilty of a misdemeanor: § 3359.

Comp. leg.—Cal. Same: Pen. C. 1872, § 435; Kerr's C. ib.

Cited: Vermont Loan & Trust Co. v. Hoffman (1897) 5 I. 376, 49 P. 314.

Civil and criminal liability: The license tax is required to be paid before a person commences business. The tax is not imposed as a penalty, but is a debt due the county or state for doing or conducting the business. The penalty for doing such business without a license is made a misdemeanor. S. v. Wall (1910) 18 I. 300, 109 P. 724.

Where a license must be procured before commencement of a business or occupation liable to pay a license tax, a person operating without license is not only liable for the tax but may also be prosecuted criminally. Bingham Co. v. Fidelity etc. Co. (1907) 13 I. 34, 88 P. 829.

§ 8386. [6984] **Neglect of duty by tax collector.** If any tax collector or his deputy wilfully neglects or refuses to perform any of the duties enjoined on him by the provisions of title XXVIII of these Compiled Statutes he is guilty of a misdemeanor in office, and shall be punished by imprisonment in the county jail not more than one year, or by a fine of not less than $200 nor more than $1000, or by both such fine and imprisonment, and shall be forthwith removed from office. [R. S. § 6984.]

Hist. ('64, p. 334, § 26) R. S. § 6984, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872. § 440; Kerr's C. ib.

§ 8387. [6985] **Same: By auditor.** If any county auditor neglects or refuses to perform the duties enjoined on him by the provisions of title XXVIII of these Compiled Statutes he is guilty of a felony, and shall be punished by imprisonment in the state prison for not more than one year, or by a fine of not less than $200 nor more than $1000, or by both such fine and imprisonment, and shall be forthwith removed from office. [R. S. § 6985.]

Hist. ('64, p. 334, § 74) R. S. § 6985, reen. R. C. ib.. reen. C. L. ib.

ARTICLE 3.

DISPOSING OF MILITARY SUPPLIES.

§ 8388. [6986] **Selling military supplies of state.** Every person who unlawfully disposes of any arms, equipments, clothing or military stores, the property of this state, is guilty of a misdemeanor. [R. S. § 6986.]

Hist. R. S. § 6986, reen. R. C. ib., reen. C. L. ib.

Cross ref. An enlisted man disposing of equipment is subject to court martial: § 756. The unauthorized possession of military property is a misdemeanor: § 761. Embezzlement of military funds is a felony: § 762.

ARTICLE 4.

DESTRUCTION OF STATE TIMBER.

Cross ref. A lessee of state lands who cuts timber thereon in violation of law is guilty of a misdemeanor: § 2909. Persons occupying state land without a lease or after their lease has expired are guilty of a misdemeanor: § 2912. Persons violating the article governing the sales of timber on state lands are guilty of a misdemeanor: § 2934.

§ 8389. [6987] **Destruction of timber on state lands.** Every person who wilfully and without authority enters upon the public lands of the state and cuts down, destroys or injures any kind of wood or timber, standing or growing upon such lands, or who wilfully and without authority carries away any kind of wood or timber lying on such lands, is guilty of a misdemeanor. ['93, p. 139, § 26.]

Hist. '93, p. 139, § 26. reen. '99, p. 73, § 28, reen. R. C. § 6987, reen. C. L. ib.

§ 8390. [6988] **Cutting timber for purpose of shipment.** Every person who wilfully and without authority enters upon the public lands of the state and cuts down, destroys or injures any kind of wood or timber growing upon such lands, for the purpose of shipping, freighting, floating or otherwise transporting such wood or timber out of the state, or who shall ship, freight or float, or otherwise transport out of the state, any wood or timber cut upon the public lands of the state, shall be guilty of a felony. ['93, p. 139, § 27.]

Hist. '93, p. 139, § 27, reen. '99, p. 72, § 29, reen. R. C. § 6988. reen. C. L. ib.

CHAPTER 308.

CRIMES AGAINST PROPERTY.

ARTICLE 1.

ARSON.

Cross ref. Violations of provisions for protection of timber and prairies against fire constitute misdemeanors: §§ 2943, 2945-8. The burning or destruction of insured property is a felony: § 5029. Burning of certain property not the subject of arson is a felony: § 8556. Burning of electrical transmission plants or destruction of transmission lines is a felony: §§ 8576-8.

§ 8391. [7000] **Arson defined.** Arson is the wilful and malicious burning of a building, with intent to destroy it. [R. S. § 7000.]

Hist. (See Cr. and P. '64, § 56) R. S. § 7000, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 447; Kerr's C. ib.

N. D. Identical: Pen. C. § 9849.

§ 8392. [7001] **Building defined.** Any house, edifice, structure, vessel or other erection capable of affording shelter for human beings, or appurtenant to or connected with an erection so adapted, is a building within the meaning of this article. [R. S. § 7001.]

Hist. R. S. § 7001, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 448; Kerr's C. ib.

N. D. Identical: Pen. C. § 9850.

§ 8393. [7002] **Inhabited building defined.** Any building which has usually been occupied by any person lodging therein at night is an inhabited building within the meaning of this article. [R. S. § 7002.]

Hist. R. S. § 7002, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 449; Kerr's C. ib.

N. D. Similar: Pen. C. § 9851.

Subjects of arson: Any building which is usually occupied by any person lodging therein at night is an inhabited building within the law of arson: consequently a jail is a subject of arson. S. v. Collins (1892) 3 I. 467, 31 P. 1048.

§ **8394.** [7003] **Night time defined.** The phrase "night time" as used in this article means the period between sunset and sunrise. [R. S. § 7003.]

Hist. R. S. § 7003, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 450; Kerr's C. ib.

N. D. Similar: Pen. C. § 9852.

§ **8395.** [7004] **Burning defined.** To constitute a burning, within the meaning of this chapter, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building. [R. S. § 7004.]

Hist. R. S. § 7004. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 451; Kerr's C. ib.

N. D. Similar: Pen. C. § 9853.

§ **8396.** [7005] **Ownership of building.** To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying, such building or any part thereof. [R. S. § 7005.]

Hist. R. S. § 7005. reen. R. C. ib,, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 452; Kerr's C. ib.

N. D. Identical: Pen. C. § 9854.

§ **8397.** [7006] **Degrees of arson.** Arson is divided into two degrees. [R. S. § 7006.]

Hist. R. S. § 7006, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 453; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9859.

§ **8398.** [7007] **Degrees defined.** Maliciously burning in the night time an inhabited building in which there is at the time some human being, is arson in the first degree. All other kinds of arson are of the second degree. [R. S. § 7007.]

Hist. (See Cr. and P. '64, § 56) R. S. § 7007, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 454; Kerr's C. ib.

N. D. Similar: Pen. C. § 9860.

§ **8399.** [7008] **Punishment for arson.** Arson is punishable by imprisonment in the state prison as follows:

1. Arson in the first degree, for not less than two years, and the imprisonment may be extended to life.

2. Arson in the second degree, for not less than one nor more than 10 years. [R. S. § 7008.]

Hist. (See Cr. and P. '64. §§ 56. 57) R. S. § 7008, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "years" is last word of subd. 1: Pen. C. 1872, § 455; similar as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9867.

Cited: S. v. Grant (1914) 26 I. 189, 140 P. 959.

ARTICLE 2.

BURGLARY.

§ **8400.** [7014] **Burglary defined.** Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary. [R. S. § 7014.]

Hist. (See Cr. and P. '64, § 59) R. S. § 7014, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 459; same as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9864.

Intent to commit larceny: Since larceny is not in all cases a felony, an entry into a house with intent to commit larceny is burglary whether it is intended to commit either grand or petit larceny. P. v. Stapleton (1884) 2 I. 47, 3 P. 6.

§ 8401. [7015] **Degrees of burglary.** Every burglary committed in the night time is burglary of the first degree, and every burglary committed in the day time is burglary in the second degree. [R. S. § 7015.]

Hist. R. S. § 7015, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 460; Kerr's C. ib.

N. D. Analogous: Pen. C. §§ 9868-9.

§ 8402. [7016] **Punishment for burglary.** Burglary of the first degree is punishable by imprisonment in the state prison for not less than one nor more than 15 years. Burglary of the second degree is punishable by imprisonment in the state prison for not more than five years. [R. S. § 7016.]

Hist. (See Cr. and P. '64, § 59) R. S. § 7016, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 461; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9876.

§ 8403. [7017] **Night time defined.** The phrase "night time" as used in this article means the period between sunset and sunrise. [R. S. § 7017.]

Hist. R. S. § 7017, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 463; Kerr's C. ib.

N. D. Identical: Pen. C. § 9881.

§ 8404. Burglary with explosives. Any person who with intent to commit crime breaks and enters, either by day or by night, any building whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place within said building by use of nitroglycerin, dynamite, gunpowder or any other explosive, shall be deemed guilty of burglary with explosives. Any person duly convicted of burglary with explosives shall be sentenced to the penitentiary for a period of not less than 10 years, nor more than 25 years. ['09, p. 55, H. B. 97, §§ 1, 2.]

Hist. '09, p. 55, H. B. 97, §§ 1, 2, reen. C. L. § 7018.

ARTICLE 3.

POSSESSION OF BURGLARIOUS INSTRUMENTS AND DEADLY WEAPONS.

§ 8405. [7022] **Possession of burglarious instruments.** Every person having upon him, or in his possession, a picklock, crow, key, bit, or other instrument or tool, with intent feloniously to break or enter into any building, or who shall knowingly make or alter, or shall attempt to make or alter any key or other instrument above named, so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair, any instrument or thing, knowing, or having reason to believe, that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in the last article shall be deemed a building within the meaning of this section. [R. S. § 7022.]

Hist. (See Cr. and P. '64, § 133) R. S. § 7022, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same in Pen. C. 1872, § 466; same as amended except reference: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9877.

§ 8406. [7023] **Possession of deadly weapons.** Every person having upon him any deadly weapon with intent to assault another is guilty of a misdemeanor. [R. S. § 7023.]

Hist. (See Cr. and P. '64, § 133) R. S. § 7023, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—Cal.** Same: Pen. C. 1872, § 467; Kerr's C. ib.

§ 8407. Concealed and dangerous weapons. If any person, excepting officials of a county, officials of the state of Idaho, officials of the United States, peace officers, guards of any jail, or any officer of any express company on duty, shall carry concealed upon or about his person, any dirk, dirk knife, bowie knife, dagger, sling shot, pistol, revolver, gun or any other deadly or dangerous weapon within the limits or confines of any city, town or village, or in any public assembly, or in any mining, lumbering, logging, railroad or other construction camp, public conveyances or on public highways within the state of Idaho, or shall, in the presence of one or more persons, exhibit any deadly or dangerous weapon in a rude, angry or threatening manner, or shall have or carry such weapons upon or about his person when intoxicated or under the influence of intoxicating drinks, or shall, directly or indirectly, sell or deliver, loan or barter to any minor under the age of 16 years any such weapon without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by a fine of not less than $25 nor more than $200, and by imprisonment in the county jail for a period of not less than 20 days nor more than 90 days: *Provided, however,* That any person shall be allowed to carry any of the above weapons in the places mentioned above on securing a permit from the sheriff of the county after satisfying the sheriff of the necessity therefor. ['17, c. 146, p. 461.]

Hist. '09, p. 6, H. B. 62, § 1; am. '17, c. 146, p. 461, reen. C. L. § 7024. **Cross ref.** Exhibition or use of deadly weapon: § 8375.

ARTICLE 4.

FORGERY AND COUNTERFEITING.

Cross ref. False signature to nomination papers: § 559.

Alteration of certificates of birth and death is a misdemeanor: § 1645. The making of a false certificate or refusal to make certificate of death by a physician is a misdemeanor: § 1645.

The making of false entries or reports by bank officers is a felony: § 5276. The making of false entries or reports by investment company officers is a felony: § 5316. The making of a false report by officers of mining companies is a felony: § 5323.

Various offenses connected with the issuance of false bills of lading are felonies: § 6108, et. seq. Same as to warehouse receipts: § 6173 et seq.

Tampering with public records and documents: § 8155 et seq. Falsifying evidence: § 8172 et seq. Mutilating written instruments is a felony: § 8566.

§ 8408. [7028] **Forgery defined.** Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits, any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any state auditor's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit action demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other

property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine any of the above named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court, or the return of any officer to any process of any court, is guilty of forgery. [R. S. § 7028.]

Hist. (See Cr. and P. '64, § 77) R. S. § 7028, reen. R. C. ib., reen. C. L. ib.

Cross ref. False signature to a nomination paper is forgery: § 559. Persons presenting the diploma of another, or a forged affidavit of identity, to the dept. law enforcement, or who attempt to personate another practitioner, are guilty of forgery: § 2112.

Comp. leg.—Cal. Same: Pen. C. 1872, § 470; similar as amended: Kerr's C. ib. S. v. Swensen (1905) 13 I. 1, 81 P. 379.

N. D. Similar: Pen. C. §§ 9882-3.

Information: Intent: An information for forgery must allege that the wrongful act was done with intent to defraud another. S. v. Swensen (1905) 13 I. 1, 81 P. 379. (Sullivan, J. dissents.)

An information charging that defendants did wilfully, unlawfully, feloniously and falsely utter a bank check, and did then and there utter the said bank check as true and genuine, with intent to defraud, is fatally defective, in that the part charging the making of the instrument fails to allege an intent to defraud, and the part charging the uttering of the same fails to allege its utterances knowing the same to be false, altered, forged or counterfeited. (Sullivan, J. dissents.) Ib.

Information insufficient: An information which charges merely the forgery of an affidavit, but does not specify in what manner or in what particular the affidavit was forged, is insufficient. S. v. Burtenshaw (1914) 25 I. 607, 138 P. 1105.

Forgery of affidavit charging insanity: An affidavit or information before a probate judge charging insanity may be a subject of forgery. Ib.

Forgery of void instrument: Where the original instrument claimed to have been forged is void upon its face, an indictment for forgery will not lie. P. v. Heed (1874) 1 I. 531.

Uttering: While the uttering of an instrument containing a forged indorsement does not raise a prima facie presumption that the person uttering the same forged the instrument, that fact constitutes a circumstance against the defendant which the jury have a right to consider in connection with other facts and circumstances of the case in arriving at their verdict. S. v. Miles (1912) 22 I. 166, 124 P. 786.

§ 8409. [7029] **False entries in books.** Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery. [R. S. § 7029.]

Hist. (See Cr. and P. '64, § 77) R. S. § 7029, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 471; Kerr's C. ib.

N. D. Similar: Pen. C. § 9886.

§ 8410. [7030] **Forging or counterfeiting public seals.** Every person who, with intent to defraud another, forges, or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or of any other state, or territory, government, or country, or who falsely makes, forges or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and wilfully conceals the same, is guilty of forgery. [R. S. § 7030.]

Hist. (See Cr. and P. '64, § 87) R. S. § 7030, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 9884.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 472; Kerr's C. ib.

§ 8411. [7031] **Punishment for forgery.** Forgery is punishable by imprisonment in the state prison for not less than one nor more than 14 years. [R. S. § 7031.]

Hist. (See Cr. and P. '64, § 77) R. S. § 7031, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9905.

Comp. leg.—Cal. Same: Pen. C. 1872, § 473; Kerr's C. ib.

§ 8412. [7032] **Forgery of telegraphic messages.** Every person who knowingly and wilfully sends by telegraph to any person a false or forged message, purporting to be from such telegraph office, or from any other person, or who wilfully delivers, or causes to be delivered to any person any such message falsely purporting to have been received by telegraph, or who furnishes or conspires to furnish, or causes to be furnished, to any agent, operator, or employee, to be sent by telegraph, or to be delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud another, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $5000, or by both fine and imprisonment. [R. S. § 7032.]

Hist. R. S. § 7032, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 474; Kerrs' C. ib.

Cross ref. Disclosing contents or altering telegraphic messages is a felony: §§ 8568-9.

§ 8413. [7033] **Possession of forged notes.** Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up and complete such blank and unfinished note or bill, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison for not less than one nor more than 14 years. [R. S. § 7033.]

Hist. (See Cr. and P. '64, § 82) R. S. § 7033, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9891.

Comp. leg.—Cal. Same: Pen. C. 1872, § 475; Kerr's C. ib.

§ 8414. [7034] **Passing fictitious bills.** Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be

fictitious, is punishable by imprisonment in the state prison for not less than one nor more than 14 years. [R. S. § 7034.]

Hist. (See Cr. and P. '64, § 83) R. S. § 7034, reen. R. C. ib., reen. C. L. ib.

Cross ref. Circulating illegal money: § 8588.

Comp. leg.—Cal. Same: Pen. C. 1872, § 476; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9890.

Indeterminate sentence: By the indeterminate sentence law the power of the court to impose a specified term is transferred to the prison board. The court merely announces the maximum and minimum term fixed by the statute. Re Setters (1913) 23 I. 270, 128 P. 1111.

§ **8415.** [7035] **Counterfeiting coin or bullion.** Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind or species of gold dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes or procures the same to be sold, uttered or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting. [R. S. § 7035.]

Hist. (See Cr. and P. '64, §§ 78, 88) R. S. § 7035, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 477; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9896.

Elements: The crime of uttering or attempting to utter counterfeit gold dust consists in the possession of counterfeit or spurious gold dust, knowing it to be such, and passing it, or attempting to pass it, with intent to defraud. P. v. Page (1867) 1 I. 189.

Extent of debasement: No definite amount of proportion or relative difference in the actual value of genuine gold dust and that which is counterfeit is required; it is sufficient that it be debased and that the party uttering it knows this and passes it for genuine. Ib.

Knowledge and intent: Simply passing counterfeit gold dust is not a criminal offense; the uttering must be accompanied with knowledge that the article is counterfeit, and must have been uttered with the intention to defraud. P. v. Sloper (1867) 1 I. 158.

§ **8416.** [7036] **Punishment for counterfeiting.** Counterfeiting is punishable by imprisonment in the state prison for not less than one nor more than 14 years. [R. S. § 7036.]

Hist. (See Cr. and P. '64, § 78) R. S. § 7036, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 478; Kerr's C. ib.

§ **8417.** [7037] **Possession of counterfeit coin.** Every person who has in his possession, or receives for any other person, any counterfeit gold or silver coin of the species current in this state, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces, or nuggets, with the intention to sell, utter, put off, or pass the same, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the state prison not less than one nor more than 14 years. [R. S. § 7037.]

Hist. (See Cr. and P. '64, §§ 79, 89) R. S. § 7037, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 479; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9904.

§ **8418.** [7038] **Possession of counterfeiting apparatus.** Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, metal, machine, or other thing whatever, made use of in counterfeiting coin, current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lump, pieces or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison not less than one nor more than 14 years; and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed. [R. S. § 7038.]

Hist. (See Cr. and P. '64, §§ 84, 88) R. S. § 7038, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 480; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9900.

Presumption from possession: Knowingly and secretly keeping instruments, adapted and intended for the unlawful business of counterfeiting, is presumptive evidence of intention to use them for that purpose, which presumption defendant is called upon to rebut. P. v. Page (1867) 1 I. 102.

§ 8419. [7039] **Counterfeiting railroad ticket.** Every person who counterfeits, forges, or alters, any ticket, check, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, designed to entitle the holder to ride in the cars of such company, or who utters, publishes, or puts into circulation, any such counterfeit or altered ticket, check, or order, coupon, receipt for fare, or pass, with intent to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the state prison, or in the county jail, not exceeding one year, or by fine not exceeding $1000, or by both such imprisonment and fine. [R. S. § 7039.]

Hist. R. S. § 7039, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 481; similar as amended: Kerr's C. ib.

§ 8420. [7040] **Restoring cancelled railroad tickets.** Every person who, for the purpose of restoring to its original appearance and nominal value in whole or in part, removes, conceals, fills up, or obliterates, the cuts, marks, punch holes, or other evidence of cancellation, from any ticket, check, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, cancelled in whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding $1000, or by both such imprisonment and fine. [R. S. § 7040.]

Hist. R. S. § 7040, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 482; similar as amended: Kerr's C. ib.

§ 8421. [7041] **Simulation of switch and car keys.** It shall be unlawful for any person by himself or another, without the written order or consent of such common carrier, to make, simulate, sell or dispose of any key belonging to or which might be used to open or unlock any switch, lock, car lock, or locks, used upon or belonging to any switch or car of any kind owned, controlled or operated by any common carrier in this state. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $300, or by imprisonment in the county jail not less than 30 days nor more than six months. ['93, p. 70, §§ 1, 2.]

Hist. '93, p. 70, §§ 1, 2, reen. '99, p. 182, §§ 1, 2, reen. R. C. § 7041, reen. C. L. ib.

§ 8422. [6862] **Forging or counterfeiting trade marks.** Every person who wilfully forges or counterfeits or procures to be forged or counterfeited, any trade mark usually affixed by any person to his goods, with intent to pass off any goods to which such forged or counterfeited trade mark is affixed or intended to be affixed, as the goods of such person, is guilty of a misdemeanor. [R. S. §6862.]

Hist. (See Cr. and P. '64, § 80) R. S. § 6862, reen. R. C. ib., reen. C. L. § 7042.

Cross ref. Persons counterfeiting union labels, trade marks, etc., are guilty of a misdemeanor: § 2315. Persons fraudulently procuring the filing of a trade label or trade mark for record with the secretary of state are guilty of a misdemeanor:

§ 2317. Persons using a trade mark or trade name without having authority so to do are guilty of a misdemeanor: §§ 2319-20. Mutilating or counterfeiting animal brands is a misdemeanor: § 1931.

Comp. leg.—Cal. Same: Pen. C. 1872, § 350; amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9711.

§ 8423. [6863] **Sale of counterfeit goods.** Every person who sells or keeps for sale any goods upon or to which any counterfeited trade mark has been affixed, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor. [R. S. § 6863.]

Hist. (See Cr. and P. '64, § 81) R. S. § 6863, reen. R. C. ib., reen. C. L. § 7043.

Comp. leg.—Cal. Same: Pen. C. 1872, § 351; amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9714.

§ 8424. [6864] **Forged and counterfeit trade marks defined.** The phrases "forged trade mark" and "counterfeited trade marks," or their equivalents, as used in this chapter include every alteration or imitation of any trade mark so resembling the original as to be likely to deceive. [R. S. § 6864.]

Hist. R. S. § 6864, reen. R. C. ib., reen. C. L. § 7044.

Comp. leg.—Cal. Same: Pen. C. 1872, § 352; Kerr's C. ib.

§ 8425. [6865] **Trade mark defined.** The phrase "trade mark" as used in the three preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description. [R. S. § 6865.]

Hist. R. S. § 6865, reen. R. C. ib., reen. C. L. § 7044a.

Comp. leg.—Cal. Same: Pen. C. 1872, § 353; Kerr's C. ib.

N. D. Similar: Pen. C. § 9716.

ARTICLE 5.

LARCENY.

§ 8426. [7045] **Larceny defined.** Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. [R. S. § 7045.]

Hist. (See Cr. and P. '64, §§ 61, 62) R. S. § 7045, reen. R. C. ib., reen. C. L. ib.

Cross ref. Mortgagor of personal property who sells the same without the consent of the mortgagee is guilty of larceny: § 6386. See also § 8479.

Comp. leg.—Cal. Same: Pen. C. 1872, § 484; Kerr's C. ib.

N. D. Similar: Pen. C. § 9913.

Cited: Re Henry (1909) 15 I. 757, 99 P. 1054, 21 L. R. A. (N. S.) 207.

Informations: Indictments and informations for grand larceny are set out and held sufficient in the following cases: P. v. Freeman (1870) 1 I. 322; S. v. Collett & Ireland (1904) 9 I. 608, 75 P. 271; S. v. Rooke (1904) 10 I. 388, 79 P. 82.

Although the crime of robbery includes the crime of larceny, a jury would not be justified in returning a verdict against a defendant, finding him guilty of larceny where he is charged with robbery, unless the information is also sufficient in terms to charge the specific offense of larceny under this section as well as the crime of robbery, under § 8226. (Con.. op.) S. v. Brill (1912) 21 I. 269, 121 P. 79.

Ownership: Variance: An information charging C to be the owner of the stolen property is supported by proof that C was in possession as agent of the owner with power of sale and disposition. S. v Faris (1897) 5 I. 666, 51 P. 772.

An information for larceny which alleges title to the thing stolen to be in B is supported by proof of property in the firm of B & J. P. v. Frank, 1 I. 200, overruled; S. v. Ireland (1904) 9 I. 686, 75 P. 257.

There is no material variance where the information charges that the thing stolen was the property of C. W. D. when, in fact, it belonged to C. D., and it is nowhere shown that C. W. D. and C. D. are not the same person. S. v. Rooke, supra.

Intent: To constitute the crime of larceny, the felonious intent must exist at

the time of taking the property. S. v. Riggs (1902) 8 I. 630, 70 P. 947.

Where one rightfully in possession of personal property subsequently conceives the intent of appropriating it, he is not guilty of larceny. Ib.

§ 8427. [7046] **Same: Of lost property.** One who finds lost property under circumstances which give him knowledge of, or means of inquiry as to, the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny. [R. S. § 7046.]

Hist. R. S. § 7046, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 485; Kerr's C. ib.

N. D. Similar: Pen. C. § 9914.

§ 8428. [7047] **Degrees of larceny.** Larceny is divided into two degrees, the first of which is termed grand larceny; the second petit larceny. [R. S. § 7047.]

Hist. R. S. § 7047, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 486; Kerr's C. ib.

N. D. Identical: Pen. C. § 9915.

§ 8429. [7048] **Grand larceny defined.** Grand larceny is larceny committed in either of the following cases:

1. When the property taken is of a value exceeding $60.
2. When the property is taken from the person of another.
3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, jenny, sheep or hog. [R. S. § 7048.]

Hist. (See Cr. and P. '64, § 61) R. S. § 7048, reen. R. C. ib., reen. C. L. ib.

Cross ref. Use or possession of running iron is grand larceny: § 8329. Larceny of car parts is a felony: § 8514.

Failure of a person slaughtering cattle to preserve hide for 30 days is a misdemeanor: § 1949, and may be proof of grand larceny: § 1948. Altering marks or brands with intent to steal is a misdemeanor: § 8328.

Comp. leg.—Cal. Same except "fifty" for "sixty," subd. 1: Pen. C. 1872, § 487; similar as amended, but subd. 3 now includes bicycle: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9916.

Cited: S. v. Barber (1908) 15 I. 96, 96 P. 116; Re Henry (1909) 15 I. 757, 99 P. 1054, 21 L. R. A. (N. S.) 207.

Larceny from person: Larceny from the person is grand larceny. T. v. McKern (1891) 3 I. 15, 26 P. 123.

Whether it is necessary to allege in an information charging larceny from the person the value of the property taken is a question of the sufficiency of the information, and does not go to the jurisdiction of the court. The only manner in which such question can be raised is by demurrer to the information, at the trial under the plea of not guilty, or after the trial in arrest of judgment. Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

Information: An information charging, in the language of the statutes, the felonious taking of two mares, the property of B, from a range in a certain county, is sufficient. S. v. Rathbone (1901) 8 I. 161, 67 P. 186.

An information charging an unlawful and felonious taking of a "gray horse colt" charges grand larceny under this section. S. v. Williams (1906) 12 I. 483, 86 P. 53.

The charging part of the information must name the person charged, state what was stolen by that particular person, and where and when. S. v. Flower (1915) 27 I. 223, 147 P. 786.

Same—Variance: An information charging the larceny of two mares from G. M. B. is supported by proof that the mares were the property of G. M. B. and R. L. B. S. v. Rathbone, supra.

Evidence: Finding stolen goods taken by the husband, at the home, is insufficient to convict the wife as an abettor. S. v. Flower, supra.

§ 8430. [7049] **Petit larceny defined.** Larceny in other cases is petit larceny. [R. S. § 7049.]

Hist. (See Cr. and P. '64, § 62) R. S. § 7049, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 488; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9916.

Turpitude: Conviction on the charge of petit larceny is construed as an act of moral turpitude. Re Henry (1909) 15 I. 755, 99 P. 1054, 21 L. R. A. (N. S.) 207.

§ **8431.** [7050] **Punishment for grand larceny.** Grand larceny is punishable by imprisonment in the state prison for not less than one nor more than 14 years. [R. S. § 7050.]

Hist. Cr. and P. '64, § 62; R. S. § 7050, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "ten" for "fourteen" years: Pen. C. 1872, § 589; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9917.

§ **8432.** [7051] **Same: For petit larceny.** Petit larceny is punishable by fine not exceeding $300, or by imprisonment in the county jail not exceeding six months or both. [R. S. § 7051.]

Hist. (See Cr. and P. '64, § 62) R. S. § 7051, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "five" for "three" hundred dollars: Pen. C. 1872, § 490; Kerr's C. ib.

N. D. Analogous: Pen. C. § 9918.

§ **8433.** [7052] **Dogs are property.** Dogs are property, and of the value of $1 each, within the meaning of the terms "property" and "value" as used in this article. [R. S. § 7052.]

Hist. (See Cr. and P. '64, § 63) R. S. § 7052, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 491; different: Kerr's C. ib.

§ **8434.** [7053] **Value of written instrument.** If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen. [R. S. § 7053.]

Hist. (See Cr. and P. '64, § 64) R. S. § 7053, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 492; Kerr's C. ib.

N. D. Similar: Pen. C. § 9921.

Presumption of value: Upon a prosecution for larceny of a check for a certain amount of money, no proof of actual value is required, as the law presumes that the face value of the check is the actual value. S. v. Bogris (1914) 26 I. 587, 144 P. 789.

§ **8435.** [7054] **Value of passage tickets.** If the thing stolen is any ticket, or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad or vessel, or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance, is the value of such ticket, paper or writing. [R. S. § 7054.]

Hist. R. S. § 7054, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 493; Kerr's C. ib.

N. D. Similar: Pen. C. § 9922.

§ **8436.** [7055] **Larceny of papers before delivery.** All the provisions of this article apply where the property taken is an instrument for the payment of money, evidence of debt, public security or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof, to any person as a purchaser or owner. [R. S. § 7055.]

Hist. (See Cr. and P. '64, § 64) R. S. § 7055, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 494; Kerr's C. ib.

N. D. Identical: Pen. C. § 9923

§ **8437.** [7056] **Larceny of fixtures.** The provisions of this article apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time. [R. S. § 7056.]

Hist. R. S. § 7056, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 495; Kerr's C. ib.

N. D. Similar: Pen. C. § 9924.

§ 8438. [7057] **Receiving stolen property.** Every person who, for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding six months, or by fine not exceeding $1000, or by both such fine and imprisonment. [R. S. § 7057.]

Hist. (See Cr. and P. '64, § 65) R. S. § 7057, reen. R. C. ib., reen. C. L. ib.

Cross ref. Receiving stolen car parts is a felony: § 8515.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 496; amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9926.

Elements of crime: Before a defendant can be convicted under this section, four things must be established to the satisfaction of the jury beyond a reasonable doubt: (1) That the property was stolen; (2) that either the thief delivered it to the defendant, or to someone else who delivered it to him; (3) that at the time the defendant received the possession of the property he knew it was stolen, or that it was received under such circumstances that any reasonable person of ordinary observation would have known that it was in fact stolen property; and (4) that he received it for his own gain or to prevent the owner from again possessing it. S. v. Banks (1914) 26 I. 567. 144 P. 779.

§ 8439. [7058] **Bringing stolen property into state.** Every person who, in another state or country, steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed in this state. [R. S. § 7058.]

Hist. R. S. § 7058, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 497; similar as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9928.

§ 8440. [7059] **Larceny of water.** Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, or other instrument, with any main, service pipe, or other pipe or conduit or flume for conducting water, for the purpose of taking water from such main, service pipe, conduit or flume, without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor. [R. S. § 7059.]

Hist. R. S. § 7059, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 499: Kerr's C. ib.

§ 8441. [7060] **Larceny of lumber.** Every person who wilfully and without authority takes, with intent to deprive the owner thereof, any saw logs, timber, lumber, railroad ties, poles, rails, posts or cordwood, owned by any other person on any river or creek, or on the land adjoining, which may have floated down a river or creek, or removes or attempts to remove such logs, timber, lumber, railroad ties, poles, rails, posts or cordwood, or otherwise destroys or injures them, is guilty of a misdemeanor. [C. L. §7060.]

Hist. (See '85, p. 177, § 1) R. S. § 7060, reen. R. C. ib.; compiled and reen. C. L. ib.

§ 8442. **Defacing marks on logs or lumber.** Every person who cuts out, alters, mutilates, changes, disfigures, or defaces any legally recorded mark or marks made upon any log, lumber, or wood, or remarks or puts a false mark thereon with intent to prevent the owner from discovering its identity, or places any mark upon, or cuts, saws, manufactures, or in any manner appropriates to his own use, or to the use of any other person, any prize log or timber, is guilty of a misdemeanor and punishable by a fine not exceeding $500, or imprisonment in the county jail not exceeding six months, or by both such fine and

imprisonment. In any prosecution for a violation of the provisions of this section relating to prize logs it shall be sufficient to prove that such logs are prize logs without further proof of ownership. ['19, c. 11, § 3, p. 74.]

Hist. (See '85, p. 177, § 3) R. S. § 6866, reen. R. C. ib., reen. C. L. § 7060a; am. '19, c. 11, § 3, p. 74.

Cross ref. Persons marking logs or timber without previously recording their mark, or using the marks of others without authority so to do, or marking prize logs, forfeit $10: § 2349.

Comp. leg.—Cal. See Pen. C. 1872, § 356: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9724.

§ 8443. [7061] **Stealing rides.** Every person who shall, at any place within this state, ride or attempt to ride upon any locomotive engine, railroad car, railroad train, or trains of any character, in or upon any part thereof, for the purpose or with the intent of stealing a ride thereon, or who shall at any place within this state, climb upon, hold to, or in any manner attach himself to, any locomotive engine or railroad car or railroad train or trains of any character, while the same are in motion, shall be guilty of a misdemeanor: *Provided,* That this section shall not apply to any employee of a railroad company operating such train, locomotive or car, nor to any person operating such train, locomotive or car, nor to any person having business with, or acting under legal authority of, such railroad company. ['03, p. 41, § 1.]

Hist. '03, p. 41, § 1, reen. R. C. § 7061, reen. C. L. ib.

§ 8444. [7061a] **Same: Authority to arrest.** Authority is hereby given to and conferred upon railroad conductors and engineers of railroad trains, to immediately arrest, without warrant or other process, any person or persons violating the preceding section, and deliver such persons to any peace officer: *Provided,* That nothing in this section contained shall be construed to restrict the authority or duty of the regular officer within the state of making arrests for said offense. ['03, p. 41, § 2.]

Hist. '03, p. 41, § 2, reen. R. C. § 7061a, reen. C. L. ib.

§ 8445. [7061b] **Same: Venue of action.** Any person charged with a violation of section 8443 may be tried in any county in this state through which such train carrying such person may pass, or in the county in which such violation may have occurred or may be discovered. ['03, p. 41, § 3.]

Hist. '03, p. 41, § 3, reen. R. C. § 7061b, reen. C. L. ib.

§ 8446. [7061c] **Same: Punishment.** Every person who shall be convicted of a violation of any of the offenses mentioned in section 8443 shall be punished by imprisonment in the county jail for a period not exceeding 30 days, or by a fine of not more than $60, or by both such fine and imprisonment. ['03, p. 41, § 4.]

Hist. '03, p. 41, § 4, reen. R. C. § 7061c, reen. C. L. ib.

§ 8447. [7062] **Stealing electric current: Tampering with meters.** Whoever shall without permission or authority of any person, firm or corporation engaged in the generation or distribution of electricity, make connections, or cause connections to be made, by wire or wires or by any other device, with the wires, cables or conductors, or any of them, of any such person, firm or corporation, for the purpose of obtaining or diverting electric current from such wires, cables or conductors; or whoever shall, without permission or authority from any person,

firm or corporation using any meter or meters erected or set up for the purpose of registering or recording the amount of electric current supplied to any customer of such person, firm or corporation within this state, connect or cause to be connected by wire or any other device, any such meter or meters, or change or shunt the wiring leading to or from any such meter or meters, or by any device or appliance or means whatsoever tamper with any such meter or meters in such manner that such meter or meters do not measure or record the full amount of electric current supplied to such customer, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $300, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment: *Provided,* That nothing herein contained shall be deemed to affect the right of any person, firm or corporation to recover by action in any court of competent jurisdiction damages for any injury done by such unlawful acts. ['05, p. 72, § 1.]

Hist. '05, p. 72, § 1, reen. R. C. § 7062, reen. C. L. ib.

Comp. leg.—N. D.—Analogous: Pen. § 9942.

§ 8448. [7062a] **Same: Accessories liable as principals.** Any person or persons aiding, abetting or counseling the acts, or any of them, mentioned in the preceding section, shall, upon conviction thereof, be equally guilty with the principals and subject to the same penalties. ['05, p. 72, § 2.]

Hist. '05, p. 72, § 2, reen. R. C. § 7062a, reen. C. L. ib.

§ 8449. [7062b] **Same: Evidence of guilt.** In all prosecutions under the two preceding sections, proof that any of the acts herein forbidden were done on or about the premises owned or occupied by the defendant charged with the commission of such offense, or that he received the benefit of any such electric current on account of the commission of such acts, shall be prima facie evidence of the guilt of such defendant. ['05, p. 72, § 3.]

Hist. '05, p. 72, § 3, reen. R. C. § 7062b, reen. C. L. ib.

ARTICLE 6.

EMBEZZLEMENT.

§ 8450. [7065] **Embezzlement defined.** Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted. [R. S. § 7065.]

Hist. R. S. § 7065, reen. R. C. ib., reen. C. L. ib.

Cross ref. Embezzlement by insurance agent: § 5011; by bank officers: § 5279.

Comp. leg.—Cal. Same: Pen. C. 1872, § 503: Kerr's C. ib.

N. D. Identical: Pen. C. § 9929.

Cited: S. v. Steers (1906) 12 I. 174, 85 P. 104; (Dis. op.) Re Huston (1915) 27 I. 231, 257, 147 P. 1064; S. v. Lottridge (1916) 29 I. 53, 60, 155 P. 487.

Information held sufficient: S. v. Roland (1905) 11 I. 490, 83 P. 337.

Where one systematically institutes a continuous series of withholding of his principal's money for the purpose of acquiring for his own use ultimately a large sum, the series of acts constitutes but one offense, namely, embezzlement of the aggregate amount. S. v. Dawe, 31 I. 796, 177 P. 393.

Owner must be deprived of property: There can be no embezzlement unless the owner is deprived of the money or property involved in the transaction. S. v. Jones (1914) 25 I. 587, 138 P. 1116.

Applied: This section defines embezzlement as used in '11, c. 124, § 60, p. 404 (§ 5279).

(Con. op. on rehearing) S. v. Lottridge (1917) 29 I. 822, 162 P. 672.

§ 8451. [7066] **Embezzlement by public and corporate officers.** Every officer of this state, or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of

any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. [R. S. § 7066.]

Hist. (See Cr. and P. '64, § 69) R. S. § 7066, reen. R. C. ib., reen. C. L. ib.

Cross ref. Neglect or refusal of any county officer or deputy to account for, and pay into the county treasury, any money received as fees, in excess of expenses, constitutes embezzlement of public funds: Const. XVIII, 9. See also Pol. C. § 3695. Embezzlement of military funds: 762. Embezzlement of school funds: 917. School trustees failing to pay into the county treasury money arising from the sale of school district bonds are guilty of a felony: 941. Fish and game wardens failing to account for funds are guilty of a sort of petit embezzlement, the offense being a misdemeanor: 2678.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 504; similar as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. §§ 9930-31.

Cited: (Dis. op.) Re Huston (1915) 27 I. 231, 257, 147 P. 1064.

Information: An information which charges the sheriff of a county with wilfully, unlawfully, fraudulently and feloniously appropriating to his own use, certain money to him in an official capacity, is sufficient. S. v. Steers (1906) 12 I. 174, 85 P. 104.

Indictment: If one converts to his own use money belonging to a municipality, which comes into his possession while acting in the capacity of either officer or agent, the statute makes him guilty of embezzlement. It is expressly designed to cover all cases of embezzlement of public funds by public servants. S. v. Dawe, 31 I. 796, 177 P. 393. (dis. op. by Morgan J.)

§ **8452.** [7067] **Same: By carrier.** Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not. [R. S. § 7067.]

Hist. R. S. § 7067, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 505: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9932.

§ **8453.** [7068] **By trustee, banker or agent.** Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise entrusted with, or having in his control, property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. [R. S. § 7068.]

Hist. (See Cr. and P. '64, § 75) R. S. § 7068, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 506: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9933.

Cited: S. v. Lottridge (1916) 29 I. 53, 155 P. 487.

Definition: This section defines the crime of embezzlement. S. v. Sage (1912) 22 I. 489, 126 P. 403, Ann. Cas. 1914B 251.

Application: This section has no application to a charge of embezzlement under '11, c. 124, § 60, p. 404 (§ 5279). (Con. op. on rehearing.) S. v. Lottridge (1917) 29 I. 822, 162 P. 672.

Intent: Intent may be established either by direct or circumstantial evidence. Evidence of secretion is competent. S. v. Sage, supra.

§ **8454.** [7069] **By bailee, tenant or attorney.** Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement. [R. S. § 7069.]

Hist. (See Cr. and P. '64, § 76) R. S. § 7069, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 507: Kerr's C. ib.

N. D. Analogous: Pen. C. §§ 9933-4.

Cited: S. v. Lottridge (1917) 29 I. 822, 162 P. 672.

§ 8455. [7070] **By clerk, agent or servant.** Every clerk, agent or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement. [R. S. § 7070.]

Hist. (See Cr. and P. '64, § 74) R. S. § 7070, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 508: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9935.

§ 8456. [7071] **Act of taking unnecessary.** A distinct act of taking is not necessary to constitute embezzlement. [R. S. § 7071.]

Hist. R. S. § 7071, reen. R. C. ib., reen. C. L. ib.

Cross ref. This section distinguishes larceny and embezzlement: § 8426.

Comp. leg.—Cal. Same: Pen. C. 1872, § 509: Kerr's C. ib.

N. D. Similar: Pen. C. § 9936.

Cited: (Con. op. on rehearing) S. v. Lottridge (1917) 29 I. 822, 162 P. 672.

Evidence: A distinct act of taking is not necessary to constitute embezzlement. S. v. Sage (1912) 22 I. 489, 126 P. 403. Ann. Cas. 1914B 251. But see S. v. Jones (1914) 25 I. 587, 138 P. 1116.

§ 8457. [7072] **Evidence of debt may be embezzled.** Any evidence of debt, negotiable by delivery only, and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not. [R. S. § 7072.]

Hist. R. S. § 7072, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 510: Kerr's C. ib.

N. D. Similar: Pen. C. § 9937.

What may be embezzled: Checks, whether delivered or not are the subject of embezzlement. S. v. Sage (1912) 22 I. 489, 126 P. 403, Ann. Cas. 1914B 251.

§ 8458. [7073] **Claim of title as defense.** Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him. [R. S. § 7073.]

Hist. R. S. § 7073, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 511: Kerr's C. ib.

N. D. Similar: Pen. C. § 9938.

§ 8459. [7074] **Intention to restore no defense.** The fact that the accused intended to restore the property embezzled, is no ground of defense or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense. [R. S. § 7074.]

Hist. R. S. § 7074, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 512; additional provision as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9939.

§ 8460. [7075] **Actual restoration as mitigating circumstance.** Whenever, prior to any information laid before a magistrate, charging the commission of embezzlement, the person accused voluntarily and actually restored or tendered restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense, but it authorizes the court to mitigate punishment, in its discretion. [R. S. § 7075.]

Hist. R. S. § 7075, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 513; similar as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9940.

§ 8461. [7076] **Punishment for embezzlement.** Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled; and where the property embezzled is an evidence of debt or right of action, the sum due upon it or secured to be paid by it shall be taken as its value: *Provided,* That if the embezzlement or defalcation be of the public funds of this state, or of any county, city, or municipality within this state, the offense is a felony, and shall be punishable by imprisonment in the state prison not less than one year nor more than 10 years; and the person so convicted shall be ineligible thereafter to any office of honor, trust, or profit under this state. [R. S. § 7076.]

Hist. R. S. § 7076, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 514; amended: Kerr's C ib.

N. D. Similar: Pen. C. § 9941.

ARTICLE 7.

EXTORTION.

§ 8462. [7080] **Extortion defined.** Extortion is the obtaining of property from another, with his consent, induced by a wrongful force or fear or under color of official right. [R. S. § 7080.]

Hist. (See Cr. and P. '64, § 113) R. S. § 7080, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 518: Kerr's C. ib.

N. D. Identical: Pen. C. § 9943.

Cited: Wilbur v. Blanchard (1912) 22 I. 517, 126 P. 1069.

§ 8463. [7081] **Fear induced by threats.** Fear, such as will constitute extortion, may be induced by a threat, either:

1. To do an unlawful injury to the person or property of the individual threatened or to any relative of his, or member of his family; or
2. To accuse him, or any relative of his, or member of his family of any crime; or,
3. To expose, or impute to him or them any deformity or disgrace; or
4. To expose any secret affecting him or them. [R. S. § 7081.]

Hist. (See Cr. and P. '64, § 116) R. S. § 7081, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 519: Kerr's C. ib.

N. D. Similar: Pen. C. § 9944.

Applied: Although one party has committed a crime in the theft of property from another, the party whose property is thus taken is not justified and cannot be protected by the courts in extorting money from the one who committed the theft under threats of arrest and imprisonment, where he uses such threats as a means of procuring a payment from the guilty party in excess of the reasonable value of the property taken. Wilbur v. Blanchard (1912) 22 I. 517, 126 P. 1069.

§ 8464. [7082] **Punishment for extortion.** Every person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force, or any threat such as is mentioned in the preceding section, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding $5000, or by both. [R. S. § 7082.]

Hist. R. S. § 7082, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 520: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9945.

§ 8465. [7083] **Same: Cases not otherwise provided for.** Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in this code, is guilty of a misdemeanor. [R. S. § 7083.]

Hist. R. S. § 7083, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 521: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9946.

§ 8466. [7084] **Procuring signatures by extortion.** Every person who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action were obtained. [R. S. § 7084.]

Hist. R. S. § 7084, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 522: Kerr's C. ib.

N. D. Similar: Pen. C. § 9947.

§ 8467. [7085] **Attempts to extort by threatening letters.** Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying or adapted to imply, any threat such as is specified in this article, is punishable in the same manner as if such money or property were actually obtained by means of such threat. [R. S. § 7085.]

Hist. (See Cr. and P. '64, § 116) R. S. § 7085, reen. R. C. ib., reen. C. L. ib.

Cross ref. Letters threatening to expose another of crime, etc.: § 8589.

Comp. leg.—Cal. Same: Pen. C. 1872, § 523: Kerr's C. ib.

N. D. Similar: Pen. C. § 9948.

§ 8468. [7086] **Same: By verbal threats.** Every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in this article, to extort money or other property from another, is guilty of a misdemeanor. [R. S. § 7086.]

Hist. R. S. § 7086, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 524: Kerr's C. ib.

N. D. Identical: Pen. C. § 9949.

ARTICLE 8.

FALSE PERSONATION.

Cross ref. The false personation of an elector entitled to vote under absent voting law is a misdemeanor: § 621. A medical doctor impersonating another by using his name or diploma to secure admission in this state is guilty of forgery: § 2112. A person not authorized so to do wearing a military uniform is guilty of a misdemeanor: § 759.

§ 8469. [7090] **Marriage under false personation.** Every person who falsely personates another, and in such assumed character marries or pretends to marry, or sustain the marriage relation towards another, with or without the connivance of such other, is guilty of a felony. [R. S. § 7090.]

Hist. (See Cr. and P. '64, § 98) R. S. § 7090, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 528: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9964.

§ 8470. [7092] **Solemnizing marriage without authority.** Every person who undertakes or pretends to join others in marriage, knowing that he is not by law authorized so to do, or knowing of any legal impediment to the proposed marriage, is guilty of a misdemeanor. [R. S. § 7092.]

Hist. (See '77 p. 24, § 18) R. S. § 7092, reen. R. C. ib., reen. C. L. ib

§ 8471. [7093] **False personation.** Every person who falsely personates another, and in such assumed character, either:

1. Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take such bail or surety; or

2. Verifies, publishes, acknowledges or proves in the name of another person, any written instrument, with the intent that the same may be recorded, delivered and used as true; or

3. Does any act whereby, if it were done by the person falsely personated, he might in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture or penalty, or whereby any benefit might accrue to the party personating, or to any other person;

Is punishable by imprisonment in the county jail not exceeding two years, or by a fine not exceeding $5000. [R. S. § 7093.]

Hist. Cr. and P. '64, § 98; R. S. § 7093, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "other" inserted before "act," subd. 3; Pen. C. 1872, § 529; similar as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9964.

§ 8472. [7094] **Receiving property under false personation.** Every person who falsely personates another, and in such assumed character receives any money or property knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or that of another person, or to deprive the owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received. [R. S. § 7094.]

Hist. Cr. and P. '64, § 99; R. S. § 7094, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "true" inserted before "owner": Pen. C. 1872, § 530; similar as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 9965.

ARTICLE 9.

FRAUDULENT CONVEYANCES, FALSE PRETENSES, CHEATS AND MISREPRESENTATIONS.

Cross ref. Sale of female animal to evade lien for service of sire: § 1907. Price discrimination in the purchase and sale of agricultural products is punishable by fine: § 2053. Frauds in connection with bills of lading: § 6108 et seq.; warehouse receipts: § 6168. See also article 11 of this chapter, Frauds in the Management of Corporations: § 8498 et seq.

§ 8473. [7095] **Participation in fraudulent conveyances.** Every person who is a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made or contrived with intent to deceive or defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends the same, or any of them, as true, and done, had or made in good faith, or upon good consideration, or aliens, assigns, or sells any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him or them, conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor. [R. S. § 7095.]

Hist. Cr. and P. '64, § 135; R. S. § 7095, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 531: Kerr's C. ib.

Cross ref. Fraudulent disposal of property by a debtor is an indictable misdemeanor: §§ 8187-8.

§ 8474. Obtaining money under false pretenses. Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds any other person of money, labor or property, whether real or personal, or obtains the signature of another to any instru-

ment in writing whereby any liability is created, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property so obtained; and the reasonable value of any labor or services and the amount of the liability created by any written instrument shall be taken as the value of such labor or services or of such written instrument. ['09, p. 20, H. B. 112.]

Hist. (See Cr. and P. '65, §§ 136, 137) R. S. § 7096, reen. R. C. ib.; am. '09, p. 20, H. B. 112, reen. C. L. § 7096.

Cross ref.—Evidence required on trial of prosecution for false pretenses: § 8956. Other similar offenses are: The sale of adulterated or misbranded foods, drugs, etc. is a misdemeanor: § 1684. False proof of loss under insurance policy: § 5030. False statements in application for insurance: § 5050. False statements in application for fraternal benefit insurance: § 5195. False representation to secure workmen's compensation is a misdemeanor: § 6332.

Obtaining state money under false pretenses: The making of a false certificate on a state voucher is a felony: §§ 241, 8123. The making of a false affidavit to secure animal bounty is a misdemeanor: § 1882. False representations to secure state insurance is a misdemeanor: § 6312.

§ 8475. Obtaining title to real property under false pretenses. Any person who shall, by means of misrepresentation, deceit, fraud, menace or duress, secure or by such means seek to secure any release, relinquishment, assignment or deed to any right, title or interest in or to real estate, or possessory right to real estate, or who shall by means of misrepresentation, deceit, fraud, threats, menace or duress, secure, or by such means seek to secure any oral or written statement, affidavit or admission with intent to use the same, or which could or might be used to affect the right, title or interest of such party so giving or making the same to real estate, or possessory right to real estate, shall be guilty of a misdemeanor, and upon conviction be punished by a fine of not more than $500 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. ['09, p. 418, S. B. 51.]

Hist. '09, p. 418, S. B. 51, reen. C. L. § 7096a.

§ 8476. [7097] **Selling land twice.** Every person who, after once selling, bartering or disposing of any tract of land or town lot, or after executing any bond or agreement for the sale of any land or town lot, again wilfully and with intent to defraud previous or subsequent purchasers, sells, barters or disposes of the same tract of land or town lot, or any part thereof, or wilfully and with intent to defraud previous or subsequent purchasers, executes any bond or agreement to sell, barter or dispose of the same land or lot, or any part thereof, to any other person for a valuable consideration, is punishable by imprisonment in the state prison not less than one nor more than five years, or by fine not exceeding $5000, or by both. [R. S. § 7097.]

Hist. (See Cr. and P. '64, § 138) R. S. § 7097, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 533: Kerr's C. ib.

Selling land twice: A land company which undertakes to sell and convey land twice and fails to compensate one of the purchasers who loses the land because of the other conveyance may be dealt with criminally under this section. Froman v. Madden (1907) 13 I. 138, 88 P. 894.

§ 8477. [7098] **Fraudulent conveyance by married person.** Every married person who falsely and fraudulently represents himself or herself as competent to sell or mortgage any real estate, to the validity of which sale or mortgage the assent or concurrence of his wife or her

husband is necessary, and under such representation wilfully conveys or mortgages the same, is guilty of felony. [R. S. § 7098.]

Hist. R. S. § 7098, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 534: Kerr's C. ib.

§ 8478. [7099] False statement by brokers, factors, etc. Every commission merchant, broker, agent, factor or consignee who shall wilfully and corruptly make, or cause to be made, to the principal or consignor of such commission merchant, agent, broker, factor or consignee, a false statement concerning the price obtained for, or the quality or quantity of any property consigned or intrusted to, such commission merchant, agent, broker, factor or consignee, for sale, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $300, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [R. S. § 7099.]

Hist. R. S. § 7099, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "five" for "three hundred dollars." and "imprisoned" for "imprisonment": Kerr's C. § 536.

§ 8479. [7100] Removal or sale of mortgaged chattels. Every mortgagor of property mortgaged in pursuance of the provisions of article 3 of chapter 238 who, while such mortgage remains unsatisfied in whole or in part, wilfully removes from the county or counties where such mortgage is recorded, or destroys, conceals, sells or in any manner disposes of the property mortgaged, or any part thereof, without the consent of the holder of the mortgage, is guilty of larceny. [R. S. § 7100.]

Hist. ('85, p. 74, § 13) R. S. § 7100, reen. R. C. ib., reen. C. L. ib.

Cross ref. Similar provision: § 6386. Penalty for negotiation of bill of lading for mortgaged goods: § 6111; of warehouse receipt: § 6173.

Comp. leg.—Cal. Similar: Kerr's Pen. C. § 538, enacted 1893.

N. D. Analogous: Pen. C. § 10248.

Cited: Campbell v. Bk. & Trust Co. (1917) 30 I. 552, 166 P. 258.

Different degrees of larceny: Under the provisions of this section, a person may be convicted of either petit or grand larceny. The fact that the mortgagee has received full payment of the mortgage debt after the sale of the mortgaged property will not necessarily prevent the prosecution of the mortgagor for the crime of larceny for wilfully selling mortgaged property. S. v. Barber (1908) 15 I. 96, 96 P. 116.

§ 8480. Drawing check without funds. Any person who with intent to defraud shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depositary, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depositary for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor. The making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary for the payment of such check, draft or order. ['15, c. 129, p. 286.]

Hist. '03, p. 41, § 1; am. R. C. § 7101; am. '15, c. 129, p. 286, reen. C. L. § 7101.

Comp. leg.—N. D. See: Pen. C. § 9971.

§ 8481. [7102] Fraudulent use of society emblems. Any person who wilfully wears the badge of the Grand Army of the Republic, the insignia, emblem, badge or rosette of the Military Order of the Loyal Legion of the United States, or of the Military Order of Foreign Wars of the United States, or the badge, emblem or button of the Spanish war veterans, or the order of Patrons of Husbandry, or of the Benevolent and Protective order of Elks of the United States of America, or of the order of the Knights of Pythias, or the order of the Knights of Co-

lumbus, or of any Greek letter college fraternity, or any society, order or organization of one year's standing in the state of Idaho, or uses the name to obtain aid or assistance within this state, or wilfully uses the insignia, emblem, button, rosette or badge, or uses the name of any society, order or organization, the title of its officers, or its insignia, rituals or ceremonies, unless entitled to use or wear the same under the constitution and by-laws, rules and regulations of such order, or of such society, order or organization, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for a term not to exceed 90 days in the county jail, or a fine not to exceed $200, or by both such fine and imprisonment. ['07, p. 165, § 1.]

Hist. '07, p. 165, § 1, reen. R. C. § 7102, reen. C. L. ib. **Comp. leg.—N. D.** Analogous: Pen. C. § 9967.

§ 8482. [7103] **Fraudulent procurement of board.** Any person who shall obtain food, lodging or other accommodations at any hotel, lodging house, furnished room, boarding house or other eating house, with intent to defraud the owner or keeper thereof by not paying for the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $25 and not exceeding $100, or imprisonment in the county jail not less than five days nor more than 30 days, or both, in the discretion of the court. ['03, p. 410, § 1.]

Hist. '03, p. 410, § 1, reen. R. C. § 7103, reen. C. L. ib. **Comp. leg.—N. D.** Analogous: Pen. C. § 10254.

§ 8483. [7103a] **Same: Proof of fraudulent intent.** Proof that lodging, food or other accommodation was obtained by any false pretense, or by any false or fictitious show or pretense of any baggage or other property, or that any person absconded without paying or offering to pay for such food, lodging or other accommodation, or that any such person surreptitiously removed, or attempted to remove, his or her baggage, shall be prima facie proof of the fraudulent intent mentioned in the preceding section. ['03, p. 410, § 2.]

Hist. '03, p. 410, § 2, reen. R. C. § 7103a, reen. C. L. ib. **Comp. leg.—N. D.** Analogous: Pen. C. § 10255.

§ 8484. [7103b] **Same: Proprietor to post copy of law.** It shall be the duty of every hotel, lodging house, furnished room, boarding house or other eating house keeper within this state to keep a copy of the two preceding sections of this article, printed in plain English type, posted upon the inside entrance door of each public sleeping room in such house, and no conviction shall be had under the provisions of the two preceding sections of this article unless it shall be made to appear to the court that such notice was posted upon the inside entrance of the door of the sleeping room occupied by the person or persons by whom it is alleged the crime has been committed: *Provided, however,* That when such act is committed against any persons who do not keep public sleeping rooms in connection with their eating house, it shall be sufficient to show, in such case, that said notice was so posted in some public place at or near where guests usually paid their bills. ['03, p. 410, § 3.]

Hist. '03, p. 410, § 3, reen. R. C. § 7103b, reen. C. L. ib.

§ 8485. [7103c] **Same: Jurisdiction of offenses.** Justices of the peace for the county in which the act complained of shall be committed shall have jurisdiction of cases arising under the three preceding sections, and appeals from the judgment of such justice of the peace shall lie to the district court in such county, in the same manner as is now

provided by law for appeals from judgments of justices of the peace in other cases of misdemeanor. ['03, p. 410, § 4.]

Hist. '03, p. 410, § 4, reen. R. C. § 7103c, reen. C. L. ib.

Cross ref. Appeals from justices of the peace: §§ 9263-70.

§ 8486. Fraudulent procurement of livery accommodations. Any person who obtains any livery hire or other accommodation at any livery or feed stable, kept for profit, in the state of Idaho, without paying therefor, with intent to defraud the proprietor or manager thereof; or who obtains credit at any such livery or feed stable by the use of any false pretense or representation, either oral or written; or who after obtaining a horse, team, vehicle or other property, at any livery or feed stable wilfully or maliciously abuses the same by beating, goading, overdriving or other wilful or malicious conduct; or who after obtaining such horse, team, vehicle or other property, shall, with intent to defraud the owner, manager or proprietor of such livery or feed stable, keep the same for a longer period, or take the same to a greater distance than contracted for; or allow a feed bill or other charge to accumulate against such property or any part thereof, without paying therefor; or abandons or leaves the same or any part thereof, is guilty of a misdemeanor. ['15, c. 118, p. 263.]

Hist. '15, c. 118, p. 263, reen. C. L. § 7104.

§ 8487. False advertising. Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, entertainment or amusement or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof or to increase the attendance at places of amusement or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, entertainment or amusement or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $25 and not to exceed $300. ['15, c. 23, p. 74.]

Hist. '15, c. 23, p. 74, reen. C. L. § 7104a.

Cross ref. False advertising by owners of stallions: § 1901. False advertising by insurance companies: § 5020-2. False advertising by banks: § 5281 et seq.

§ 8488. Sales with trading stamps prohibited: Penalty. Any person, firm or corporation who shall sell or exchange any goods, wares or merchandise whatsoever, or offer, or attempt so to do, upon a representation, advertisement, notice or inducement that any stamps, trading stamps, coupons, tickets, certificates or other similar devices which entitles the purchaser to demand or receive, either from the vendor or from any other person, firm or corporation, any other article of property as a premium or premium gift, are to be delivered or received, or are in any way connected with, or are a part of the transaction as a premium or premium gift, shall for each and every offense be guilty of a mis-

demeanor and be punishable by a fine of not less than $50 nor more than $300. ['17, c. 122, §1, p. 409.]

Hist. '17, c. 122, § 1, p. 409, reen. C. L. § 7104g.

§ 8489. Giving of premiums prohibited: Penalty. Any person, firm or corporation who shall sell or exchange any of the devices mentioned in the preceding section upon a contract to enable the purchaser or receiver thereof to sell or exchange property, or attempt so to do, upon any representation, advertisement, notice or inducement hereinbefore mentioned, or who shall deliver any goods, wares or merchandise upon the presentation of any such stamps or other similar devices, shall be guilty of a misdemeanor, and be punishable by a fine not less than $50 nor more than $300. ['17, c. 122, § 2, p. 410.]

Hist. '17, c. 122, § 2, p. 410, reen. C. L. § 7104h.

§ 8490. Application of sections: Fairs exempted. The provisions of the two preceding sections shall not apply to agricultural or church fairs conducted for scientific or charitable purposes. [C. L. § 7104i.]

Hist. '17, c. 122, § 3, p. 410; compiled and reen. C. L. § 7104i.

ARTICLE 10.

FALSE WEIGHTS AND MEASURES.

Cross ref. Weights and measures: c. 118.

§ 8491. [7105] **False weights defined.** A false weight or measure is one which does not conform to the standard established by the laws of the United States of America. [R. S. § 7105.]

Hist. R. S. § 7105, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872 § 552: Kerr's C. ib.

Cross ref. State standards: § 2561.

N. D. Analogous: Pen. C. § 9983.

§ 8492. [7106] **Use of false weights or measures.** Every person who knowingly sells any goods, wares or merchandise, or any valuable thing, by false weight or measure, or knowingly uses false measures at any mill in taking toll for grinding corn, wheat, rye or other grain, is guilty of a misdemeanor. [R. S. § 7106.]

Hist. (See Cr. and P. '64, § 139) R. S. § 7106, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 553: Kerr's C. ib.

Cross ref. Similar provision: § 2581.

N. D. Analogous: Pen. C. § 9983.

§ 8493. [7107] **Defrauding another by false weight or measure.** Every person who uses any weight or measure, knowing it to be false, by which use another is defrauded or otherwise injured, is guilty of a misdemeanor. [R. S. § 7107.]

Hist (See Cr. and P. '64. § 139) R. S. § 7107, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 9983.

Comp. leg.—Cal. Same: Pen. C. 1872, § 553: Kerr's C. ib.

§ 8494. [7108] **Stamping false weight on packages.** Every person who knowingly marks or stamps false or short weight or measure, or false tare, on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor. [R. S. § 7108.]

Hist. R. S. § 7108, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 554: Kerr's C. ib.

Cross ref. Similar provision: § 2581. In stating weight on packages, net weight is required under statute prohibiting misbranding: § 1692.

N. D. Identical: Pen. C. § 9988.

§ 8495. [7109] **Sales by the ton and pound.** In all sales of coal, hay and other commodities, usually sold by the ton or fractional parts thereof, the seller must give to the purchaser full weight, at the rate of 2000 pounds to the ton; and in all sales of articles which are sold in commerce by avoirdupois weight the seller must give to the purchaser full weight, at the rate of 16 ounces to the pound. Any person violating this section is guilty of a misdemeanor. [R. S. § 7109.]

Hist. R. S. § 7109, reen. R. C. ib., reen. C. L. ib.

Cross ref. Standards of weight: § 2563. Lard pails: § 2576.

Comp. leg.—Cal. Same: Kerr's Pen. C. § 555.

Construed: The intention of this section is to require vendors of the articles therein designated to sell the full weight for which they charge, and to hold them criminally answerable for selling to a purchaser an article of commerce which does not weigh the amount he represents it to weigh and that the purchaser understands he is buying. S. v. Schweitzer (1910) 18 I. 609, 111 P. 130.

Net or gross weight a question of fact: In a prosecution for selling lard by short weight, where the purchaser called for "a three-pound pail of lard," it is a question for the jury whether he called for three pounds of lard, net or gross. Ib.

§ 8496. [7110] **Use of fraudulent scales for ore.** Every person, association or corporation, or the agent of any person, association or corporation, engaged in the business of milling, sampling, concentrating, reducing, shipping or purchasing ores, who keeps or uses any false or fraudulent scales or weights for weighing ores, who keeps or uses any false or fraudulent assay scales or weights for ascertaining the assay value of ore, knowing them to be false, is guilty of a misdemeanor, and is punishable by a fine in any sum not exceeding $1000, or by imprisonment in the county jail for a term of not more than one year nor less than one month, or by both such fine and imprisonment. [R. S. § 7110.]

Hist. '85, p. 30, § 1; R. S. § 7110, reen. R. C. ib., reen. C. L. ib.

§ 8497. [7111] **Alteration of ore values.** Every person, corporation or association, or the agent of any person, corporation or association, engaged in milling, sampling, concentrating, reducing, shipping or purchasing ores in this state, who in any manner knowingly alters or changes the true value of any ores delivered to him or them, so as to deprive the seller of the result of the correct value of the same, or who issues any bill of sale or certificate of purchase that does not exactly and truthfully state the actual weight, assay value and total amount paid for any lot or lots of ore purchased, or who, by any secret understanding or agreement with another, issues a bill of sale or certificate of purchase that does not exactly and truthfully state the actual weight, assay value and total amount paid for any lot or lots of ore purchased, or who, by any secret understanding or agreement with another, issues a bill of sale or certificate of purchase that does not truthfully and correctly set forth the weight, assay value and total amount paid for any lot or lots of ore purchased by him, is guilty of a misdemeanor, and shall be punished as provided in the preceding section. [R. S. § 7111.]

Hist. '85, p. 30, § 2; R. S. § 7111, reen. R. C. ib., reen. C. L. ib.

ARTICLE 11.

FRAUDS IN THE MANAGEMENT OF CORPORATIONS.

Cross ref. Other offenses which might be classed here are:

Farmers' cooperative corporations failing to keep records and accounts acceptable to the dept. of agriculture are guilty of a misdemeanor: §§ 2049-50. A corporation exercising powers after forfeiture of its charter is guilty of a misdemeanor: § 4789. Failure of irrigation company to make annual report, after demand, is a misdemeanor: § 4847.

Violations of public utilities law: An officer or agent of a public utility who violates any provision of the public utilities law is guilty of a misdemeanor: § 2525. Any

person not employed by a public utility who violates that law is guilty of a misdemeanor: § 2527.

Violations of the insurance law: The following offenses are misdemeanors: Refusal to permit inspection of insurance policies: § 4976. Refusal of officers of domestic insurance companies to aid dept. of commerce and industry: § 4981. Acting as agent for unauthorized company: § 5013. False advertising: §§ 5020-22. Misrepresentation and twisting to secure business: §§ 5023-5. Rebating: § 5026. Failure of agent to report exact premium: § 5028. Collection of policy fee: § 5028. Discrimination: § 5036.

Acting as agent for unauthorized fidelity or surety company: § 5116. Acting as attorney in fact for reciprocal or interinsurance associations without authority: § 5131. False statements by officers of fraternal benefit societies: § 5194. Soliciting membership for unlicensed society: § 5196.

Violations of the banking law: The following are felonies unless otherwise specified: Loaning money to officials of dept. of commerce and industry: § 5259. Certifying check when there are not sufficient funds standing to the credit of the drawer: § 5264. The making of false entries or reports: § 5276. Perjury by bank officials: § 5277. Embezzlement: § 5279. Unauthorized banking a misdemeanor: § 5280. Advertising by unauthorized banker: § 5281. Advertising before issuing of charter a misdemeanor: § 5282. Misleading advertising a misdemeanor: § 5283. Receiving deposits when insolvent: § 5291. Violation of banking law where no specific penalty is provided is a felony: § 5284. Commissioner or official of department of commerce and industry closing bank with criminal intent is guilty of an indictable misdemeanor: § 5298.

Blue sky law: False entry on statement by investment company a felony: § 5316. Investment company selling stock in violation of law a misdemeanor: § 5317. Failure of mining company to file report a misdemeanor: § 5322. False statements or report by mining company a felony: § 5323. Unauthorized sale of water rights by irrigation company a misdemeanor: § 3065. Failure of promoter of creamery, cheese factory or condensery to secure license is a felony: § 2048.

§ 8498. [7114] **Fictitious stock subscription.** Every person who signs the name of a fictitious person to any subscription for, or agreement to take, stock in any corporation existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not the means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor. [R. S. § 7114.]

Hist. R. S. § 7114, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 10003.

Comp. leg.—Cal. Same: Pen. C. 1872, § 557: Kerr's C. ib.

§ 8499. [7115] **Exhibition of false papers to public officers.** Every officer, agent or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board, with intent to deceive such officer or board in respect thereto, is guilty of a misdemeanor. [R. S. § 7115.]

Hist. R. S. § 7115, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar except as to punishment: Pen. C. 1872, § 558: Kerr's C. ib.

N. D. Similar: Pen. C. § 10004.

§ 8500. [7116] **Use of false name in prospectus.** Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in, any prospectus, circular or other advertisement or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor. [R. S. § 7116.]

Hist. R. S. § 7116, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 10005.

Comp. leg.—Cal. Same: Pen. C. 1872, § 559: Kerr's C. ib.

§ **8501.** [7117] **Illegal dividends and reductions of capital.** Every director of any stock corporation who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended, either:

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any note or other evidence of debt in payment of any instalment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him or his stock; or,

5. To receive from any other stock corporation, in exchange for the shares, notes, bonds or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds or other evidences of debt issued by such other corporation;

Is guilty of a misdemeanor. [R. S. § 7117.]

Hist. R. S. § 7117, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 560: Kerr's C. ib.

§ **8502.** [7118] **Overdrafts by savings bank officers.** Every officer, agent, teller or clerk of any savings bank who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor. [R. S. § 7118.]

Hist. R. S. § 7118, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 561: Kerr's C. ib.

N. D. Similar: Pen. C. § 10011.

§ **8503.** [7119] **Insolvent banks receiving deposits.** Every officer, agent, teller or clerk of any bank, and every individual banker or agent, teller or clerk of any individual banker, who receives any deposits, knowing that such bank or association or banker is insolvent, is guilty of a misdemeanor. [R. S. § 7119.]

Hist. R. S. § 7119, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 562: Kerr's C. ib.

Cross ref. See also § 5291.

N. D. Analogous: Pen. C. § 10012.

§ **8504.** [7120] **Falsification of corporate books.** Every director, officer or agent of any corporation or joint stock association who knowingly receives or possesses himself of any property of such corporation or association otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent or member of any corporation or joint stock association who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes or concurs in making, any false entries, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three nor more than 10 years, or by imprisonment in a county jail not exceeding one year, or a fine not exceeding $500, or by both such fine and imprisonment. [R. S. §7120.]

Hist. R. S. § 7120, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "and a fine" for "or a fine": Pen. C. 1872, § 563: Kerr's C. ib.

§ 8505. [7121] **Fraudulent reports by officers.** Every director, officer or agent of any corporation or joint stock association who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, is guilty of a misdemeanor. [R. S. § 7121.]

Hist. R. S. § 7121, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 564; as amended: Kerr's C. ib. S. v. Paulsen (1912) 21 I. 686, 123 P. 588.

N. D. Analogous: Pen. C. § 10015.

Cited: S. v. Paulsen (1912) 21 I. 686, 123 P. 588; (In brief of counsel) S. v. Cutts (1913) 2 I. 329, 133 P. 115.

§ 8506. [7122] **Refusal to permit inspection.** Every officer or agent of any corporation having or keeping an office within this state who has in his custody or control any book, paper or document of such corporation and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor. [R. S. § 7122.]

Hist. R. S. § 7122, reen. R. C. ib., reen. C. L. ib.

Cross ref. As to banks this section is modified by § 5248.

Comp. leg.—Cal. Same: Pen. C. 1872, § 565: Kerr's C. ib.

N. D. Identical: Pen. C. § 10016.

Construed: This section and §§ 4758-9 have adopted and extended the common law rule and make the right of inspection of books of corporation by members absolute. Pfirman v. Success M. Co. (1917) 30 I. 468, 166 P. 216.

The right to make copies of records can not be denied stockholders. Ib.

§ 8507. [7123] **Directors deemed to have knowledge of affairs.** Every director of a corporation or joint stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this article. [R. S. § 7123.]

Hist. R. S. § 7123, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 568: Kerr's C. ib.

N. D. Identical: Pen. C. § 10020.

§ 8508. [7124] **Assent of directors to illegal acts.** Every director of a corporation or a joint stock association who is present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors. [R. S. § 7124.]

Hist. R. S. § 7124, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 569: Kerr's C. ib.

N. D. Identical: Pen. C. § 10021.

§ 8509. [7125] **Same.** Every director of a corporation or joint stock association, although not present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this article occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors. [R. S. § 7125.]

Hist. R. S. § 7125, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 570: Kerr's C. ib.

N. D. Identical: Pen. C. § 10022.

§ 8510. [7126] **Foreign corporations subject to article.** It is no defense to a prosecution for a violation of the provisions of this article that the corporation was one created by the laws of another state, territory, government or country, if it was one carrying on business or keeping an office therefor within this state. [R. S. § 7126.]

Hist. R. S. § 7126, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: Pen. C. § 10024.

Comp. leg.—Cal. Same: Pen. C. 1872, § 571: Kerr's C. ib.

§ 8511. [7127] **Director defined.** The term "director" as used in this article embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law. [R. S. § 7127.]

Hist. R. S. § 7127, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 572: Kerr's C. ib.

§ 8512. Combinations in restraint of trade. It shall be unlawful for any incorporated company, association of persons or stock company in this state, directly or indirectly to combine or make any contract with any incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people.

A violation of the provisions of this section shall constitute a misdemeanor and be punished by a fine of not exceeding $5,000, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If the violation of this section is committed by an association of persons, or by a stock company, all of the persons forming such association or being members of such stock company shall be equally liable and punishable as herein provided, and if the offense is committed by a corporation, the directors of said corporation shall be held personally liable and punishable as herein provided, and in addition thereto the court may impose against said corporation a fine not exceeding $5,000, and may declare its franchise forfeited. ['09, p. 297, S. B. 127.]

Hist. '09, p. 297, S. B. 127, reen. C. L. § 7129.

Cross ref. Combination in restraint of trade prohibited: Const. XI, 18. Anti-trust law: § 2531 et seq. Combination in restraint of trade: § 2531. Monopoly: § 2532. Unfair competition: § 2534. Violation of order of prohibition against continuance of business: § 2538. Rebating: § 2540. Refusal to testify on prosecution: § 2547. Perjury on subornation of perjury: § 2547.

ARTICLE 12.

MALICIOUS INJURIES TO RAILROADS, HIGHWAYS, BRIDGES AND TELEGRAPHS.

Cross ref. Owners of live stock who neglect or refuse to repair damages done to highways by their stock are guilty of a misdemeanor: § 1388. The sale of narrow-tired wagons unless permitted by the county commissioners is a misdemeanor: § 1392. Toll road companies refusing to repair roads after being notified by the road overseer so to do are subject to fine: § 1440. A violation of the state highway law is a misdemeanor: § 1619. Burning of a bridge is a felony: § 8556.

§ 8513. [7131] **Injuring railroad property.** Every person who maliciously removes, displaces, injures, or in any way interferes with, or changes, or destroys, any part of any railroad property, whether for cars propelled by steam, or any other motive power, or any track of any railroad, or any branch or branchway, switch, block or other signal or signaling device, turnout, bridge, viaduct, culvert, embankment, station house or other structure or fixture, or any part thereof attached to or connected with any railroad, is punishable by imprisonment in

the state prison not exceeding 10 years, or by fine not exceeding $1,000, or by both fine and imprisonment, in the discretion of the court. ['07, p. 316, § 1.]

Hist. '07, p. 316, § 1, reen. R. C. § 7131, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 10035(1).

§ 8514. Larceny of car parts: Murder by wrecking. Any person or persons who shall remove, take, steal, change, add to, take from, or in any manner interfere with any journal bearings or brasses, or any parts or attachments of any locomotive, tender or car, or any fixture or attachment belonging thereto, connected with, or used in operating any locomotive, tender or car, owned, leased or used by any railway or transportation company in this state, is guilty of a felony, and upon conviction thereof shall be subject to punishment by imprisonment in the penitentiary not less than one nor more than five years, in the discretion of the court: *Provided,* That if the removal of such journal bearings or brasses, fixtures or attachments, as aforesaid, shall be the cause of wrecking any train, locomotive or other car in this state, whereby the life or lives of any person or persons shall be lost as the result of the felonious or malicious stealing, interfering with or removal of the fixtures, as aforesaid, the person or persons found guilty thereof shall be liable for murder as in other cases. ['09, p. 81, H. B. 224, § 1.]

Hist. '09, p. 81, H. B. 224, § 1, reen. C. L. § 7131a.

§ 8515. Receiving stolen car parts. Every person who buys or receives any of the property described in the foregoing section, knowing the same to have been stolen, is guilty of a felony, and upon conviction thereof shall be subject to the punishment provided in said section. ['09, p. 81, H. B. 224, § 2.]

Hist. '09, p. 81, H. B. 224, § 2, reen. C. L. § 7131b.

§ 8516. [7132] **Placing obstructions on tracks.** Every person who maliciously places any obstruction upon the rails or track of any railroad, or of any switch, branch, branchway, or turnout connected with any railroad, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not less than six months. [R. S. § 7132.]

Hist. R. S. § 7132, second part, reen. R. C. § 7132, reen. C. L. ib.

N. D. Analogous: Pen. C. § 10035(2).

Comp. leg.—Cal. Same: Pen. C. 1872, § 587: Kerr's C. ib.

§ 8517. [7133] **Injuries to highway or bridge.** Every person who maliciously digs up, removes, displaces, breaks or otherwise injures or destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year. [R. S. § 7133.]

Hist. (See Cr. and P. '64, § 130) R. S. § 7133, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 10036.

Comp. leg.—Cal. Same: Pen. C. 1872, § 588: Kerr's C. ib.

§ 8518. [7134] **Injuries to toll house or gate.** Every person who maliciously injures or destroys any toll house or turnpike gate is guilty of a misdemeanor. [R. S. § 7134.]

Hist. R. S. § 7134, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 10041.

Comp. leg.—Cal. Same: Pen. C. 1872, § 589: Kerr's C. ib.

§ 8519. [7135] **Injuries to milestones and guideposts.** Every person who maliciously removes or injures any mile board, post or stone, or guidepost, or any inscription on such, erected upon any highway, is guilty of a misdemeanor. [R. S. § 7135.]

Hist. '85, p. 277, § 29; R. S. § 7135, reen. R. C. ib., reen. C. L. ib.

Cross ref. Similar provision: § 1335. Injury to guide posts: § 1379.

Comp. leg.—Cal. Same: Pen. C. 1872, § 590: Kerr's C. ib.

N. D. Similar: Pen. C. § 10042.

§ 8520. Placing debris in highways. If any person shall wilfully or negligently throw or deposit upon any highway, street, alley or easement used by the public for public travel, any glass bottle, glass, nails, tacks, hoops, cans, barbed wire, boards or other substance which would be likely to injure any horse, stock, vehicle or person traveling upon such highway, street, alley or easement, such person shall, upon conviction thereof, be punished by a fine not exceeding $25 or by imprisonment in the county jail not exceeding 10 days. ['11, c. 116, p. 374.]

Hist. '11, c. 116, p. 374, reen. C. L. § 7135a.

§ 8521. [7136] **Removal and obstruction of telegraph and telephone lines.** Every person who maliciously takes down, removes, injures or obstructs any line of telegraph or telephone, or any part thereof, or appurtenance or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor. [R. S. § 7136.]

Hist. R. S. § 7136, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or telephone" omitted; Pen. C. 1872, § 591; similar as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 10043.

§ 8522. [7138] **Obstruction of highways.** Any person who obstructs, injures or damages any public road, street or highway, either by placing obstruction therein or by digging in, deepening or deviating the water of any stream, or by placing any obstruction in any ditch or stream within or along any public road, street or highway, or by placing or constructing any obstruction, ditch or embankments upon their [his] own or other lands, so as to make or cause any water to flow upon or impair any public road, street or highway, or rides or drives upon and along the sidewalk of any road, street or highway, whenever such sidewalk has been graded or graveled, located or designated by any order of the board of commissioners or city council, or prepared in any other manner dedicating and designating the same for and to that particular use and purpose, either by the property owner or by the public, or in any other manner injures or obstructs any public road, street or highway, is guilty of a misdemeanor. [R. S. § 7138.]

Hist. '85, p. 162, § 37; R. S. § 7138, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 10038.

Road by prescription: Where a landowner fences his land and leaves a tract 50 feet wide outside of his fence for a public road and the public travel such road for five years or more, the public has acquired a prescriptive right thereto and the owner may not obstruct said road. S. v. Berg (1916) 28 I. 724, 155 P. 968.

§ 8523. [7139] **Flooding highways.** Any person who runs water across any public highway, road or street, without first constructing a good and sufficient ditch or ditches to convey the same, or who fails to bridge such ditch or ditches, or to keep such bridge or ditches in good repair, and all persons, companies or corporations who suffer any water used by them for the purpose of irrigation, or any other purposes, to flow into or upon any public highway, road or street, in any other manner than that authorized by law, is [are] guilty of a misdemeanor, and upon conviction thereof must be fined in any sum not less than $25 nor

more than $50, together with the costs of suit, and for a second offense, double said fine and costs; and it is hereby made the duty of all road supervisors, constables and marshals, to make complaint before the proper court, for violations of this section, whenever notified or having knowledge thereof. [R. S. § 7139.]

Hist. '85, p. 162, § 42; R. S. § 7139, reen. R. C. ib., reen. C. L. ib.

Cited: Lewiston v. Booth (1893) 3 I. 692, 34 P. 809.

§ 8524. [7140] **Obstruction or interference with railroad.** Any person or persons who shall wilfully or maliciously place any obstruction on any railroad track or roadbed, or street car track in this state, or who shall loosen, tear up, remove or misplace any rail, switch, frog, guard rail, cattle guard, or any part of such railroad track or roadbed or street car track, or who shall tamper with or molest any such road, roadbed or track, or who shall destroy or damage any locomotive, motor or car on said track, or who shall otherwise interfere with the maintenance or operation of such road so as to endanger the safety of any train, car, motor or engine, or so as to endanger or injure any passenger or person riding thereon, or being about the same, shall, upon conviction thereof, be punished by imprisonment in the penitentiary for any term not exceeding 20 years nor less than five years. ['93, p. 68, § 1.]

Hist. '93, p. 68, § 1, reen. '99, p. 182, § 1, reen. R. C. § 7140, reen. C. L. ib.

§ 8525. [7141] **Same: Act causing death.** Any person or persons who shall, within this state, wilfully or maliciously place any obstruction upon any railroad track or roadbed or street car track, or shall misplace, remove, obstruct, detach, damage or destroy any rail, switch, frog, guard rail, cattle guard, or any other part of such railroad track or roadbed or street car track, or who shall otherwise interfere with the maintenance and operation of such road, thereby causing the death of any person, whether passenger or employee of such railroad, or street railway, or otherwise, shall, upon conviction thereof, be deemed guilty of a felony and be punished by imprisonment in the penitentiary for a term not less than five years and which may extend to the natural life of such person so found guilty, or may be tried and punished for murder. But this section shall not in any way lessen the liability of the railroad company where a wreck may hereafter occur in the state of Idaho. ['93, p. 68, § 2.]

Hist. '93, p. 68, § 2, reen. '99, p. 182, § 2, reen. R. C. § 7141, reen. C. L. ib.

§ 8526. [7142] **Opening gates and destroying fences.** It shall be a misdemeanor for any person to open and leave open any gate not belonging to such person or rightfully under his control, or to cut, break, tear down, or otherwise injure, any fence or wall or any obstruction used for a fence not belonging to such person or rightfully under his control. ['03, p. 427, § 1.]

Hist. '03, p. 427, § 1, reen. R. C. § 7142, reen. C. L. ib.

§ 8527. [7143] **Injury to telegraph and telephone lines.** Any person who shall wilfully cut down or burn, or otherwise materially injure, any telegraph, telephone, or electric light pole, or shall shoot so as to materially injure any insulator, or knock said insulator loose from the pole to which it is attached, or otherwise materially injure such insulator, or who shall shoot any telegraph, telephone, or electric light wire, thereby breaking said wire, or who shall otherwise wilfully cut, break, or injure such wire, shall, upon conviction thereof, be fined not less

than $25 nor more than $100, and in case of failure to pay such fine, shall be imprisoned in the county jail one day for every $2 of such fine. ['88-89, p. 58, § 1.]

Hist. '88-89, p. 58, § 1, reen. R. C. § 7143, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 591; as amended: Kerr's C. ib.

ARTICLE 13.

INJURIES TO IRRIGATION WORKS.

Cross ref. Malicious injury to water conduit is a felony: § 8563. Interference with the distribution of stored water is a misdemeanor: § 5625.

§ 8528. [7137] **Interference with ditches or canals.** Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume or reservoir, used for the purpose of holding or conveying water for manufacturing, agricultural, mining, or domestic uses, or who shall, without like authority, raise, lower, or otherwise disturb, any gate or other appurtenance thereof used for the control or measurement of water, or who shall empty or place, or cause to be emptied or placed, into any such canal, ditch, flume, or reservoir, any rubbish, filth or obstruction to the free flow of the water, is guilty of a misdemeanor. [R. S. § 7137.]

Hist. R. S. § 7137, reen. R. C. ib., reen. C. L. § 7143g.

Comp. leg.—Cal. Same: Kerr's Pen. C. 1872, § 592; similar as amended: Kerr's C. ib.

Cited: Walbridge v. Robinson (1912) 22 I. 236, 125 P. 812, 43 L. R. A. (N. S.) 240.

§ 8529. [7144] **Wasting water used for irrigation.** Any person or persons who shall wilfully or wantonly waste any of the waters of any stream, the waters of which are used for irrigation, to the detriment of any claimant of such water for irrigation purposes, by diverting the same for an unnecessary use or purpose, or by allowing such water to waste by running into depressions or dry channels so that the same can not be used for irrigation, nor reach the original channel of the stream from which it has been diverted, is [are] guilty of a misdemeanor. ['99, p. 336, § 1.]

Hist. '99, p. 336, § 1, reen. R. C. § 7144, reen. C. L. ib.

Waste water: The waters of all streams belong to the public, and while the right to use thereof for beneficial purposes may be acquired and maintained, yet the public is interested in the water and in its beneficial use, and it is against the spirit and policy of the constitution and laws, as well as contrary to public policy, to permit the wasting of the waters. Stickney v. Hanrahan (1900) 7 I, 424, 63 P. 189.

Where it is necessary to divert and apply more water than the soil will absorb, as on sloping land, excess is not waste within the meaning of this and § 5640. Beasley v. Engstrom (1917) 31 I. 14, 168 P. 1145.

§ 8530. [7144a] **Obstruction of overflow and gauges.** Any person or persons who shall obstruct any overflow, gauge or water way, placed in any dam by order of any water master, so as to impede the flow of water over such dam as regulated by the water master, shall be guilty of a misdemeanor. ['99, p. 336, § 2.]

Hist. '99, p. 336, § 2, reen. R. C. § 7144a, reen. C. L. ib.

§ 8531. [7144b] **Wrongful diversion of water.** Any person who, without the consent of the water master of the district, diverts any water from a ditch or channel where it has been placed, or caused or left to run by the water master or his deputies, or who shuts or opens any ditch, gate or dam, or in any way impedes or increases the flow of water in any stream or ditch diverting water from a stream, while the same is under the charge of a water master, or who cuts away any em-

bankment of a stream, whereby the water of such stream is diverted, or breaks, injures or removes any gate, flume or other device used for the equitable distribution of the water of such stream by the water master, shall be guilty of a misdemeanor. ['99, p. 336, § 3.]

Hist. '99, p. 336, § 3, reen. R. C. § 7144b, reen. C. L. ib.

§ 8532. [7144c] **Interference with headgate: Cutting banks of stream.** If any obstruction shall be wilfully and maliciously placed on any overflow gauge in any stream of water which is used for irrigation and is under control of a water master, and such obstruction retards or impedes the free overflow of the water of such stream, thereby increasing the pressure against a headgate through which water is diverted by means of such dam, or if any headgate regulated by a water master shall be removed, broken, injured or interfered with so as to disturb the distribution of the water as regulated by the water master, or if any bank of the natural stream, the water of which is being used for irrigation and is being distributed by a water master, shall be cut away so as to increase the flow of water from such stream, thereby interfering with the distribution of the water as regulated by a water master, the person or persons so interrupting the flow of said water as aforesaid, shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of $100 or be imprisoned in the county jail not exceeding 60 days. ['99, p. 336, § 4.]

Hist. '99, p. 336, § 4, reen. R. C. § 7144c, reen. C. L. ib.

Cross ref. Interference with distribution of water: § 5625.

§ 8533. [7145] **Injuries to ditches and appurtenances.** Any person or persons, who shall cut, break, damage, or in any way interfere with any ditch, canal, headgate, or any other works in or appurtenant thereto, the property of another person, corporation, or association of persons, and whereby water is conducted to any place for beneficial use or purposes, and when said canal, headgate, ditch, dam, or appurtenances are being used or are to be used for said conduct of water, shall be guilty of an indictable misdemeanor. ['07, p. 237, § 1.]

Hist. '07, p. 237, § 1, reen. R. C. § 7145, reen. C. L. ib.

Application: Breaking padlock which fastened headgate and interfering with headgate was a violation of this section. Nettleton v. Cook (1917) 30 I. 82, 163 P. 300.

§ 8534. [7146] **Injury to measuring devices.** Any person or persons who shall cut, break, injure, destroy, enlarge, change or alter any headgate, sluiceway, weir, water box, or other measuring device, the property of any irrigation district, corporation or association of persons, or in the possession of, or in the use of, said irrigation district, corporation, or association, or the property of another, shall be guilty of an indictable misdemeanor.

Any person or persons who shall change, alter, destroy, disturb, enlarge or interfere with any headgate, dam, weir, water box, or other measuring device, made, placed, used or regulated by any duly appointed, elected, or authorized water master, deputy water master, ditch walker, ditch rider, engineer, or other authorized agent of any irrigation company, corporation or association or person, when said measuring device is being used or is to be used for the measurement of water, shall be guilty of an indictable misdemeanor. ['07, p. 237, §§ 2, 3.]

Hist. '07, p. 237, §§ 2, 3, reen. R. C. § 7146, reen. C. L. ib.

Cited: Nettleton v. Cook (1917) 30 I. 82, 163 P. 300.

§ **8535.** [7147] **Change of lateral ditch.** Where any lateral ditch has heretofore been, or may hereafter be, constructed across the lands of another, the person or persons owning or controlling the said land, shall have the right at his own expense to change said lateral ditch to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such lateral ditch. ['07, p. 237, § 4.]

Hist. '07, p. 237, § 4, reen. R. C. § 7147, reen. C. L. ib.

§ **8536.** [7148] **Punishment for violation of preceding sections.** Any person or persons violating any of the provisions of the three preceding sections, shall be guilty of an indictable misdemeanor and shall be punished upon conviction thereof, by a fine of not exceeding $300, or by imprisonment in the county jail not exceeding 12 months, or by both such fine and imprisonment. ['07, c. 237, § 5.]

Hist. '07, p. 237, § 5, reen. R. C. § 7148, reen. C. L. ib.

§ **8537.** [7148a] **Unauthorized tampering with measuring devices.** Every person who shall wilfully waste water for irrigation, or who shall wilfully open, close, change or disturb, or interfere with, any headgate or water box or measuring device, without authority, shall be fined a sum not exceeding $100, or be imprisoned in the county jail for a term not to exceed six months or shall suffer both such fine or imprisonment. The water masters or their assistants, within their district, shall have power to arrest any person or persons offending, and turn them over to the sheriff or the nearest peace officer of the county in which such offense is committed, and immediately upon delivering such person so arrested into the custody of either of such officers, it shall be the duty of the water master making such arrest to make complaint, in writing and under oath, before the proper justice of the peace, or the probate judge of such county, against the person so arrested. [R. C. § 7148a.]

Hist. '03, p. 223, § 26, last half of section; am. R. C. § 7148a, reen. C. L. ib.

§ **8538.** [7149] **Neglect to deliver water: Interference with delivery.** Any superintendent or any person having control or charge of the said ditch, canal or conduit, who shall wilfully neglect or refuse to deliver water as provided in chapter 220, or person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having a right thereto, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than $25, nor more than $100 for each offense; and the money thus collected shall be paid into the school fund of the county in which the misdemeanor has been committed; and the owner or owners of such ditch, canal or conduit shall be liable in damages to the person or persons deprived of the use of water to which they were entitled as provided in said chapter 220. [R. C. § 7149.]

Hist. '99, p. 380, § 18; am. R. C. § 7149, reen. C. L. ib.

CHAPTER 309.

MALICIOUS MISCHIEF.

Cross ref. Mutilation or destruction of books in state law library is a misdemeanor: § 1267. Malicious injuries to railroads, highways, bridges and telegraphs: § 8513 et seq. Injuries to irrigation works: § 8528 et seq.

§ 8539. [7150] Malicious injury to property. Every person who maliciously injures or destroys any real or personal property not his own, in cases otherwise than such as are specified in this code, is guilty of a misdemeanor. [R. S. § 7150.]

Hist. (See Cr. and P. '64, § 143) R. S. § 7150, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 594: Kerr's C. ib.

N. D. Similar: Pen. C. § 10050.

§ 8540. [7151] Construction of following sections. The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section. [R. S. § 7151.]

Hist. R. S. § 7151, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 595: Kerr's C. ib.

N. D. Identical: Pen. C. § 10051.

Cruelty to Animals.

§ 8541. [7152] Poisoning animals. Every person who wilfully administers any poison to an animal, the property of another, or maliciously exposes any poisonous substance, with the intent that the same shall be taken or swallowed by any such animal, is punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding one year, and a fine not exceeding $500. [R. S. § 7152.]

Hist. (See Cr. and P. '64, § 142) R. S. § 7152, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 596: Kerr's C. ib.

N. D. Similar: Pen. C. § 10052.

§ 8542. Killing, maiming, torturing, overdriving, overloading, etc. Every person who maliciously kills, maims, or wounds an animal, the property of another, or who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink or shelter, or to be cruelly beaten, mutilated or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering or inflicts any unnecessary cruelty upon the same, or in any manner abuses any animal, or fails to provide the same with proper food, drink, shelter or protection from the weather, or who cruelly drives, rides, or otherwise uses the same when unfit for labor, is, for every such offense, guilty of a misdemeanor. ['09, p. 175, H. B. 288, § 1.]

Hist. (See Cr. and P. '64, § 143) R. S. § 7153, reen. R. C. ib.; am. '09, p. 175, H. B. 288, § 1, reen. C. L. § 7153.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 597; same, Kerr's C. ib.

N. D. Analogous: Pen. C. § 10053.

Malice: In a prosecution under this section, for the malicious killing, maiming or wounding of a dog, malice is the gist of the action, and must be established to the satisfaction of the jury beyond a reasonable doubt, in order to justify a conviction. S. v. Churchill (1909) 15 I. 645, 98 P. 853, 19 L. R. A. (N. S.) 835, 16 Ann. Cas. 947.

§ 8543. Carrying in a cruel manner: Unnecessary torture. Whoever carries or causes to be carried in or upon any vehicle or otherwise any domestic animal in a cruel or inhuman manner, or knowingly and wilfully authorizes or permits it to be subjected to unnecessary torture, suffering or cruelty of any kind, is guilty of a misdemeanor, and whenever any such person is taken into custody therefor by any officer, such officer must take charge of such vehicle, and its contents, together with the horse or team attached to such vehicle and deposit them in some place of custody; and any unnecessary [necessary] expense incurred for taking care of and keeping the same, is a lien thereon, to be paid before the same can be lawfully recovered; and if such expense, or any part thereof remains unpaid, it may be recovered, by the person incurring the same, of the owner of such domestic animal, in an action therefor. ['09, p. 175, H. B. 288, § 2, subd. 7153a.]

Hist. R. C. § 7153a, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153a.

Comp. leg.—Cal. Same: Kerr's C. § 597a.

§ 8544. Permitting animal fights for amusement. Any person who causes any bull, bear, cock, dog or other animal to fight for his amusement, or for gain, or to worry or injure each other; and any person who permits the same to be done on any premises under his charge or control; and any person who aids, abets or is present at such fighting or worrying of such animals, as a spectator, is guilty of a misdemeanor. ['09, p. 175, H. B. 288, § 2, subd. 7153b.]

Hist. R. C. § 7153b, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153b.

Comp. leg.—Cal. Similar: Kerr's C. § 597b.

Cross ref. Participation in dog or cock fighting is a misdemeanor: § 8372.

§ 8545. Training animals for fighting. Whoever owns, possesses, keeps or trains any bird or animal, with the intent that such bird or animal shall be engaged in an exhibition of fighting, or is present at any place, building or tenement, where preparations are being made for an exhibition of fighting of birds or animals, with the intent to be present at such exhibition, is guilty of a misdemeanor. ['09, p. 175, H. B. 288, § 2, subd. 7153c.]

Hist. R. C. § 7153c, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153c.

Comp. leg.—Cal. Same: Kerr's C. § 597c.

§ 8546. Arrests without warrants. Any sheriff, constable, police or peace officer, or any officer or agent of any incorporated society for the prevention of cruelty to animals, qualified under the provisions of law to make arrests may enter any place, building or tenement where there is an exhibition of the fighting of birds or animals or where preparations are being made for such an exhibition, and without a warrant, arrest all persons there present. ['09, p. 175, H. B. 288, § 2, subd. 7153d.]

Hist. R. C. § 7153d, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153d.

Comp. leg.—Cal. Same except reference to officer: Kerr's C. § 597d.

§ 8547. Impounding without food or water. Any person who impounds, or causes to be impounded in any pound, any domestic animal, must supply the same during such confinement with a sufficient quantity of good and wholesome food and water, and in default thereof, is guilty of a misdemeanor. In case any domestic animal is at any time impounded as aforesaid and continues to be without necessary food and water for more than 12 hours, it is lawful for any person, from time to time, as may be deemed necessary, to enter into and upon any pound in which such animal is confined, and supply it with necessary food and

water so long as it remains so confined. Such person is not liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal, and such animal is not exempt from levy and sale upon execution issued upon a judgment therefor. ['09, p. 175, H. B. 288, § 2, subd. 7153e.]

Hist. R. C. § 7153e, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153e.

Comp. leg.—Cal. Same: Kerr's C. § 597e.

§ 8548. Permitting animals to go without care: Abandoned animals to be killed. Every owner, driver or possessor of any animal, who shall permit the same to be in any building, inclosure, lane, street, square or lot of any city, county or precinct, without proper care and attention, shall, on conviction, be deemed guilty of a misdemeanor. And it shall be the duty of any peace officer, or officer of any incorporated association qualified as provided by law, to take possession of the animal so abandoned or neglected, and care for the same until it is redeemed by the owner or claimant, and the cost of caring for such animal shall be a lien on the same until the charges are paid. Every sick, disabled, infirm or crippled animal which shall be abandoned in any city, county or precinct, may if after due search no owner can be found therefor, be killed by such officer; and it shall be the duty of all peace officers, or by an officer of said incorporated association, to cause the same to be killed on information of such abandonment. Such officer may likewise take charge of any animal that by reason of lameness, sickness, feebleness or neglect, is unfit for the labor it is performing, or that in any other manner is being cruelly treated; and, if such animal is not then in custody of its owner, such officer shall give notice thereof to such owner, if known, and may provide suitable care for such animal until it is deemed to be in a suitable condition to be delivered to such owner, and any necessary expenses which may be incurred for taking care of and keeping the same shall be a lien thereon, to be paid before the same can be lawfully recovered. ['09, p. 175, H. B. 288, § 2, subd. 7153f.]

Hist. R. C. § 7153f, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153f.

Comp. leg.—Cal. Same except reference to officer: Kerr's C. § 597f.

§ 8549. Killing or disturbing birds in cemeteries. Every person who, within any public cemetery or burying ground, kills, wounds or traps any bird, other than swallows or English sparrows, and destroys any bird's nest other than swallows' and English sparrows' nests, or removes any eggs or young birds from any nest, other than swallows and English sparrows is guilty of a misdemeanor. ['09, p. 175, H. B. 288, § 2, subd. 7153g.]

Hist. R. C. § 7153g, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153g.

Comp. leg.—Cal. Same except reference to kinds of birds: Kerr's C. § 598.

§ 8550. Prosecutions. When complaint is made on oath, to any magistrate authorized to issue warrants in criminal cases, that the complainant believes that any provision of law relating to or in any way affecting dumb animals or birds, is being, or is about to be violated in any particular building or place, such magistrate must issue and deliver immediately a warrant directed to any sheriff, constable, police or peace officer, or officer of any incorporated association qualified as provided by law, authorizing him to enter and search such building or place, and to arrest any person there present violating or attempting to violate any law relating thereto, or in any way affecting dumb animals or birds, and to bring such person before some court or magistrate of competent jurisdiction, within the city, county, or precinct within which such offense has been committed or attempted, to be dealt with

according to law, and such attempt must be held to be a violation of section 8542. ['09, p. 175, H. B. 288, § 2, subd. 7153h.]

Hist. R. C. § 7153h, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153h.

Comp. leg.—Cal. Same except reference: Kerr's C. § 599a.

§ 8551. Words defined. In this title the word "animal" includes every dumb creature; the words "torment," "torture" and "cruelty" include every act, omission or neglect whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted; and the words "owner" and "person" include corporations as well as individuals; and the knowledge and acts of agents of, or persons employed by a corporation in regard to animals transported, owned, or employed by, or in custody of, such corporation must be held to be the act and knowledge of such corporation as well as such agent or employee. [C. L. § 7153i.]

Hist. R. C. § 7153i, enacted by '09, p. 175, H. B. 288, § 2; compiled and reen. C. L. § 7153i.

Comp. leg.—Cal. Same: Kerr's C. § 599b.

§ 8552. Not to interfere with game laws. No part of this chapter shall be construed as interfering with any of the laws of this state known as the game laws or any law for or against the destruction of certain birds, nor must this chapter be construed as interfering with the right to destroy any venomous reptile, or animal known as dangerous to life, limb, or property, or to interfere with the right to kill all animals used for food or with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college, or university of this state. ['09, p. 175, H. B. 288, § 2, subd. 7153j.]

Hist. R. C. § 7153j, enacted by '09, p. 175, H. B. 288, § 2, reen. C. L. § 7153j.

Comp. leg.—Cal. Same: Kerr's C. § 599c.

§ 8553. Docking of tails. Whoever shall cut the solid part of the tail of any horse in the operation known as docking, or in any other operation performed for the purpose of shortening the tail and whoever shall cause the same to be done or assist in doing such cutting, is guilty of a misdemeanor. ['09, p. 175, H. B. 288, § 2, subd. 7153k.]

Hist. R. C. § 7153k, enacted by '09, p. 175, H. B. 288, § 2. reen. C. L. § 7153k.

Comp. leg.—Cal. Same: Kerr's C. § 599d.

§ 8554. Animals to be killed when unfit for work. Every animal which is unfit, by reason of its physical condition, for the purpose for which such animals are usually employed, and when there is no reasonable probability of such animal ever becoming fit for the purpose for which it is usually employed, shall be by the owner or lawful possessor of the same, deprived of life within 12 hours after being notified by any peace officer, or officer of said incorporated association to kill the same, and such owner, possessor, or person omitting or refusing to comply with the provisions of this section shall, upon conviction, be guilty of a misdemeanor, and after such conviction, the court or magistrate having jurisdiction of such offense shall order any peace officer, or officer of said incorporated association, to immediately kill such animal: *Provided,* That this shall not apply to such owner keeping any old or diseased animal belonging to him on his own premises with proper care. ['09, p. 175, H. B. 288, § 2, subd. 7153 l.]

Hist. R. C. § 7131 l. enacted by '09. p. 175, H. B. 288, § 2, reen. C. L. § 7153 l.

Comp. leg.—Cal. Same except reference to officer: § 599e.

§ 8555. [7155] **Beating and worrying animals.** Every person who cruelly whips, beats or otherwise unnecessarily ill treats any animal, or

worries with dog any cattle, horses, sheep or hogs, shall be guilty of a misdemeanor. [R. S. § 7155.]

Hist. '83, p. 63, § 3; R. S. § 7155, reen. R. C. ib., reen. C. L. ib.

§ 8556. [7156] Burning property not subject to arson. Every person who wilfully and maliciously burns any bridge exceeding in value $50, or any building, snowshed, or vessel, not the subject of arson, or any stack of grain of any kind, or of hay, or any standing or growing grain, grass or tree, or any fence, not the property of such person, is punishable by imprisonment in the state prison for not less than one year nor more than 10 years. [R. S. § 7156.]

Hist. (See Cr. and P. '64, § 57) R. S. § 7156, reen. R. C ib., reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 600; as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 10059.

§ 8557. [7157] Explosion of buildings. Every person who maliciously, by the explosion of gunpowder or other explosive substance, destroys, throws down, or injures the whole or any part of any building, by means of which the life or safety of a human being is endangered, is guilty of felony. [R. S. § 7157.]

Hist. R. S. § 7157, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 601; as amended: Kerr's C. ib.

N. D. Similar: Pen. C. § 10061.

§ 8558. Trespass. Every person who wilfully commits any trespass, by either:

1. Cutting down, destroying or injuring any kind of wood or timber belonging to another, standing or growing upon the lands of another; or
2. Carrying away any kind of wood or timber lying on such lands; or
3. Maliciously injuring or severing from the freehold of another, anything attached thereto, or the produce thereof; or
4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, stone; or
5. Digging, taking, or carrying away from any land in any of the cities of the state, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil or stone; or
6. Wilfully opening, tearing down, or otherwise destroying any fence on the inclosed land of another, or opening any gate, bar, or fence of another and wilfully leaving it open without the permission of the owner; or
7. Wilfully cover[ing] up or encumber[ing] in any manner, the land or city lot of another, without written permission from the owner or custodian thereof:

Is guilty of a misdemeanor. ['11, c. 145, p. 449.]

Hist. (See Cr. and P. '64, 144; '71, p. 21, 154) R. S. § 7158, reen. R. C. ib.; am. '11, c. 145, p. 449, reen. C. L. § 7158.

Cross ref. Herding on occupied lands a misdemeanor: § 1936. Permitting hogs at large in municipalities is a misdemeanor: 1976. Permitting sheep to range in towns a misdemeanor: § 1981; in unincorporated villages a misdemeanor: § 1984. Permitting animals to run at large in herd districts a misdemeanor: § 2016. Hunting on enclosed lands without permission, resulting in killing of live stock, is a misdemeanor: § 2591. Trespassing with fire arms on enclosed land in violation of warning signs a misdemeanor: § 2592. Trespass upon a private park or pond is a misdemeanor: § 2797.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 602; am. Kerr's C. ib.

N. D. Analogous: Pen. C. § 10063.

Principals: Any person who is present at the commission of a trespass, encouraging or inciting the same, is liable as a principal. Duck Lee v. Boise Dev. Co. (1912) 21 I. 461, 122 P. 851.

Wrongful occupation of dwelling house: When a trespasser refuses to leave the

premises after being asked to depart, or defiantly stands his ground armed with a deadly weapon, the rightful occupant may at once resort to a reasonable degree of force to remove him. Tipsword v. Potter, 31 I. 509, 174 P. 133.

§ 8559. [7159] Injuries to crops. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this code, is guilty of a misdemeanor. [R. S. § 7159.]

Hist. R. S. § 7159, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 10065.

Comp. leg.—Cal. Same: Pen. C. 1872, § 604: Kerr's C. ib.

§ 8560. [7160] Obliterating and defacing boundary monuments. Every person who either:

1. Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land; or
2. Maliciously defaces or alters the marks upon any such monument; or
3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks;

Is guilty of a misdemeanor. [R. S. § 7160.]

Hist. (See Cr. and P. '64, § 73) R. S. § 7160, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 10069.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 605; Kerr's C. ib.

§ 8561. Defacing natural scenic objects. It shall be unlawful for any person to paint, sketch, or place in any manner or form or by any means, upon any rock or rocks or similar natural object or objects, any place within the state of Idaho, any sign, advertisement or picture or commercial or business name, for business or commercial purposes. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor. ['11, c. 132, p. 419.]

Hist. '11, c. 132, p. 419, reen. C. L. § 7160a.

§ 8562. [7161] Injuring jails. Every person who wilfully and intentionally breaks down, pulls down or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding $10,000, and by imprisonment in the state prison not exceeding five years. [R. S. § 7161.]

Hist. (See Cr. and P. '64, § 147) R. S. § 7161, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 606: Kerr's C. ib.

§ 8563. [7162] Injuring dams, canals, etc. Every person who wilfully and maliciously cuts, breaks, injures or destroys any bridge, dam, canal, flume, acqueduct, levee, embankment, reservoir or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed or marsh land, or to conduct water for mining, manufacturing, reclamation or agricultural purposes, or any embankment necessary to the same, or either of them; or wilfully or maliciously makes, or causes to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee or structure, with intent to injure or destroy the same, is punishable by a fine not exceeding $1000, or by imprisonment in the state prison not exceeding two years, or by both. [R. S. § 7162.]

Hist. Cr. and P. '64, § 146; R. S. § 7162, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 10071.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 607: Kerr's C. ib.

§ 8564. Destroying lumber, poles, rafts and vessels. Every person who wilfully and maliciously burns, injures, marks, brands or defaces or destroys any pile, piling, telegraph pole, telephone pole or electric transmission line pole, fence post, pile or raft of wood, plank, boards or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or part thereof, or cuts, breaks, injures, sinks or sets adrift any vessel the property of another, is punishable by a fine not exceeding $300, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. ['09, p. 26, H. B. 41.]

Hist. (See Cr. and P. '64, § 145) R. S. § 7163, reen. R. C. ib.; am. '09, p. 26, H. B. 41, reen. C. L. § 7163.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 608: Kerr's C. ib.

§ 8565. [7164] **Destroying legal notices.** Every person who intentionally defaces, obliterates, tears down or destroys any copy or transcript, or extract from or of any law of the United States or of this state, or any proclamation, advertisement or notification set up at any place in this state, by authority of any law of the United States or of this state, or by order of any court, before the expiration of the time for which the same was to remain set up, is punishable by fine of not less than $20 nor more than $100, or by imprisonment in the county jail not more than one month. [R. S. § 7164.]

Hist. Cr. and P. '64, § 132; R. S. § 7164, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 616: Kerr's C. ib.

§ 8566. [7165] **Mutilating written instruments.** A person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison for not less than one nor more than five years. [R. S. § 7165.]

Hist. (See Cr. and P. '64, § 72) R. S. § 7165, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 10075.

Comp. leg.—Cal. Same: Pen. C. 1872, § 617: Kerr's C. ib.

§ 8567. [7166] **Opening sealed letters.** Every person who wilfully opens or reads, or causes to be read, any sealed letter not addressed to himself, without being authorized so to do, either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter knowing the same to have been unlawfully opened, is guilty of a misdemeanor. [R. S. § 7166.]

Hist. (See Cr. and P. '64, § 117) R. S. § 7166, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 10077.

Comp. leg.—Cal. Same: Pen. C. 1872, § 618: Kerr's C. ib.

§ 8568. [7167] **Disclosing contents of telegraphic messages.** Every person who wilfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person, without the permission of such person, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $5000, or by both fine and imprisonment. [R. S. § 7167.]

Hist. R. S. § 7167, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: Pen. C. § 10078.

Comp. leg.—Cal. Same: Pen. C. 1872, § 619; similar as amended: Kerr's C. ib.

§ 8569. [7168] **Altering telegraphic messages.** Every person who wilfully alters the purport, effect or meaning of a telegraphic message,

to the injury of another, is punishable as provided in the preceding section. [R. S. § 7168.]

Hist. R. S. § 7168, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 620; amended to include telephone messages: Kerr's C. ib.

§ 8570. [7169] **Opening telegrams.** Every person not connected with any telegraphic office who, without the authority or consent of the person to whom the same may be directed, wilfully opens any sealed envelope inclosing a telegraphic message and addressed to any other person, with the purpose of learning the contents of such message, or who fraudulently represents any other person, and thereby procures to be delivered to himself any telegraphic message addressed to such other person, with the intent to use, destroy or detain the same from the person or persons entitled to receive such message, is punishable as provided in the two preceding sections. [R. S. § 7169.]

Hist. R. S. § 7169, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 621; amended to include telephone messages: Kerr's C. ib.

§ 8571. [7170] **Injuring monuments, ornaments and public improvements.** Every person not the owner thereof who wilfully injures, disfigures or destroys any monument, work of art, or useful or ornamental improvement within the limits of any village, town or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk or public park or place, is guilty of a misdemeanor. [R. S. § 7170.]

Hist. (See Cr. and P. '64, § 144) R. S. § 7170, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 622: Kerr's C. ib.

§ 8572. [7171] **Injuring gas or water pipes.** Every person who wilfully breaks, digs up, obstructs or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendages therewith connected, is guilty of a misdemeanor. [R. S. § 7171.]

Hist. R. S. § 7171, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Pen. C. § 10082.

Comp. leg.—Cal. Same: Pen. C. 1872, § 624: Kerr's C. ib.

§ 8573. [7172] **Destroying mining and water right notices.** Every person who intentionally defaces, obliterates, tears down or destroys any notice posted on any lode or placer mining claim, or ditch, or water right, or location, or who removes, takes down or destroys any post or monument erected or placed to mark or indicate any such claim, right or location, or any part or boundary thereof, or part thereon, is guilty of a misdemeanor. [R. S. § 7172.]

Hist. R. S. § 7172, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 616: Kerr's C. ib.

§ 8574. [7173] **Unauthorized connection with telegraph and telephone wires.** Whoever shall wilfully and maliciously cut, break, tap or make any connection with, any telegraph or telephone wire, or read or copy, by the use of telegraph or telephone instruments or otherwise, in any unauthorized manner, any message, either social or business, sporting, commercial or other news reports, from any telegraph or telephone line, wire or cable, so unlawfully cut or tapped in this state; or make unauthorized use of the same, or who shall wilfully and maliciously prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, conveyance or delivery, in this state, of any authorized

communication, sporting, commercial or other news reports, by or through any telegraph or telephone line, cable or wire, under the control of any telegraph or telephone company doing business in this state, or who shall wilfully and maliciously aid, agree with, employ or conspire with, any other person or persons to do any of the aforementioned unlawful acts, shall be deemed guilty of felony, and shall be punished by a fine of not less than $50 nor more than $500, or by imprisonment in the penitentiary for a period of not less than one nor more than five years, or by fine and imprisonment within the limits hereinbefore specified, at the discretion of the court. ['93, p. 90, § 1.]

Hist. '93, p. 90, § 1, reen. '99, p. 190, § 1, reen. R. C. § 7173, reen. C. L. ib.

N. D. Analogous: Pen. C. § 10231.

Comp. leg.—Cal. See Pen. C. 1872, § 640; amended: Kerr's C. ib.

§ 8575. [7174] **Explosion of buildings, machinery, etc.** Any person who shall destroy or attempt to destroy, either in whole or in part, any structure, building, house, mill, flume, car, engine, penstock, water wheel, dam, bridge, railroad, track, or machinery used for the production of power or light, by means of dynamite or any other explosive, shall be guilty of a felony, and shall be imprisoned in the state penitentiary for a term not less than one nor more than 20 years. ['05, p. 220, § 1.]

Hist. '05, p. 220, § 1, reen. R. C. § 7174, reen. C. L. ib.

§ 8576. [7175] **Removal or destruction of electric transmission lines.** It shall be unlawful for anyone within the state of Idaho to take down, remove, injure, obstruct, displace or destroy, wilfully or maliciously and without the consent of the owner, any line erected or constructed for the transmission of electrical current, or any poles, wires, conduits, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure, or appurtenances thereto, or any machinery connected therewith or necessary to the use of any line erected or constructed for the transmission of electrical current: *Provided,* Nothing in this section shall be construed to prevent any person, after having given 10 days' written notice, from removing or causing to be removed from his premises, or premises occupied by him, any of the above described line or lines, wires, conduits, cables, insulators or apparatus connected therewith: *Provided further,* Any such removals must be made by or under the direction of a skilful and competent electrician. ['03, p. 341, § 1.]

Hist. '03, p. 341, § 1, reen. R. C. § 7175, reen. C. L. ib.

§ 8577. [7176] **Burning electric plants.** It shall be unlawful for any person within the state of Idaho to set fire, wilfully or maliciously, that shall result in the destruction or injury of any line erected or constructed for the transmission of electrical current, or any poles, conduits, cables, wires, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or any house, shop, building or other structure, or appurtenances thereto, or machinery connected therewith, or necessary to the use of, any line erected or constructed for the

transmission of electrical current, or to set fire that shall in any manner interrupt the transmission of electrical current along such line. ['03, p. 341, § 2.]

Hist. '03, p. 341, § 2, reen. R. C. § 7176, reen. C. L. ib.

§ 8578. [7177] Punishment under preceding sections. Any person or persons violating any provision or provisions of the two preceding sections or any part of said sections, shall, upon conviction thereof, be punished by a fine not exceeding $500, or by imprisonment in the penitentiary not to exceed 10 years, or by both such fine and imprisonment, in the discretion of the court. ['03, p. 341, § 3.]

Hist. '03, p. 341, § 3, reen. R. C. § 7177, reen. C. L. ib.

§ 8579. Sabotage. Any person who wilfully, maliciously or mischievously drives or causes to be driven or imbedded any nail, spike or piece of iron, steel or other metallic substance, or any rock or stone, into any log or timber intended to be manufactured into boards, lath, shingles or other lumber, or to be marketed for such purpose, is punishable by imprisonment in the state prison not more than five years or by imprisonment in the county jail not less than six months, or by fine not to exceed $5000, in the discretion of the court. ['17, c. 136, p. 446.]

Hist. R. C. § 7178, enacted by '17, c. 136, p. 446, reen. C. L. § 7178.

Comp. leg.—Wis. Similar: '13, § 4451.

CHAPTER 310.

CRIMINAL SYNDICALISM.

Comp. leg. See anarchy acts: N. Y. Con. L. vol. 4, §§ 160-3, pp. 2544-5; Wis. Stat. '13, §§ 4522a, b, d, e. References to the Minnesota law which follow the Idaho law are given below.

§ 8580. Criminal syndicalism defined. Criminal syndicalism is the doctrine which advocates crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as in this chapter otherwise provided. ['17, c. 145, § 1, p. 459.]

Hist. '17, c. 145, § 1, p. 459, reen. C. L. § 7179.

Comp. leg.—Minn. Similar: '17, c. 215, S. F. 942, § 1, p. 311.

Membership in criminal organizations: Orders, organizations or associations, which teach, advise, counsel, encourage or practice the commission of crimes forbidden by law, are criminal organizations; and to become and continue to be a member of such an organization are such overt acts of recognition and participation as to make such member particeps criminis, and as guilty in contemplation of law as though he actually engaged in promoting their unlawful objects and purposes. Wooley v. Watkins (1899) 2 I. 590, 22 P. 102.

§ 8581. Same: Acts punishable. Any person who:

1. By word of mouth or writing advocates or teaches the duty, necessity or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform: or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence or other unlawful methods of terrorism; or,

3. Openly, wilfully and deliberately justifies, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, vio-

lence or other unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or,

4. Organizes or helps to organize or attempts to organize or becomes a member of or who, being a member thereof, continues or retains such membership or voluntarily assembles with any society, group or assemblage of persons formed to teach or advocate, or which does teach or advocate the doctrines of criminal syndicalism;

Is guilty of a felony and punishable by imprisonment in the state prison for not more than 10 years or by a fine of not more than $5000, or both. ['19, c. 136, p. 432.]

Hist. '17, c. 145, § 2, p. 460, reen. C. L. § 7179a; am. '19, c. 136, p. 432.

Comp. leg.—Minn. Similar: '17, c. 215, S. F. 942, § 2, p. 311.

§ 8582. Criminal syndicalist assembly. Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal syndicalism as defined in this chapter, such an assemblage is unlawful, and every person voluntarily participating therein by his presence, aid or instigation is guilty of a felony and punishable by imprisonment in the state prison for not more than 10 years, or by a fine of not more than $5000, or both. ['17, c. 145, § 3, p. 460.]

Hist. '17, c. 145, § 3, p. 460, reen. C. L. § 7179b.

Comp. leg.—Minn. Identical: '17, c. 215, S. F. 942, § 3, p. 311.

§ 8583. Permitting criminal syndicalist assembly. The owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who wilfully and knowingly permits therein any assemblage of persons prohibited by the provisions of the foregoing section, or who, after notification that the premises are so used, permits such use to be continued, is guilty of a misdemeanor and punishable by imprisonment in the county jail for not more than one year or by a fine of not more than $500, or both. ['17, c. 145, § 4, p. 460.]

Hist. '17, c. 145, § 4, p. 460, reen. C. L. § 7179c.

Comp. leg.—Minn. Identical except "janitor" and "caretaker" omitted; '17, c. 215, S. F. 942, § 4, p. 311.

CHAPTER 311.

MISCELLANEOUS CRIMES.

Cross ref. Various offenses not easily classified are as follows:

Protection of agriculture: Violation of the pure seed law is a misdemeanor: § 2026. Violation of farm markets regulations is a misdemeanor: § 2037. A thresherman failing to secure a license from the dept. of agriculture is guilty of a misdemeanor: § 2045. Price discrimination in the purchase and sale of agricultural products is punishable by fine: § 2053.

Protection of labor: Violation of law providing for municipal employment bureaus and abolishing private bureaus is a misdemeanor: § 2307. Keeping an employment bureau without license from the county commissioners is a misdemeanor: § 2310. Persons employing mechanics about mining claims, ditches, buildings, etc., who fail to record the statement required by § 2311, are guilty of a misdemeanor: § 2313. Unlawful use of union label is a misdemeanor: §§ 2315, 2319-20. Making a record of a fraudulent label is a misdemeanor: § 2317. Employers entering into a contract with employees whereby the latter agree not to become members of a labor organization are guilty of a misdemeanor: § 2321. Employers entering into contracts with employees restricting the place of the latters' board and lodging are guilty of a misdemeanor: § 2322. Persons employing aliens on public works are guilty of a misdemeanor: § 2323. Public officials or public contractors employing laborers for over eight hours on public works are guilty of a misdemeanor: § 2326. Persons working laborers in mines and smelters for over eight hours are guilty of a misdemeanor: § 2329. The employment of women for over nine hours is a misdemeanor: § 2332. Deducting premiums paid for workmen's compensation insurance from wages of workmen is a misdemeanor: § 6287. Neglect of employer to report accidents is punishable by fine: § 6317. For other offenses see c. 305, Crimes against the public health and safety.

Protection of professions: The practice of various professions without a license is a misdemeanor: Medicine and surgery: § 2109; dentistry: § 2136; osteopathy: § 2139; optometry: §§ 2156, 2170; pharmacy: § 2182; graduate nurses: § 2197; embalmers: § 2206; veterinarians: § 2217; accountants: § 2221; architects: § 2233. Persons compiling abstracts to real estate without authority are guilty of a misdemeanor: § 2262.

Violations of fish and game law: The following offenses are defined as misdemeanors: Issuance of receipts other than fish and game licenses: § 2673. Neglect of officers to turn over proceeds or mutilated licenses: § 2678. Unlawful sales of whitefish or sturgeon: § 2705. Unlawful sale and shipment of fish: § 2706. Unlicensed taxidermy: § 2720. Taxidermists' possession of carcasses without permit: § 2721. Illegal possession of fish and game: § 2723. Possession of game during closed season: § 2726. Possession of creatures taken unlawfully: § 2727. Possession of carcasses: § 2728. Taking with nets, spears, etc.: §§ 2730-1. Net fishing in Bear Lake under certain conditions: § 2733. Violation of closed season on trout in Elk creek: § 2737. Fishing through ice: § 2739. Fishing near fish ladder: § 2741. Destruction or possession of small trout and black bass: § 2743. Trout fishing on horseback: § 2744. Taking fish and game with explosives or drugs: § 2750. Operation of water power mills without screens: § 2754. Hunting game birds from motor boats: § 2756. Shooting birds at night: § 2757. Destruction of nests and young birds: § 2758. Possession of beaver and otter hides: § 2772. Killing elk unlawfully: § 2773. Violation of law concerning deer, antelope, mountain sheep and goats: § 2779. Violation of law concerning moose and elk: § 2780. Violation of open season: § 2795. Violation of law protecting young of big game: § 2781. Violation of law governing big game: § 2782. Trespass upon private parks and ponds: § 2797. Interference with federal fish culture: § 2801. Fish and game, violation of law, general penalty: § 2802. Failure of officers to enforce law: § 2818. Violation of preserves: § 2824. Violation of Cassia game preserve: § 2838. Violation of Lewiston Orchards preserve: § 2841. Unlawful for Indian to have or bear arms during closed season: §§ 8596-7.

Vital statistics: The violation of the law for acquiring vital statistics is a misdemeanor: §§ 1645, 1654.

Collection agencies: A violation of the law governing collection agencies is a misdemeanor: § 2366.

Delayed trains: Failure to give timely notice of delayed trains is a misdemeanor: §§ 4824-5.

§ 8584. [7205] **Refusal to deliver telegraph message.** Every agent, operator or employee of any telegraph office who wilfully refuses or neglects to send any message received at such office for transmission, or wilfully postpones the same out of its order, or wilfully refuses or neglects to deliver any message received by telegraph, is guilty of a misdemeanor. Nothing herein contained shall be construed to require any message to be received, transmitted or delivered unless the charges thereon have been paid or tendered. [R. S. § 7205.]

Hist. R. S. § 7205, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 638; as amended: Kerr's C. ib.

Cross ref. Additional regulations concerning telegraph and telephone messages: §§ 4837-41, 8568-70.

§ 8585. [7206] **Appropriating information from message.** Every agent, operator or employee of any telegraph office who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit or advantage, is guilty of a misdemeanor. [R. S. § 7206.]

Hist. R. S. § 7206, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except as to punishment: Pen. C. 1872, § 639; as amended includes telephone messages: Kerr's C. ib.

§ 8586. [7207] **Clandestinely learning contents of message.** Every person who, by means of any machine, instrument or contrivance, or in any other manner, wilfully and fraudulently reads, or attempts to read, any message, or to learn the contents thereof, whilst the same is being sent over any telegraph line, or wilfully and fraudulently, or clandestinely, learns or attempts to learn the contents or meaning of any mes-

sage, while the same is in any telegraph office, or is being received thereat, or sent therefrom, or who uses or attempts to use, or communicates to others, any information so obtained, is guilty of a misdemeanor. [R. S. § 7207.]

Hist. R. S. § 7207, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except as to punishment clause: Pen. C. 1872, § 640; as amended includes telephone messages: Kerr's C. ib.

§ 8587. [7208] **Vagrancy.** Every person without visible means of living, who has the physical ability to work, and who does not for the space of 10 days seek employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; every lewd and dissolute person who lives in and about houses of ill fame, and every common prostitute and common drunkard, is a vagrant, and punishable by imprisonment in the county jail not exceeding 90 days. [R. S. § 7208.]

Hist. ('85, p. 200, § 1) R. S. § 7208, reen. R. C. ib., reen. C. L. ib.

Cross ref. Pimping a felony: 8276. Prostitutes and inmates of houses of prostitution prohibited from voting: §§ 505, 508.

Comp. leg.—Cal. Same: Pen. C. 1872, § 647; as amended: Kerr's C. ib.

N. D. Analogous: Pen. C. § 9658.

Action for slander: The fact that this section declares a woman prostitute to be a vagrant and punishable as such, does not make a charge that a woman is a common prostitute actionable per se. Douglas v. Douglas (1895) 4 I. 293; 38 P. 934.

Complaint: A complaint charging that defendant is an idle, dissolute person without any lawful business, that he roams about the streets of the city at late and unusual hours of the night and lives in and about a house of ill-fame, sufficiently charges the crime of vagrancy. S. v. Preston (1894) 4 I. 215, 38 P. 694.

§ 8588. [7209] **Circulating illegal money.** Every person who makes issues or puts in circulation, any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense is guilty of a misdemeanor, and for each and every subsequent offense, is guilty of a felony. [R. S. § 7209.]

Hist. ('64, § 149) R. S. § 7209, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 648: Kerr's C. ib.

§ 8589. [7210] **Sending threatening letters.** Every person who knowingly and wilfully sends or delivers to another any letter or writing, whether subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor. [R. S. § 7210.]

Hist. (See Cr. and P. '64, § 116) R. S. § 7210, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 650: Kerr's C. ib.

Cross ref. Sending threatening letters for purposes of extortion: § 8467.

§ 8590. [7211] **Abuse of school teachers.** Every parent, guardian or other person who upbraids, insults or abuses any teacher of the public schools, in the presence and hearing of a pupil thereof, is guilty of a misdemeanor. [R. S. § 7211.]

Hist. R. S. § 7211, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C.: Kerr's C. § 653b.

§ 8591. [7212] **Offenses against railroads.** Any person disturbing the peace of any traveler on any railway train, or breaking the seal or

forcibly entering any car, or disturbing the contents of any car, or breaking any package therein, or breaking any package left at any depot for transportation or delivery, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [R. S. § 7212.]

Hist. R. S. § 7212, reen. R. C. ib., reen. C. L. ib.

§ 8592. [7213] **Same: Trainmen may arrest.** A conductor or other person having charge of any railway train in this state, section foreman or station agent, of any railway company, shall have power to arrest, without a warrant, any person violating any provision of the preceding section. [R. S. § 7213.]

Hist. R. S. § 7213, reen. R. C. ib., reen. C. L. ib.

§ 8593. [7214] **Same: Accused to be taken before magistrate.** When an arrest is made without a warrant by any person authorized to make arrests under the provisions of the preceding section, the person arrested must be taken to the most accessible magistrate, without unnecessary delay, and a complaint stating the charge against the party must be made before such magistrate, and the magistrate before whom such charge is made, if the offense is triable before him, shall have full jurisdiction over such offense and the defendant, to try and determine said offense. If he have not jurisdiction he must send the papers and the defendant to the most convenient magistrate that has jurisdiction, and said last named magistrate shall have full power to try and determine said offense. [R. C. § 7214.]

Hist. R. S. § 7214; am. R. C. ib., reen. C. L. ib.

§ 8594. [7215] **Flag desecration.** Any person who in any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature, upon any flag, standard, color or ensign of the United States, or state flag of this state or ensign, or shall expose, or cause to be exposed, to public view any such flag, standard, color or ensign, upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or receptacle of merchandise, or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article, or substance, on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding $100, or by imprisonment for not more than 30 days, or both, in the discretion of the court, and shall also forfeit a penalty of $50 for each such offense, to be recovered with costs in a civil action, or suit, in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this state, and such penalty when collected, less the reasonable cost and expense of action or suit

and recovery, to be certified by the auditor of the county in which the offense is committed, shall be paid into the treasury of such county; and two or more penalties may be sued for and recovered in the same action or suit. The words flag, standard, color, ensign, as used in this subdivision or section, shall include any flag, standard, color or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture or representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of any such flag, standard, color or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section, shall be presumptive evidence that the same is in violation of this section.

When, by any statute of this state, the use of the flag of the United States of America, or of any picture or representation of such flag, is made penal or unlawful, such statute shall not apply to any act permitted by the statutes of the United States of America or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisement. [R. C. § 7215.]

Hist. '05, p. 328, §§ 1, 2; am. R. C. § 7215, reen. C. L. ib.

Cross ref.—Desecration of school flag: § 896.

Cited: In marginal notes to Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. C. R. 419.

§ 8595. Display of red flag prohibited. Whoever in this state shall hoist, carry or display any red flag or other emblem or banner indicating disloyalty to the government of the United States or the state of Idaho, or a belief in anarchy, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term not less than one year nor more than ten years, and may also be fined in any sum not exceeding $1000. ['19, c. 96, p. 360.]

§ 8596. [7216] **Indians carrying arms.** It shall be unlawful for any Indian who is connected with any United States Indian agency to have in his possession, or to bear, firearms beyond the limits of any county or counties within which the reservation is situated during the close game season, between the 1st day of January and the 1st day of September in each year. ['99, p. 361, § 1.]

Hist. '99, p. 361, § 1, reen. R. C. § 7216, reen. C. L. ib.

§ 8597. [7217] **Peace officers to disarm Indians.** A violation of the foregoing section shall be deemed a misdemeanor, and it shall be the duty of any sheriff, constable or other peace officer of the county where the offense shall be committed to forthwith disarm such Indian, and to hold such firearm or firearms subject to redemption, upon payment to the officer of the sum of $10, one-half of which sum shall go to the officer

performing the service and the remaining one-half to be paid into the county treasury for the benefit of the school fund of said county. ['99, p. 361, § 2.]

Hist. '99, p. 361, § 2, reen. R. C. § 7217, reen. C. L. ib.

§ 8598. [7218] Notification of Indian agent: Sale of arms. Upon taking possession of the firearms as provided in the preceding section, the officer shall immediately notify, by mail, the agent at the Indian agency to which the Indian belongs, that he holds such firearms subject to redemption as herein provided, and if the same be not redeemed within a period of 30 days after the deposit of such notice in the post office, then such firearms shall be sold by the officer, in the same manner provided for sales upon execution out of justices' courts, the proceeds to be applied first to the payment of the costs and expenses of the sale, together with a fee of $5 to the officer performing the service, the balance to be paid into the county treasury for the benefit of the school fund of said county. ['99, p. 361, § 3.]

Hist. '99, p. 361, § 3, reen. R. C. § 7218, reen. C. L. ib.

§ 8599. [7219] Shipping loaded firearms. Every person who ships, or causes to be shipped, or delivers or causes to be delivered, to any railroad, express or stage company, or to any other common carrier, for shipment as baggage or otherwise, any loaded pistol, revolver, rifle, shotgun or other firearm, is guilty of a misdemeanor. ['03, p. 345, § 1.]

Hist. '03, p. 345, § 1, reen. R. C. § 7219, reen. C. L. ib.

§ 8600. [7220] Illicit conveyance of articles into penitentiary. If any person delivers or procures to be delivered, or has in his possession with intent to be delivered, to a convict of the Idaho state penitentiary, or deposits or conceals in or about the penitentiary or dependencies thereon, or upon any lands belonging or pertaining thereto, or in any wagon or other vehicle going into the premises belonging to the said penitentiary, any letter, article or thing with the intent that a convict confined in said penitentiary shall obtain or receive the same, or if any person receives from any convict of said penitentiary, any letter, article or thing with intent to convey the same out of the penitentiary contrary to the rules and regulations thereof, and without the knowledge and permission of the warden of said penitentiary, or if any person shall purchase, exchange, take or receive from any convict thereof while he may be working outside the walls of said penitentiary, any letter, article or thing, whether state or other property, manufactured or used in and about said penitentiary, without the knowledge and permission of the warden of said penitentiary, such person shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $300, or imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment. ['07, p. 97, § 1.]

Hist. '07, p. 97, § 1, reen. R. C. § 7220, reen. C. L. ib.

§ 8601. Temporarily taking and operating motor vehicle without permission of owner. Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle or other vehicle for the purpose of temporarily using or operating the same shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $200, or by imprisonment not exceeding three months or by both such fine and imprisonment. ['19, c. 99, p. 362.]

CHAPTER 312.

GENERAL PROVISIONS.

§ 8602. [7230] **Acts punishable in different ways.** An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. [R. S. § 7230.]

Hist. R. S. § 7230, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 654: Kerr's C. ib. S. v. Gutke (1914) 25 I. 737, 740, 139 P. 346.

N. D. Analogous: Pen. C. § 10328.

Construed: This section enlarges the scope of the plea of former jeopardy in that it prohibits being twice tried for the same "act or omission" irrespective of whether the second trial was for the same "offense." S. v. Gutke (1914) 25 I. 737, 139 P. 346.

Where the same act or omission may constitute several different crimes, the state must elect as to which charge it wishes to prosecute, and when a verdict on the charge so elected has been given, any further prosecution for the commission of that particular act under other statutes is prohibited. Ib.

§ 8603. [7231] **Punishment for acts also punishable as contempts.** A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt. [R. S. § 7231.]

Hist. R. S. § 7231, reen. R. C. ib., reen. C. L. ib.

Cross ref. Criminal contempts: § 8197.

Comp. leg.—Cal. Same: Pen. C. 1872, § 657; Kerr's C. ib.

N. D. Identical: Pen. C. § 10331.

Power of courts to punish contempts: Where certain acts of contempt are made a crime under our statute, the making of such acts punishable as crimes does not affect any power conferred on the court to impose or inflict punishment for contempt. McDougall v. Sheridan (1913) 23 I. 191, 128 P. 954.

§ 8604. [7232] **Common law offenses: Imprisonment for nonpayment of fine.** All offenses recognized by the common law as crimes and not herein enumerated are punishable, in case of felony, by imprisonment in the state prison for a term not less than one year nor more than five years; and in case of misdemeanors, by imprisonment in the county jail for a term not exceeding six months or less than one month, or by fine not exceeding $500, or both such fine and imprisonment. And whenever any fine is imposed for any felony or misdemeanor, whether such be by statute or at common law, the party upon whom the fine is imposed shall be committed to the county jail, when not sentenced to the state prison, until the fine is paid; and he shall be imprisoned at the rate of one day for each $2 until such fine is paid. [R. S. § 7232.]

Hist. Cr. and P. '64, § 151; R. S. § 7232, reen. R. C. ib., reen. C. L. ib.

Cross ref. Similar provision as to imprisonment in lieu of payment of fine: § 9038.

Comp. leg.—Cal. See Kerr's Pen. C. § 6, note 2.

Application: This and § 9034 authorizing the trial court to impose an alternative sentence of imprisonment against the defendant in case of failure to pay the fine or costs, or both fine and costs, as the case may be, have reference to the judgment upon the original trial of a criminal case. Re Lucas (1909) 17 I. 164, 104 P. 657.

§ 8605. Aiding in misdemeanors. Whenever an act is declared a misdemeanor, and no punishment for counseling, aiding in, soliciting or inciting the commission of such acts is expressly prescribed by law, every person who counsels, aids, solicits or incites another in the commission of such act is guilty of a misdemeanor. ['17, c. 137, p. 447.]

Hist. R. S. § 7233, reen. R. C. ib.; am. '17, c. 137, p. 447, reen. C. L. § 7233.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 559; Kerr's C. ib.

§ 8606. [7234] **Conviction of attempt when crime is consummated.** Any person may be convicted of an attempt to commit a crime, although

it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury, and directs such person to be tried for such crime. [R. S. § 7234.]

Hist. R. S. § 7234, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Kerr's Pen. C. § 663; Kerr's C. ib.

N. D. Analogous: Pen. C. § 10337.

§ 8607. [7235] **Punishment for attempts.** Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

1. If the offense so attempted is punishable by imprisonment in the state prison for five years or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in the county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted. [R. S. § 7235.]

Hist. (See Cr. and P. '64, § 158) R. S. § 7235, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 664; Kerr's C. ib.

N. D. Analogous: Pen. C. § 10338.

Cited: S. v. Downing (1913) 23 I. 540, 130 P. 461.

Attempt to commit arson: An attempt to commit arson is a crime under this section. S. v. Collins (1892) 3 I. 467, 31 P. 1048.

§ 8608. [7236] **Same: Attempt resulting in different crime.** The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed. [R. S. § 7236.]

Hist. R. S. § 7236, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 665; Kerr's C. ib.

N. D. Similar: Pen. C. § 10339.

§ 8609. [7237] **Successive terms of imprisonment.** When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be. [R. S. § 7237.]

Hist. (See Cr. and P. '64, § 446) R. S. § 7237, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 669; Kerr's C. ib.

N. D. Identical: Pen. C. § 10344.

Sufficiency of judgment: A sentence to four consecutive terms of imprisonment, of three years each, the judgment providing, in each of the sentences after the first, that the additional term of three years is "to commence at the expiration

of the term of three years to be served by said defendant this day adjudged against him in the case of the United States, criminal number three, against Henry Desmond, or whenever his term of imprisonment after the judgment in said case shall cease and be ended for any reason, except by death of said defendant," is definite and certain and valid. Re Esmond (1890) 42 F. 827.

§ 8610. [7238] **Computation of term of imprisonment.** The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term. [R. S. § 7238.]

Hist. R. S. § 7238, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 670; Kerr's C. ib.
N. D. Similar: Pen. C. § 10349.
Cited: T. v. Guthrie (1888) 2 I. 432, 17 P. 39.

§ 8611. [7239] **Effect of imprisonment on civil rights and offices.** A sentence of imprisonment in a state prison for any time less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority or power during such imprisonment. [R. S. § 7239.]

Hist. Cr. and P. '64, § 153; R. S. § 7239, reen. R. C. ib., reen. C. L. ib.
Cross ref. Restoration to civil rights on discharge of convict: § 9405.
Comp. leg.—Cal. Same: Pen. C. 1872, § 673; Kerr's C. ib.
N. D. Similar: Pen. C. § 10350.

§ 8612. [7240] **Same: Imprisonment for life.** A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead. [R. S. § 7240.]

Hist. Cr. and P. '64, § 153; R. S. § 7240, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 674; Kerr's C. ib.
N. D. Identical: Pen. C. § 10351.

§ 8613. [7241] **Same: Exceptions to preceding sections.** The provisions of the last two preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property. [R. S. § 7241.]

Hist. R. S. § 7241, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 675; same as amended: Kerr's C. ib.
N. D. Analogous: Pen. C. § 10352.

§ 8614. [7242] **Protection of person of convict.** The person of a convict sentenced to imprisonment in the state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he was not convicted or sentenced. [R. S. § 7242.]

Hist. R. S. § 7242, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 676; Kerr's C. ib.
N. D. Identical: Pen. C. § 10351.

§ 8615. [7243] **Property of convict not forfeited.** No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this state, in the nature of a deodand, or where any person shall flee from justice, are abolished. [R. S. § 7243.]

Hist. R. S. § 7243, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 677; Kerr's C. ib.
N. D. Similar: Pen. C. § 10354.

TITLE LX. CRIMINAL PROCEDURE.

Hist. The portion of this code which follows relating to criminal procedure is based on the criminal practice act of the first territorial session (1864) which was literally reenacted at the second territorial session by an act approved December 19, 1864, and was carried with but few changes into the Compiled Laws of 1875. (Comp. Laws 363, et seq.) The references in the historical note are to the act of the first session, except where otherwise expressed.

CHAPTER 313.

PRELIMINARY PROVISIONS.

§ 8616. [7350] Legal conviction necessary to punishment. No person can be punished for a public offense except upon a legal conviction in a court having jurisdiction thereof. [R. S. § 7350.]

Hist. (See Cr. and P. '64, § 5) R. S. § 7350, reen. R. C. ib., reen. C. L. ib.

Cross ref. Rights of accused in criminal prosecution: Const. I, 13.

Comp. leg.—Cal. Same: Pen. C. 1872, § 681; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10388.

§ 8617. [7351] Prosecution by indictment or information. Every public offense must be prosecuted by indictment, or information, except:

1. Where proceedings are had for the removal of civil officers of the state.

2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace.

3. Offenses tried in justices, and probate courts. ['99, p. 125.]

Hist. (See Cr. Prac. '64, § 6) R. S. § 7351; am. '99, p. 125, reen. R. C. § 7351, reen. C. L. ib.

Cross ref. Similar constitutional provision: Const. I, 8. Prosecution of military offenses: §§ 763-905. Removal of civil officers: §§ 8670-84; prosecution by information: §§ 8809-16; by indictment: § 8817. Impeachment of officers: §§ 8654-69. Proceedings in probate and justices' courts: §§ 9227-70.

Comp. leg.—Cal. Same: Pen. C. 1872, § 682; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10389.

§ 8618. [7352] Criminal action defined. The proceedings by which a party charged with a public offense is accused and brought to trial and punishment is known as a criminal action. [R. S. § 7352.]

Hist. (See Cr. Prac. '64, § 7) R. S. § 7352, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 683; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10390.

§ 8619. [7353] Same: Parties. A criminal action is prosecuted in the name of the state of Idaho, as a party, against the person charged with the offense. [R. S. § 7353.]

Hist. Cr. Prac. '64, § 9, R. S. § 7353, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 684; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10391.

Constitutionality: There is no violation of the constitution in the prosecution of a person accused of crime where the prosecution is had in the name of "the state of Idaho" instead of in the name of the people of the state of Idaho. S. v. Lockhart (1910) 18 I. 730, 111 P. 853.

§ 8620. [7354] Same: Defendant. The party prosecuted in a criminal action is designated in this code as the defendant. [R. S. § 7354.]

Hist. Cr. Prac. '64, § 9, R. S. § 7354, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 685; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10392.

§ 8621. [7355] **Rights of defendant.** In a criminal action the defendant is entitled:

1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel. [R. S. § 7355.]

Hist. Cr. Prac. '64, § 10, first two subds. R. S. § 7355, reen. R. C. ib., reen. C. L. ib.

Cross ref. Constitutional guaranty: Const. I, 13. Appointment of counsel for indigent defendants: § 8859. Defendant entitled to discharge when indictment is not found against him at next term of court, or when not brought to trial at next term: § 9176.

Comp. leg.—Cal. Same with additional provisions: Pen. C. 1872, § 686; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10393.

Public trial: The defendant in a prosecution for the crime of assault with intent to commit rape was not deprived of a public trial when the court in its discretion required all spectators and all persons except those necessarily in attendance to retire from the court room during the trial. S. v. Johnson (1914) 26 I. 609, 144 P. 784.

§ 8622. [7356] **Second prosecution prohibited.** No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted. [R. S. § 7356.]

Hist. Cr. Prac. '64, § 11, R. S. § 7356, reen. R. C. ib., reen. C. L. ib.

Cross ref. Twice in jeopardy prohibited: Const. I, 13.

Comp. leg.—Cal. Same: Pen. C. 1872, § 687; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10394.

Cited: S. v. Gutke (1914) 25 I. 737, 139 P. 346.

§ 8623. [7357] **Self-criminating evidence can not be compelled.** No person can be compelled in a criminal action to be a witness against himself, nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge. [R. S. § 7357.]

Hist. Cr. Prac. '64, § 12, R. S. § 7357, reen. R. C. ib., reen. C. L. ib.

Cross ref. Constitutional guaranty: Const. I, 13.

Comp. leg.—Cal. Same: Pen. C. 1872, § 688; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10395.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945.

Instruction: The court should instruct the jury in a proper case that no presumption can be raised against the defendant by reason of his refusal to testify, but where the defendant voluntarily submits himself as a witness in his own behalf, he may be cross-examined by the state, subject to the same rules and regulations governing cross-examination that apply to other witnesses. S. v. Gruber (1911) 19 I. 692, 115 P. 1.

§ 8624. [7358] **Prerequisites to conviction.** No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon a judgment of a probate or justice's court, a jury having been waived, in a criminal case not amounting to a felony. [R. S. § 7358.]

Hist. (Cr. Prac. '64, § 13) R. S. § 7358, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 689; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10396.

CHAPTER 314.

PREVENTION OF PUBLIC OFFENSES.

ARTICLE 1.

LAWFUL RESISTANCE.

§ 8625. [7368] **By whom made.** Lawful resistance to the commission of a public offense may be made:

1. By the party about to be injured.
2. By other parties. [R. S. § 7368.]

Hist. Cr. Prac. '64, § 14, R. S. § 7368, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10403.

Comp. leg.—Cal. Same: Pen. C. 1872, § 692; Kerr's C. ib.

§ 8626. [7369] **Same: By threatened party.** Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person, or his family, or some member thereof.

2. To prevent an illegal attempt by force to take or injure property in his lawful possession. [R. S. § 7369.]

Hist. Cr. Prac. '64, § 15, R. S. § 7369, reen. R. C. ib., reen. C. L. ib.

N. D. Identical. C. Cr. P. § 10404.

Comp. leg.—Cal. Same: Pen. C. 1872, § 693; Kerr's C. ib.

§ 8627. [7370] **Same: By other parties.** Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense. [R. S. § 7370.]

Hist. Cr. Prac. '64, § 16, R. S. § 7370, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10405.

Comp. leg.—Cal. Same: Pen. C. 1872, § 694; Kerr's C. ib.

ARTICLE 2.

INTERVENTION OF OFFICERS OF JUSTICE.

§ 8628. [7375] **Prevention of offenses by officers.** Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace.

2. By forming a police in cities and towns, and by requiring their attendance in exposed places.

3. By suppressing riots. [R. S. § 7375.]

Hist. Cr. Prac. '64, § 17, R. S. § 7375, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10406.

Comp. leg.—Cal. Same: Pen. C. 1872, § 697; Kerr's C. ib.

§ 8629. [7376] **Same: Persons assisting officers.** When the officers of justice are authorized to act in the prevention of public offenses, other persons who, by their command, act in their aid, are justified in so doing. [R. S. § 7376.]

Hist. Cr. Prac. '64, § 18, R. S. § 7376, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10407.

Comp. leg.—Cal. Same: Pen. C. 1872, § 698; Kerr's C. ib.

ARTICLE 3.

SECURITY TO KEEP THE PEACE.

§ 8630. [7380] **Information of threatened offense.** An information may be laid before any magistrate that a person has threatened to commit an offense against the person or property of another. [R. S. § 7380.]

Hist. Cr. Prac. '64, § 19, R. S. § 7380, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10408.

Comp. leg.—Cal. Substantially the same: Pen. C. § 701; Kerr's C. ib.

§ 8631. [7381] **Examination of complainant.** When the information is laid before such magistrate he must examine on oath the informer, and any witness he may produce, and must take their depositions in writing and cause them to be subscribed by the parties making them. [R. S. § 7381.]

Hist. Cr. Prac. '64, § 20, R. S. § 7381, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 702; Kerr's C. ib.

§ 8632. [7382] **Warrant of arrest.** If it appears from the depositions that there is just reason to fear the commission of the offense threatened by the person so informed against, the magistrate must issue a warrant, directed generally to the sheriff of the county or any constable, marshal or policeman in the state, reciting the substance of the information, and commanding the officer forthwith to arrest the person informed of and bring him before the magistrate. [R. S. § 7382.]

Hist. Cr. Prac. '64, § 21, R. S. § 7382, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10410.

Comp. leg.—Cal. Same: Pen. C. 1872, § 703; Kerr's C. ib.

§ 8633. [7383] **Hearing of controverted charge.** When the person informed against is brought before the magistrate, if the charge be controverted the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses. [R. S. § 7383.]

Hist. Cr. Prac. '64, § 22, R. S. § 7383, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10411.

Comp. leg.—Cal. Same: Pen. C. 1872, § 704; Kerr's C. ib.

§ 8634. [7384] **Same: Discharge of accused.** If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged. [R. S. § 7384.]

Hist. Cr. Prac. '64, § 23, R. S. § 7384, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10412.

Comp. leg.—Cal. Same: Pen. C. 1872, § 705; Kerr's C. ib.

§ 8635. [7385] **Security to keep the peace.** If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding $5000, as the magistrate may direct, with one or more sufficient sureties, to keep the peace towards the people of this state, and particularly towards the informer. The undertaking is valid and binding for six months, and may, upon the renewal of the information, be extended for a longer period, or a new undertaking may be required. [R. S. § 7385.]

Hist. Cr. Prac. '64, § 24, R. S. § 7385, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10413.

Comp. leg.—Cal. Same: Pen. C. 1872, § 706; Kerr's C. ib.

§ 8636. [7386] **Effect of giving or refusing security.** If the undertaking required by the last section is given, the party informed of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant the requirement to give security, the amount thereof and the omission to give the same. [R. S. § 7386.]

Hist. Cr. Prac. '64, § 25, R. S. § 7386, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10414.

Comp. leg.—Cal. Same: Pen. C. 1872, § 707; Kerr's C. ib.

§ 8637. [7387] **Commitment for not giving security.** If the person complained of is committed for not giving the undertaking required, he may be discharged by any magistrate upon giving the same. [R. S. § 7387.]

Hist. Cr. Prac. '64, § 26, R. S. § 7387, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10415.

Comp. leg.—Cal. Same: Pen. C. 1872, § 708; Kerr's C. ib.

§ **8638.** [7388] **Security filed in clerk's office.** The undertaking must be filed by the magistrate in the office of the clerk of the district court. [R. S. § 7388.]

Hist. Cr. Prac. '64, § 27, R. S. § 7388, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10416.

Comp. leg.—Cal. Same: Pen. C. 1872, § 709; Kerr's C. ib.

§ **8639.** [7389] **Security for threats to assault.** A person who, in the presence of a court magistrate, assaults or threatens to assault another, or to commit an offense against his person or property, may be ordered by the court or magistrate to give security, as in this article provided, and if he refuse so to do, may be committed. [R. S. § 7389.]

Hist. Cr. Prac. '64, § 28, R. S. § 7389, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10417.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 710; Kerr's C. ib.

§ **8640.** [7390] **Breach of security.** Upon the conviction of the person informed against, of a breach of the peace, the undertaking is broken. [R. S. § 7390.]

Hist. Cr. Prac. '64, § 29, R. S. § 7390, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10422.

Comp. leg.—Cal. Same: Pen. C. 1872, § 711; Kerr's C. ib.

§ **8641.** [7391] **Action on undertaking.** Upon the prosecuting attorney's producing evidence of such conviction to the district court of the county, the court must order the undertaking to be prosecuted, and the prosecuting attorney must thereupon commence an action upon it in the name of the state of Idaho. [R. S. § 7391.]

Hist. Cr. Prac. '64, § 30, R. S. § 7391, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10422.

Comp. leg.—Cal. Substantially the same: Pen. C. 1872, § 712; Kerr's C. ib.

§ **8642.** [7392] **Evidence of breach.** In the action the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach. [R. S. § 7392.]

Hist. Cr. Prac. '64, § 31, R. S. § 7392, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10423.

Comp. leg.—Cal. Same: Pen. C. 1872, § 713; Kerr's C. ib.

§ **8643.** [7393] **Provisions of article exclusive.** Security to keep the peace, or to be of good behavior, can not be required except as prescribed in this article. [R. S. § 7393.]

Hist. Cr. Prac. '64, § 32, R. S. § 7393, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10424.

Comp. leg.—Cal. Same: Pen. C. 1872, § 714; Kerr's C. ib.

§ **8644.** [7394] **Public peace: How preserved.** The mayor or other officer having the direction of the police of a city or town, must order a force sufficient to preserve the peace to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended. [R. S. § 7394.]

Hist. Cr. Prac. '64, § 33, R. S. § 7394, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10427.

Comp. leg.—Cal. Same: Pen. C. 1872, § 720; Kerr's C. ib.

ARTICLE 4.

SUPPRESSION OF RIOTS.

§ 8645. Officers may command assistance. When a sheriff or other public officer, authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many bona fide male citizens, residents of his county, as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the persons resisting, their aiders and abettors. [C. L. § 7400.]

Hist. (See Cr. Prac. '64, § 34) R. S. § 7400; am. '93, p. 13, § 1, reen. '99, p. 169, § 1, reen. R. C. § 7400; compiled and reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 723; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10428.

§ 8646. [7401] **Certificate of person resisting process.** The officer must certify to the court from which the process is issued, the names of the persons resisting and their aiders and abettors, to the end that they may be proceeded against for their contempt of court. [R. S. § 7401.]

Hist. Cr. Prac. '64, § 35, R. S. § 7401, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 724; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10429.

§ 8647. [7402] **Governor may call out militia.** If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, he must, upon the application of the sheriff of the county, order such portion as shall be sufficient, or the whole, if necessary, of the militia of the state, to proceed to the assistance of the sheriff. [R. S. § 7402.]

Hist. Cr. Prac. '64, § 37, R. S. § 7402, reen. R. C. ib., reen. C. L. ib.

Cross ref. Calling out national guard: § 745.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 725; repealed 1905.

N. D. Analogous: C. Cr. P. § 10431.

§ 8648. [7403] **Commanding rioters to disperse.** Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them in the name of the people of the state immediately to disperse. [R. S. § 7403.]

Hist. (See Cr. Prac. '64, § 38) R. S. § 7403, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 726; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10433.

§ 8649. [7404] **Arrest of rioters.** If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county. [R. S. § 7404.]

Hist. (See Cr. Prac. '64, §§ 39, 42) R. S. § 7404, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 727; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10434.

§ 8650. [7405] **Command of armed force.** When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, it must obey the orders in relation thereto of such civil officer. [R. S. § 7405.]

Hist. (See Cr. Prac. '64, § 43) R. S. § 7405, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 730; repealed 1905.

Cited: Re Boyle (1899) 6 I. 609, 57 P. 706.

§ 8651. [7406] **Proclamation of insurrection.** When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officer having the process to execute it, he may, on the application of the officer, or of the prosecuting attorney, or probate judge of the county, by proclamation to be published in such papers as he shall direct, declare the county to be in a state of insurrection, and may order into the service of the state such number and description of volunteer or uniform companies, or other militia of the state, as he shall deem necessary to serve for such term, and under the command of such officer or officers, as he shall direct. [R. S. § 7406.]

Hist. Cr. Prac. '64, § 46, R. S. § 7406, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 732.

Cross ref. Calling out national guard: § 745.

§ 8652. [7407] **Same: Disobedience of proclamation.** Any person who, after the publication of such proclamation, resists or aids in resisting the execution of process in any county so declared to be in a state of insurrection, or who aids or attempts the rescue or escape of any person from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, shall be punished by imprisonment in the state prison for a term not less than two years. [R. S. § 7407.]

Hist. (See Cr. Prac. '64, § 48) R. S. § 7407, reen. R. C. ib., reen. C. L. ib.

§ 8653. [7408] **Revocation of proclamation.** The governor may, when he thinks proper, revoke the proclamation authorized by the last section, or declare that it shall cease at the time and in the manner directed by him. [R. S. § 7408.]

Hist. Cr. Prac. '64, § 47, R. S. § 7408, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 733.

CHAPTER 315.

IMPEACHMENTS.

§8654. [7425] **Officers subject to impeachment.** Any state officer, created by state law, shall be liable to impeachment for any misdemeanor in office. [R. S. § 7425.]

Hist. Cr. Prac. '64, § 49, R. S. § 7425, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10440.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 737; Kerr's C. ib.

§ 8655. [7426] **Articles: Preparation and trial.** All impeachments must be by resolution adopted and originated in the house of representatives, and conducted by managers elected by the house, who must prepare articles of impeachment, present them at the bar of the senate, and prosecute the same. The trial must be had before the senate, sitting as a court of impeachment. [R. S. § 7426.]

Hist. (See Cr. Prac. '64, § 50) R. S. § 7426, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 738; Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10441-2.

Cross ref. House of representatives alone has power to impeach: Const. V, 4. Senate is court of impeachment: V, 3.

§ 8656. [7427] **Same: To whom delivered.** When an officer is impeached by the house of representatives for a misdemeanor in office, the articles of impeachment must be delivered to the president of the senate. [R. S. § 7427.]

Hist. Cr. Prac. '64, § 51, R. S. § 7427, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10442.

Comp. leg.—Cal. Same: Pen. C. 1872, § 739; Kerr's C. ib.

§ 8657. [7428] **Time and notice of hearing.** The senate must assign a day for the hearing of the impeachment and inform the house of representatives thereof. The president of the senate must cause a copy of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant not less than 10 days before the day fixed for the hearing. [R. S. § 7428.]

Hist. Cr. Prac. '64, § 52, R. S. § 7428, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10444.

Comp. leg.—Cal. Same: Pen. C. 1872, § 740; Kerr's C. ib.

§ 8658. [7429] **Service of notice.** The service must be made upon the defendant personally, or if he can not, upon diligent inquiry, be found within the state, the senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him to appear at a specified time and place, and answer the articles of impeachment. [R. S. § 7429.]

Hist. Cr. Prac. '64, § 53, R. S. § 7429, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10445.

Comp. leg.—Cal. Same: Pen. C. 1872, § 741: Kerr's C. ib.

§ 8659. [7430] **Failure of defendant to appear.** If the defendant does not appear, the senate, upon proof of service or publication, as provided in the last two sections, may, of its own motion or for cause shown, assign another day for hearing the impeachment, or may proceed in the absence of the defendant to trial and judgment. [R. S. § 7430.]

Hist. Cr. Prac. '64, § 54, R. S. § 7430, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10446.

Comp. leg.—Cal. Same: Pen. C. 1872, § 742: Kerr's C. ib.

§ 8660. [7431] **Answer or demurrer.** When the defendant appears he may, in writing, object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment. [R. S. § 7431.]

Hist. (See Cr. Prac. '64, §§ 55, 56) R. S. § 7431, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10450.

Comp. leg.—Cal. Same: Pen. C. 1872, § 743; am. Kerr's C. ib.

§ 8661. [7432] **Overruling demurrer: Plea and trial.** If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the senate who heard the argument, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, or refuses to plead, the senate must render judgment of conviction against him. If he pleads not guilty, the senate must at such time as it may appoint, proceed to try the impeachment. [R. S. § 7432.]

Hist. Cr. Prac. '64, § 57, R. S. § 7432, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 744: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10452.

§ 8662. [7433] **Senate to be sworn.** At the time and place appointed and before the senate proceeds to act on the impeachment, the secretary must administer to the president of the senate, and the president of the senate to each of the members of the senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the senate can act or vote upon the impeachment or upon any question arising thereon without having taken such oath. [R. S. § 7433.]

Hist. Cr. Prac. '64, § 58, R. S. § 7433, reen. R. C. ib., reen. C. L. ib.

Cross ref. Chief justice to preside when governor is impeached. Const. V, 4.

Comp. leg.—Cal. Same: Pen. C. 1872, § 745: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10448.

§ 8663. [7434] **Vote necessary for conviction.** The defendant can not be convicted on an impeachment without the concurrence of two-thirds of the members elected, voting by ayes and noes, and if two-thirds of the members elected do not concur in a conviction, he must be acquitted. [R. C. § 7434.]

Hist. Cr. Prac. '64, § 60, R. S. § 7434, modified by Const. V, 4; am. R. C. § 7434, reen. C. L. ib.

Cross ref. Two-thirds vote necessary to conviction: Const. V, 4.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 746: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10458.

§ 8664. [7435] **Judgment of conviction.** After conviction the senate must, at such time as it may appoint, pronounce judgment in the form of a resolution, entered upon the journals of the senate. [R. S. § 7435.]

Hist. (See Cr. Prac. '64, § 61) R. S. § 7435, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 747: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10459.

§ 8665. [7436] **Same: Adoption of judgment.** On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the senate. [R. S. § 7436.]

Hist. Cr. Prac. '64, § 62, R. S. § 7436, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 748: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10460.

§ 8666. [7437] **Extent of judgment.** The judgment may be that the defendant be suspended and removed from office, or that he be removed from office and disqualified to hold and enjoy a particular office, or class of offices, or any office in this state. [R. S. § 7437.]

Hist. Cr. Prac. '64, § 63, R. S. § 7437, reen. R. C. ib., reen. C. L. ib.

Cross ref. Judgment shall not extend beyond removal from, and disqualification to hold office, but the party is liable to indictment: Const. V, 3.

Comp. leg.—Cal. Same: Pen. C. 1872, § 749; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10461.

§ 8667. [7438] **Judgment of suspension.** If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office. [R. S. § 7438.]

Hist. (See Cr. Prac. '64, § 64) R. S. § 7438, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 750: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10462.

§ 8668. [7439] **Suspension pending trial.** Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, such officer is temporarily suspended from his office, and can not act in his official capacity until he is acquitted. Upon such suspension of any state officer, his office must at once be temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled as required by law. [R. S. § 7439.]

Hist. Cr. Prac. '64, § 65; R. S. § 7439, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 751: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10447.

§ 8669. [7440] **Impeachment not a bar to indictment.** If the offense for which the defendant is convicted on impeachment is also the subject of an indictment, the indictment is not barred thereby. [R. S. § 7440.]

Hist. Cr. Prac. '64, § 66, R. S. § 7440, reen. R. C. ib., reen. C. L. ib.

Cross ref. Indictment not barred: Const. V, 3.

Comp. leg.—Cal. Same: Pen. C. 1872, § 753; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10464.

CHAPTER 316.

REMOVAL OF CIVIL OFFICERS.

ARTICLE 1.

ON INDICTMENT OR INFORMATION.

Cross ref. Removal of city officers: § 3803.

Cited: Conwell v. Culdesac (1907) 13 I. 575, 92 P. 535; Hodges v. Tucker (1914) 25 I. 563, 575, 138 P. 1139; Daugherty v. Nagel (1915) 28 I. 302, 154 P. 375; Corker v. Cowen (1917) 30 I. 213, 164 P. 85.

§ 8670. [7445] **Presentation of accusation.** An accusation in writing against any district, county, precinct, or municipal officer, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed. [R. S. § 7445.]

Hist. Cr. Prac. '64, § 67; R. S. § 7445, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "township" for "precinct": Pen. C. 1872, § 758: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10468.

Cited: Ponting v. Isaman (1900) 7 I. 283, 62 P. 680; (In brief of counsel) Robinson v. Huffaker (1912) 23 I. 173; Collman v. Wanamaker (1915) 27 I. 342, 351, 149 P. 292; McRoberts v. Hoar (1915) 28 I. 163, 171, 152 P. 1046.

Remedy not exclusive: The remedy here provided for the removal of civil officers is not an exclusive remedy, nor does it prohibit village trustees from removing appointive officers. Conwell v. Culdesac (1907) 13 I. 575, 92 P. 535.

Applies to malfeasance not nonfeasance: Where an information charges that defendant knowingly, intentionally and illegally performed the duties of his office, said allegations do not charge that the defendant refused to perform the duties of his office within the meaning of § 8684, but defendant would be subject to prosecution under an indictment as provided under §§ 8670-82. Daugherty v. Nagel (1915) 28 I. 302, 154 P. 375.

Removal of county officers: This and the following sections authorize the prosecution and removal of county officers for all wilful or corrupt misconduct in office other than that mentioned in § 8684. Corker v. Pence (1906) 12 I. 152, 85 P. 388. Members of the county board of equalization may be prosecuted under this chapter for wilful and corrupt equalization of assessments. Ib.

Accusation: Accusation under this section must be by the prosecuting attorney or by the grand jury. Ib.

§ 8671. [7446] **Form of accusation.** The accusation must state the offense charged, in ordinary and concise language, and without repetition. [R. S. § 7446.]

Hist. Cr. Prac. '64, § 68; R. S. § 7446, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 759: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10469.

§ 8672. [7447] Service on defendant. The accusation must be delivered by the foreman of the grand jury to the prosecuting attorney of the county (except when he is the officer accused), who must cause a copy thereof to be served upon the defendant, and require by notice in writing, of not less than 10 days, that he appear before the district court of the county, then sitting or at its next term, and answer the accusation. The original accusation must then be filed with the clerk of the district court. [R. S. § 7447.]

Hist. Cr. Prac. '64, § 69, R. S. § 7447, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "then sitting or" omitted: Pen. C. 1872, § 760; superior court system as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10470.

Cited: Ponting v. Isaman (1900) 7 I. 283, 62 P. 680; Corker v. Pence (1906) 12 I. 152; 85 P. 838.

§ 8673. [7448] Appearance and answer: Default. The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assign another day for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence. [R. S. § 7448.]

Hist. Cr. Prac. '64, § 70; R. S. § 7448, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 761: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10471.

§ 8674. [7449] Same: Answer or demurrer. The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same. [R. S. § 7449.]

Hist. Cr. Prac. '64, § 71; R. S. § 7449, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 762: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10472.

§ 8675. [7450] Form of demurrer. If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. [R. S. § 7450.]

Hist. Cr. Prac. '64, § 72; R. S. § 7450, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 763: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10473.

§ 8676. [7451] Form of denial. If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes. [R. S. § 7451.]

Hist. Cr. Prac. '64, § 73; R. S. § 7451, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 764: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10474.

§ 8677. [7452] Answer after overruling demurrer. If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith. [R. S. § 7452.]

Hist. Cr. Prac. '64, § 74; R. S. § 7452, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 765: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10475.

§ 8678. [7453] Proceedings on plea. If the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment

of conviction against him. If he denies the matters charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation. [R. S. § 7453.]

Hist. Cr. Prac. '64, § 75, R. S. § 7453, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 766: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10476.

§ 8679. [7454] Trial by jury. The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor. [R. S. § 7454.]

Hist. Cr. Prac. '64, § 76; R. S. § 7454, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 767: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10477.

§ 8680. [7455] Process for witnesses. The prosecuting attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial of an indictment. [R. S. § 7455.]

Hist. Cr. Prac. '64, § 77; R. S. § 7455, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 768: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10479.

§ 8681. [7456] Judgment of removal. Upon a conviction, the court must, at such time as it may appoint, pronounce a judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein. [R. S. § 7456.]

Hist. (See Cr. Prac. '64, § 78) R. S. § 7456, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 769: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10478.

§ 8682. [7457] Appeal: How taken and effect. From a judgment of removal an appeal may be taken to the supreme court, in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy. [R. S. § 7457.]

Hist. Cr. Prac. '64, § 79; R. S. § 7457, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 770; as amended: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10480.

§ 8683. [7458] Removal of prosecuting attorney. The same proceedings may be had on like grounds for the removal of a prosecuting attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to the district judge of the district, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the prosecuting attorney of an adjoining county, and require him to conduct the proceedings. [R. S. § 7458.]

Hist. Cr. Prac. '64, § 80; R. S. § 7458, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 771; as amended, "judge of superior court" for "district judge": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10481.

ARTICLE 2.

SUMMARY PROCEEDINGS.

§ 8684. [7459] Summary proceedings for removal. When an information in writing, verified by the oath of any person, is presented to a district court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for

services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than 10 nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than 20 days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for $500 in favor of the informer, and such costs as are allowed in civil cases. [R. S. § 7459.]

Hist. New section added by code commission in R. S. See Daugherty v. Nagel (1915) 27 I. 511, 149 P. 729. Enacted as R. S. § 7459, reen. R. C. ib., reen. C. L. ib.

Cross ref. Express reference to this section: Proceedings under this section may be prosecuted at chambers: § 6493.

Prosecution by qualified elector against officers failing to enforce prohibition: 2641. Duty of county commissioners to proceed hereunder in event assessor fails to make affidavit to tax rolls: § 3149. Same as to county auditor: § 3230.

Comp. leg.—Cal. Same: Pen. C. 1872, § 772; similar as amended: Kerr's C. ib. Daugherty v. Nagel (1915) 27 I. 511, 149 P. 729; Daugherty v. Nagel (1915) 28 I. 302, 307, 154 P. 375.

N. D. Analogous: C. Cr. P. § 10482.

Utah. Identical: § 4580. Collman v. Wanamaker (1915) 27 I. 342, 149 P. 292.

Cited: Rankin v. Jauman (1895) 4 I. 394; 39 P. 1111; Mahoney v. Elliott (1902) 8 I. 356; 69 P. 108; Robinson v. Huffaker (1912) 23 I. 173, 129 P. 334; Corker v. Ake (1917) 30 I. 218, 164 P. 87.

Constitutionality: This section is constitutional, and confers jurisdiction on the district court to summarily hear and determine the cases provided for herein; to remove the delinquent and to enter judgment against him in favor of the informer as therein provided. Rankin v. Jauman (1894) 4 I. 53; 36 P. 502.

Application to commission cities: Recall is the exclusive remedy for the removal of officers in cities adopting the commission form of government (See § 4251. The adoption of said form of government has the effect of suspending the operation of this section. Hodges v. Tucker (1914) 25 I. 563, 138 P. 1139.

Fees defined: "Fees" as used in this section designates the sums authorized by law to be charged for services rendered by a public officer in the discharge of his duties as prescribed by law. McRoberts v. Hoar (1915) 28 I. 163, 152 P. 1046.

Nature of proceeding: The action provided for in this section being of a public nature and for the public good may be commenced either in the name of the state as plaintiff or in the name of the informant. The action of a district court in permitting a change of the style of the action from "state of Idaho, plaintiff," to "A. plaintiff," is error, but such error affects no substantial right of the defendant, is not prejudicial and will not be considered on appeal. Smith v. Ellis (1900) 7 I. 196; 61 P. 695. An action under this section is not a criminal proceeding and the informant may appeal under § 7152, from a judgment in favor of the officer. Ponting v. Isaman (1900) 7 I. 283, 62 P. 680. These proceedings are in the nature of a quo warranto and are quasi criminal. Daugherty v. Nagel (1915) 27 I. 511, 149 P. 729. If proceedings are brought before the term of the officer expires, the expiration of the term pending the determination of the cause does not work a dismissal of the proceeding. Ib.

A proceeding under this section while in form a civil action is, in substance and effect a criminal prosecution, and a defendant cannot under Const. I. 13, be compelled to become a witness against himself. Daugherty v. Nagel (1915) 28 I. 302, 154 P. 375.

Who may prosecute: A proceeding for the removal of a public officer need not be brought by indictment or information by the public prosecutor. Hays v. Simmons (1899) 6 I. 651, 69 P. 182. A corrupt official may be prosecuted by a private person for the acts therein specified, while prosecutions under § 8670 must be on information from the prosecuting attorney or presentment of the grand jury. Corker v. Pence (1906) 12 I. 152, 85 P. 388.

This is a penal statute intended to punish public officials for charging and collecting illegal fees, or for neglecting to perform official duties. For those offenses a public officer can be informed against and prosecuted by a private person, but no proceeding can be maintained by a private individual under this statute for any other kind of misconduct. McRoberts v. Hoar, supra.

Ground for removal: This section prescribes but two offenses for which a defendant may be removed from office. The first is the charging and collecting of illegal fees, and the second, the neglect to perform official duties pertaining to his office. Corker v. Pence, supra; Collman v. Wanamaker (1915) 27 I. 342, 149 P. 292; Collman v. Gordon (1915) 27 I. 351, 149 P. 294; McRoberts v. Hoar, supra.

When a public officer presents a claim against the county for services which he admits he has not performed, procures its

allowance, and receives a county warrant covering such charge, he should be removed from office, and the penalty provided for in this section should be adjudged against him and in favor of the informant. Smith v. Ellis (1900) 7 I. 196, 61 P. 695.

Proof that a county commissioner wilfully and knowingly approved a large number of official bonds, the sureties on which were not qualified to act as such sureties, is sufficient to sustain a conviction under this section. Miller v. Smith (1900) 7 I. 204, 61 P. 824.

Same: Insufficient grounds: Charges that a county commissioner allowed illegal fees to others are proper matters for investigation by the grand jury but are not a proper subject of inquiry in a proceeding under this section to remove the commissioner from office. Ponting v. Isaman (1900) 7 I. 283, 62 P. 680.

The allowance of a claim against the county without its being accompanied by a proper voucher is not a cause for removal under the provisions of this section. Corker v. Pence (1906) 12 I. 152, 85 P. 388.

The failure to properly itemize a claim against the county is not a cause for the removal of an officer under this section. Ib.

The wilful and corrupt equalization of assessments by the county board of equalization is not ground for removal under this section, but prosecutions therefor must be conducted under § 8670. Ib.

The statute is highly penal and will not be extended to acts or omissions that do not come clearly within it. It does not include the wrongful or illegal performance of an official duty. Selling of merchandise by an officer to village does not come within the terms of this statute. Collman v. Wanamaker, supra.

An officer contracting to perform special services outside his official duties is not subject to prosecution under this section for receiving illegal fees. Such contract, however, is void ab initio, as against public policy. McRoberts v. Hoar, supra.

This section is aimed at nonfeasance and not designed to cover acts of misfeasance. Daugherty v. Nagel (1915) 28 I. 302, 154 P. 375; Corker v. Cowen (1917) 30 I. 213, 164 P. 85.

Information: An information or accusation by which an action is commenced to remove a public officer from office should charge with certainty the specific acts of omission or commission for which the removal is sought. Smith v. Ellis (1900) 7 I. 196, 61 P. 695; Miller v. Smith (1900) 7 I. 204, 61 P. 824. The allegations of an information should be made positively when the facts are of record and accessible, or are within the personal knowledge of the informant; otherwise they may be made on information and belief. Corker v. Pence, supra.

An information which charges that the defendant as county commissioner, charged and collected the per diem and mileage for services rendered by him in viewing roads and bridges, that he did so wilfully, knowingly and corruptly, states good cause for removal of such officer under this section and of awarding to the informant the penalty provided for. Ponting v. Isaman, supra.

An information under this section which charges the defendant with knowingly, wilfully and intentionally charging and collecting illegal fees, specifying them, or knowingly, wilfully and intentionally refusing to perform or neglecting to perform an official duty, specifying such duty, is sufficient. Corker v. Pence, supra.

Where an information charges that defendant knowingly, intentionally and illegally performed the duties of his office, the allegation is properly stricken. But the defendant is subject to prosecution under §§ 8670-82. Daugherty v. Nagel (1915) 28 I. 302, 154 P. 375.

Same: Surplus allegations: An information seeking to remove a public officer from office on the ground that he received and collected illegal fees for himself, is not vitiated by a further improper allegation of the allowance by him of illegal fees to others nor subject to demurrer for misjoinder of causes of action, but the court should strike the improper allegations from the files and proceed to hear the cause on the proper allegations of the information. Ponting v. Isaman, supra.

Defenses: Public officers are supposed to know the law under which they act and a misunderstanding as to their duty can not be set up as a defense in a proceeding under this section. Miller v. Smith, supra.

A county commissioner will not be removed from office under this section on the ground that he presented illegal claims against the county for services rendered by him, where it appears that he acted honestly and without intent to defraud the county, under the belief that the claims were legal and on advice of the courty attorney. (Quarles, C. J., dissents.) Ponting v. Isaman (1901) 7 I. 581, 65 P. 434.

This section contemplates that when illegal fees are charged and collected, or when an officer has refused or neglected to perform the official duties pertaining to his office, and those facts are properly shown to the court, the informer has made out his case. The proof of those facts is proof of the intent with which they were done, and such acts can only be excused by showing that they were done by reason of a wrongful construction of an obscure or doubtful statute, but cannot be excused by a plea of ignorance of the plain provisions of the law. Miller v. Smith, supra.

Nature of proceeding: An appeal from a final judgment in a proceeding under this section is governed by the statutes and rules of court relative to civil appeals. Worthman v. Shane, 31 I. 433, 173 P. 750.

CHAPTER 317.

CRIMINAL PROCEEDINGS TO THE COMMITMENT.

ARTICLE 1.

LOCAL JURISDICTION OF PUBLIC OFFENSES.

§ 8685. [7480] **All offenders liable to punishment.** Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. [R. S. § 7480.]

Hist. (See Cr. Prac. '64, § 81) R. S. § 7480, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 777; same with clause added as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10501.

Cited: (In brief of counsel) Re Mallon (1909) 16 I. 737.

§ 8686. [7481] **Offenses commenced without the state.** When the commission of a public offense, commenced without the state is consummated within its boundaries, the defendant is liable to punishment therefor in this state, though he was out of the state at the time of the commission of the offense charged. If he consummated it in this state through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the jurisdiction is in the county in which the offense is consummated. [R. S. § 7481.]

Hist. Cr. Prac. '64, § 82; R. S. § 7481, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 778: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10502.

Cited: Re Moyer (1906) 12 I. 250, 85 P. 897.

§ 8687. [7482] **Fighting duels out of the state.** When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel or is concerned as second therein, out of the jurisdiction of this state, and in the duel a wound is inflicted upon a person, whereof he dies in this state, the jurisdiction of the offense is in the county where the death happens. [R. S. § 7482.]

Hist. Cr. Prac. '64, § 83; R. S. § 7482, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 779: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10503.

§ 8688. [7483] **Offenses committed in different counties.** When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisidiction is in either county. [R. S. § 7483.]

Hist. Cr. Prac. '64, § 84; R. S. § 7483, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 781: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10505.

§ 8689. [7484] **Offenses committed on county boundaries.** When a public offense is committed on the boundary of two or more counties, or within 500 yards thereof, the jurisdiction is in either county. [R. S. § 7484.]

Hist. Cr. Prac. '64, § 85; R. S. § 7484, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 782: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10506.

§ 8690. [7485] **Offenses committed on vessels or trains.** When an offense is committed in this state, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of her

voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this state, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates. [R. S. § 7485.]

Hist. Cr. Prac. '64, § 86; R. S. § 7485, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 783; same as amended: Kerr's C. ib.

Cross. ref. Venue of prosecutions for stealing rides on trains: § 8445.

N. D. Analogous: C. Cr. P. § 10507.

§ 8691. [7486] **Kidnapping and similar offenses.** The jurisdiction of a criminal action:

1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnapping him with intent, against his will, to cause him to be secretly confined or imprisoned in this state, or to be sent out of the state, or from one county to another, or to be sold as a slave, or in any way held to service; or

2. For decoying, taking, or enticing away a child under the age of 12 years, with intent to detain and conceal it from its parent, guardian, or other person having the lawful charge of the child; or

3. For inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of 18 years, for the purpose of prostitution; or

4. For taking away any female under the age of 16 years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of concubinage or prostitution;

Is in the county in which the offense is committed, or out of which the person upon whom the offense was committed may, in the commission of the offense, have been brought, or in which an act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense, or in abetting the parties concerned therein. [R. S. § 7486.]

Hist. (See Cr. Prac. '64, § 87) R. S. § 7486, reen. R. C. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 784; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10508.

§ 8692. [7487] **Bigamy or incest.** When the offense either of bigamy or incest is committed in one county, and the defendant is apprehended in another, the jurisdiction is in either county. [R. S. § 7487.]

Hist. Cr. Prac. '64, § 88; R. S. § 7487, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 785: Kerr's C. ib.

§ 8693. [7488] **Stolen property carried from county to county.** When property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former. [R. S. § 7488.]

Hist. (See Cr. Prac. '64. § 89) R. S. § 7488, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 786: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10509.

§ 8694. [7489] **Escape from prison.** The jurisdiction of a criminal action for escaping from prison is in any county of the state. [R. S. § 7489.]

Hist. R. S. § 7489, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 787; same as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10514.

§ 8695. [7490] **Bringing stolen property into the state.** The jurisdiction of a criminal action for stealing, in any other state, the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought. [R. S. § 7490.]

Hist. R. S. § 7490, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 789; embezzling included as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10516.

§ 8696. [7491] **Murder or manslaughter.** The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county and the party injured dies in another county or out of the state, is in the county where the injury was inflicted. [R. S. § 7491.]

Hist. (See Cr. Prac. '64, § 24) R. S. § 7491, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 790; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10517.

Death without state: Venue: Where the injury which produced death was inflicted in one county and the deceased was carried out of the state in an effort to save his life, the venue is properly laid in the county where the injury was inflicted. S. v. Corcoran (1900)) 7 I. 220, 61 P. 1034.

§ 8697. [7492] **Jurisdiction over accessories.** In the case of an accessory in the commission of a public offense, the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county. [R. S. § 7492.]

Hist. Cr. Prac. '64, § 90; R. S. § 7492, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 791: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10511.

§ 8698. [7493] **Jurisdiction over absent principal.** The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were so present and aiding and abetting therein. [R. S. § 7493.]

Hist. R. S. § 7493, reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 792; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10518.

§ 8699. [7494] **Conviction or acquittal in another state.** When an act charged as a public offense, is within the jurisdiction of another state, territory, or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state. [R. S. § 7494.]

Hist. Cr. Prac. '64, § 91; R. S. § 7494, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 793: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10512.

§ 8700. [7495] **Same: In another county.** When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another. [R. S. § 7495.]

Hist. Cr. Prac. '64, § 92; R. S. § 7495, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 794: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10513.

ARTICLE 2.

TIME OF COMMENCING CRIMINAL ACTIONS.

§ 8701. [7500] **Prosecutions for murder.** There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed. [R. S. § 7500.]

Hist. Cr. Prac. '64, § 93; R. S. § 7500, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 799; broader as amended: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10520.

§ 8702. [7501] **Other felonies.** An indictment for any other felony than murder must be found within three years after its commission. [R. S. § 7501.]

Hist. Cr. Prac. '64, § 94; R. S. § 7501, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 800; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10521.

§ 8703. [7502] **Misdemeanors.** An indictment for any misdemeanor must be found within one year after its commission. [R. S. § 7502.]

Hist. Cr. Prac. '64, § 95; R. S. § 7502, reen. R. C. ib., reen. C. L. ib.

Cross ref. Limitation on offenses against municipal ordinances is one year: § 3899.

Comp. leg.—Cal. Same: Pen. C. 1872, § 801; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10522.

§ 8704. [7503] **Absence of defendant from state.** If, when the offense is committed, the defendant is out of the state, the indictment may be found within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within, the state is part of the limitation. [R. S. § 7503.]

Hist. Cr. Prac. '64, § 96; R. S. § 7503, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 802: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10518.

§ 8705. [7504] **Indictment: When deemed found.** An indictment is found, within the meaning of this article, when it is presented by the grand jury in open court, and there received and filed. [R. S. § 7504.]

Hist. Cr. Prac. '64, § 97; R. S. § 7504, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 803: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10519.

ARTICLE 3.

COMPLAINT.

§ 8706. [7509] **Definition of complaint.** The complaint or information is the allegation in writing, made to a magistrate, that a person has been guilty of some designated offense. [R. S. § 7509.]

Hist. Cr. Prac. '64, § 99; R. S. § 7509, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "complaint or" omitted: Pen. C. 1872. § 806; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10525.

Cited: S. v. Raaf (1909) 16 I. 411, 101 P. 747.

Complaint and information defined: It is clear that the words "complaint" and "information" as used in the statute are used to represent the name of a pleading by which a criminal action is instituted in a justice's or probate court, or on which a criminal prosecution may be based in the district court; and if the words "complaint" and "information" are not meant to apply to the same thing, it may be said that "complaint" is the name given to the pleading filed by any person other than the prosecutor himself with a justice's or probate court, and that the same pleading is called "information" when the pleading is filed by the public prosecutor. S. v. Stafford (1914) 26 I. 381, 143 P. 528.

Defendant's name: A defendant may be prosecuted at a preliminary examination under his own or a fictitious name, and same does not render the examination void. If his true name is ascertained, it should be inserted. S. v. Ytursaspe (1912) 22 I. 360, 125 P. 802.

§ 8707. [7510] **Definition of magistrate.** A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense. [R. S. § 7510.]

Hist. Cr. Prac. '64, § 100; R. S. § 7510, reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 807: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10528.

Cited: S. v. Raaf (1909) 16 I. 411, 416, 101 P. 747.

§ 8708. [7511] **Who are magistrates.** The following persons are magistrates:

1. The justices of the supreme court.
2. The probate judges.
3. Justices of the peace.
4. Police magistrates in towns or cities. [R. S. § 7511.]

Hist. (See Cr. Prac. '64, § 101) R. S. § 7511, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 808; as am. Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10529.

Cited: S. v. Clark (1894) 4 I. 7. 35 P. 710.

Who are magistrates: A coroner is not a magistrate and the finding of his inquest is not a sufficient basis for an information for homicide. Re Sly (1904) 9 I. 779, 76 P. 766.

Jurisdiction of magistrates: Magistrates, as such, are given a special and fixed jurisdiction by the constitution and statutes. S. v. Raaf (1909) 16 I. 411. 416, 101 P. 747.

Same—Police judge: The jurisdiction of a police judge to try a person charged with having committed a nonindictable misdemeanor under the general laws of the state committed within the city limits, and his jurisdiction to hold preliminary examinations of persons charged with indictable misdemeanors or felonies under the general laws of the state committed within the city limits, is concurrent with that of justices of the peace and probate judges. S. v. Frederic (1916) 28 I. 709, 155 P. 977.

ARTICLE 4.

WARRANT OF ARREST.

§ 8709. [7516] **Examination of informant.** When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine, on oath, the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing and cause them to be subscribed by the parties making them. [R. S. § 7516.]

Hist. Cr. Prac. '64, § 102; R. S. § 7516, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 811: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10531.

Cited: S. v. Braithwaite (1891) 3 I. 119, 27 P. 731; S. v. Farris (1897) 5 I. 666, 51 P. 772.

§ 8710. [7517] **Contents of deposition.** The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant. [R. S. § 7517.]

Hist. Cr. Prac. '64, § 103; R. S. § 7517. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 812: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10535.

Cited: S. v. Farris (1897) 5 I. 666, 51 P. 772.

Informal charge: No formal or detailed charge or description of the offense is necessary in the complaint before the magistrate; all that is required is a general description or designation of the offense so that the defendant may be given a fair opportunity to know, by a proffered preliminary examination, the general character and outline of the offense for which he is to have an examination. S. v. McGreevey (1909) 17 I. 453, 464, 105 P. 1047.

§ 8711. [7518] **When warrant may issue.** If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest. [R. S. § 7518.]

Hist. Cr. Prac. '64. § 104; R. S. § 7518, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 813: Kerr's C. ib

§ 8712. [7519] Form of warrant. A warrant of arrest is an order in writing, in the name of the state of Idaho, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of ....., State of Idaho.

To any sheriff, constable, marshal, or policeman of said state, or of the county of.....:

A complaint on oath, having this day been laid before me, by A. B., that the crime of (designating it) has been committed, and accusing C. D. thereof, you are therefore commanded forthwith to arrest the above named C. D. and bring him before me at (naming the place), or in the case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at ....., this..... day of....., 19.....

[R. S. § 7519.]

Hist. Cr. Prac. '64. § 105; R. S. § 7519. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 814: Kerr's C ib.

N. D. Analogous: C. Cr. P. § 10536.

§ 8713. [7520] Same: Additional requirements. The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or town where it is issued, and be signed by the magistrate, with his name of office, and state the offense charged. [R. S. § 7520.]

Hist. (See Cr. Prac. '64, § 106) R. S. § 7520, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same omitting the concluding clause: Pen. C. 1872, § 815: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10537.

§ 8714. [7521] To whom directed. The warrant must be directed to and executed by a peace officer. [R. S. § 7521.]

Hist. Cr. Prac. '64, § 107; R. S. § 7521, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 816: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10538.

§ 8715. [7522] Peace officers enumerated. A peace officer is a sheriff of a county, or a constable, marshal, or policeman of a city or town. [R. S. § 7522.]

Hist. Cr. Prac. '64. § 108; R. S. § 7522. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the word township is used: Pen. C. 1872. § 817: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10539.

Cited: Union Pac. R. Co. v. Belek (Neb. 1913) 211 F. 699, 706.

§ 8716. Railroad and steamboat police. The governor of the state of Idaho is authorized and empowered, upon the application of any railroad or steamboat company to appoint and commission during his pleasure any person designated by such company to serve at the expense of such company as policeman, with the powers of a police officer, and who, after being duly sworn, may act as such policeman upon the premises, cars or boats of such company. The company designating such person shall be responsible civilly for any abuse of his authority. Every such policeman shall, when on duty, wear in plain view a shield bearing the words, "railroad police" or "steamboat police," as the case may be, and the name of the company for which he is commissioned. [C. L. § 7522a.]

Hist. '09. p. 110, S. B. 129; compiled and reen. C. L. § 7522a.

§ 8717. [7523] **Direction to officers throughout state.** If a warrant is issued by a justice of the supreme court, or probate judge, it may be directed generally to any sheriff, constable, marshal or policeman in the state, and may be executed by any of those officers to whom it may be delivered. [R. S. § 7523.]

Hist. Cr. Prac. '64, § 109; R. S. § 7523, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 828: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10540.

§ 8718. [7524] **Direction to officers of county; execution in other county.** If it be issued by any other magistrate it may be directed generally to any sheriff, constable, marshal or policeman, in the county in which it is issued, and may be executed by any sheriff to whom it is directed in any county of this state; and when the sheriff of any county is paid by salary instead of fees, he shall receive 20 cents per mile for each mile necessarily traveled outside his county. ['83, p. 7.]

Hist. Cr. Prac. '64, § 110; am. '83, p. 7, reen. R. S. § 7524, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: Pen. C. 1872, § 819: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10541.

§ 8719. Defendant to be taken before magistrate. If the offense charged is one which must afterward be investigated by the grand jury, or presented to the district court upon information, the officer making the arrest must take the defendant before the magistrate who issued the warrant, but, if such magistrate does not reside in the precinct where the offense was committed or the majority of the witnesses reside, the officer having the charge of the defendant must take him, and the warrant, deposition and all papers in the case, before some magistrate in such precinct for hearing and examination, or if there be no magistrate in such precinct, then before some magistrate residing in some other precinct, but all hearings on preliminary examinations must, as far as possible, be had before the magistrate most convenient to the majority of the witnesses for the prosecution, unless for good cause it is ordered to be held elsewhere, and in all such cases the preliminary examinations must be had as hereinafter provided, unless such person shall waive his right to such examination.

For taking such examinations the magistrate must be allowed 20 cents per folio, except when a county stenographer employed by the board of county commissioners takes the testimony at such preliminary examination, in which event no fee shall be allowed the justice of the peace. [C. L. § 7525.]

Hist. (See Cr. Prac. '64. §§ 111, 112) R. S. § 7525; am. '99, p. 433. § 1, reen. R. C. § 7525; amended as to transcription fees by '09, p. 146, H. B. 82, § 4; compiled and reen. C. L. § 7525,

Cross ref. Commitment on indictable offense upon plea of guilty to lower offense: § 9231.

Comp. leg.—N. D. Analogous: C. Cr. P. § 10543.

Venue of examination: One accused of crime can not insist upon examination before a magistrate of the precinct in which the crime is charged to have been committed, but the prosecuting attorney may designate the precinct where, and the magistrate before whom, the examination will be had. S. v. Griffin (1895) 4 I. 462, 40 P. 58.

The jurisdiction of justice of peace as committing magistrate extends over the entire county, but a person arrested for crime is entitled to be taken for his preliminary examination before the magistrate who issued the warrant of arrest, unless there is some reason to the contrary that can be made to appear. S. v. Andrus (1916) 29 I. 1, 156 P. 421.

§ 8720. [7529] **Same: Attorney may visit defendant.** The defendant must in all cases be taken before the magistrate without unnecessary delay, and any attorney at law entitled to practice in courts of record of the state of Idaho may, at the request of the prisoner after such arrest, visit the person so arrested. [R. S. § 7529.]

Hist. Cr. Prac. '64, § 116; R. S. § 7529, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10548.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 825; same as amended: Kerr's C. ib.

§ 8721. [7530] **Depositions to be transmitted to magistrate.** If the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they can not be procured, the prosecutor and his witnesses must be summoned to give their testimony anew. [R. S. § 7530.]

Hist. Cr. Prac. '64, § 117; R. S. § 7530, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10550.

Comp. leg.—Cal. Same: Pen. C. 1872. § 826: Kerr's C. ib.

§ 8722. [7531] **Offenses triable in another county: Proceedings.** When an information is laid before a magistrate of the commission of a public offense, triable in another county of the state, but showing that the defendant is in the county where the complaint is laid, the same proceedings must be had as prescribed in this chapter, except that the warrant must require the defendant to be taken before the magistrate most accessible to the witnesses for the prosecution, but in the county in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered. [R. S. § 7531.]

Hist. Cr. Prac. '64, § 118; R. S. § 7531, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10551.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 827: Kerr's C. ib.

§ 8723. [7532] **Duties of officer.** The officer who executes the warrant must take the defendant before the magistrate most accessible to the witnesses for the prosecution, but in the county in which the offense is triable, and must deliver to him the depositions and the warrant, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself. [R. S. § 7532.]

Hist. Cr. Prac. '64, § 119; R. S. § 7532, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872. § 828: Kerr's C. ib.

ARTICLE 5.

ARREST, BY WHOM AND HOW MADE.

§ 8724. [7538] **Arrest defined.** An arrest is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person. [R. S. § 7538.]

Hist. (See Cr. Prac. '64, §§ 121, 122) R. S. § 7538, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. §§ 10556-7.

Comp. leg.—Cal. Same: Pen. C. 1872. § 834: Kerr's C. ib.

§ 8725. [7539] **Same: How made.** An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. [R. S. § 7539.]

Hist. Cr. Prac. '64, §§ 125, 126; R. S. § 7539, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. §§ 10561-2.

Comp. leg.—Cal. Same: Pen. C. 1872. § 835: Kerr's C. ib.

§ 8726. [7540] **When a peace officer may arrest.** A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
5. At night, when there is reasonable cause to believe that he has committed a felony. [R. S. § 7540.]

Hist. Cr. Prac. '64, §§ 131, 133; R. S. § 7540, reen. R. C. ib., reen. C. L. ib.

Cross ref. For arrest by various officers: See Index under "Arrest."

Comp. leg.—Cal. Same: Pen. C. 1872. § 836: Kerr's C. ib.

N. D. See C. Cr. P. §§ 10563, 10566.

Cited: Union Pac. R. Co. v. Belek (Neb. 1913) 211 F. 699, 707; S. v. Anderson, 31 I. 514, 174 P. 124. (In dis. op. by Morgan J.)

§ 8727. [7541] **When private person may arrest.** A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. [R. S. § 7541.]

Hist. Cr. Prac. '64, § 137; R. S. § 7541, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 837: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10573.

§ 8728. [7542] **Magistrate may order arrest.** A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate. [R. S. § 7542.]

Hist. Cr. Prac. '64, § 136; R. S. § 7542, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 838: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10559.

§ 8729. [7543] **Person arresting may summon assistance.** Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein. [R. S. § 7543.]

Hist. (See Cr. Prac. '64, § 123) R. S. § 7543, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 839: Kerr's C. ib.

§ 8730. [7544] **When arrest may be made.** If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor the arrest can not be made at night, unless upon the direction of the magistrate, indorsed upon the warrant. [R. S. § 7544.]

Hist. (See Cr. Prac. '64, p. 124) R. S. § 7544, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 840; same as amended with additional clause: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10560.

§ 8731. [7545] **Information to person arrested.** The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense, or is pursued immediately after its commission, or after an escape. [R. S. § 7545.]

Hist. Cr. Prac. '64, § 134; R. S. § 7545, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 841: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10570-4.

§ 8732. [7546] **Warrant must be shown.** If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required. [R. S. § 7546.]

Hist. Cr. Prac. '64, § 127; R. S. § 7546, reen R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 842: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10563.

§ 8733. [7547] **What force may be used.** When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest. [R. S. § 7547.]

Hist. (See Cr. Prac. '64, § 128) R. S. § 7547, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 843: Kerr's C. ib.

§ 8734. [7548] **Same: Breaking doors and windows.** To make an arrest, if the offense is a felony, a private person, if any public offense, a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which there is reasonable ground for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired. [R. S. § 7548.]

Hist. Cr. Prac. '64, §§ 129, 132, 139; R. S. § 7548, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 844: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10568-79.

§ 8735. [7549] **Same: For purpose of liberation.** Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein. [R. S. § 7549.]

Hist. Cr. Prac. '64, §§ 129, 132, 139; R. S. § 7549, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872. § 845: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10579.

§ 8736. [7550] **Weapons may be taken.** Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken. [R. S. § 7550.]

Hist. R. S. § 7550, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 846: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10577.

Cited: S. v. Anderson, 31 I. 514, 174 P. 124. (In dis. op. by Morgan J.)

§ 8737. [7551] **Duty of private person making arrest.** A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. [R. S. § 7551.]

Hist. Cr. Prac. '64, § 140; R. S. § 7551, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 847: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10576.

§ 8738. [7552] **Person arrested without warrant.** When an arrest is made without a warrant by a peace officer or private person the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate. [R. S. § 7552.]

Hist. (See Cr. Prac. '64, § 140) R. S. § 7552, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10578.

Comp. leg.—Cal. Same: Pen. C. 1872, § 849: Kerr's C. ib.

§ 8739. [7553] **Telegraphing warrant for service.** A justice of the supreme court or probate judge may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers, and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it as though he held an original warrant issued by the magistrate making the indorsement. [R. S. § 7553.]

Hist. R. S. § 7553, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10580.

Comp. leg.—Cal. Same: Pen. C. 1872, § 850: Kerr's C. ib.

§ 8740. [7554] **Same.** Every officer causing telegraphic copies of warrants to be sent must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder. [R. S. § 7554.]

Hist. R. S. § 7554, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10581.

Comp. leg.—Cal. Same: Pen. C. 1872, § 851: Kerr's C. ib.

ARTICLE 6.

RETAKING AFTER AN ESCAPE OR RESCUE.

§ 8741. [7559] **Recapture after escape.** If a person arrested escape or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him at any time and in any place within the state. [R. S. § 7559.]

Hist. Cr. Prac. '64, § 141; R. S. § 7559, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10592.

Comp. leg.—Cal. Same: Pen. C. 1872, § 854: Kerr's C. ib.

§ 8742. [7560] **Same: Breaking doors and windows.** To retake the person escaping or rescued, the person pursuing may break open an outer or inner door or window of a dwelling house, if, after notice of his intention, he is refused admittance. [R. S. § 7560.]

Hist. Cr. Prac. '64, § 142; R. S. § 7560, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10593.

Comp. leg.—Cal. Same: Pen. C. 1872, § 855: Kerr's C. ib.

ARTICLE 7.

EXAMINATION.

Cited: S. v. Raaf (1909) 16 I. 411, 101 P. 747.

§ 8743. [7565] **Right to counsel.** When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings. [R. S. § 7565.]

Hist. Cr. Prac. '64, § 143; R. S. § 7565, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10595.

Cited: S. v. Frederic (1916) 28 I. 709, 155 P. 977.

Cross ref. Constitutional right to counsel: Const. I. 13.

Comp. leg.—Cal. Same: Pen. C. 1872, § 858: Kerr's C. ib.

§ 8744. [7566] **Sending for counsel.** He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose, and must upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty. [R. S. § 7566.]

Hist. Cr. Prac. '64, § 144; R. S. § 7566, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 859: Kerr's C. ib.
N. D. Similar: C. Cr. P. §10596.

§ 8745. [7567] **Examination: When to proceed.** If the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a resonable time therefor, none appears, proceed to examine the case. [R. S. §7567.]

Hist. Cr. Prac. '64, § 145; R. S. § 7567, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 860: Kerr's C. ib.
N. D. Analogous: C. Cr. P. § 10597.

§ 8746. [7568] **Completion and postponements.** The examination must be completed at one session unless the magistrate for good cause shown by affidavit, postpone it. The postponement can not be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant. [R. S. § 7568.]

Hist. Cr. Prac. '64, § 146; R. S. § 7568, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 861: Kerr's C. ib.
N. D. Similar: C. Cr. P. § 10599.

§ 8747. [7569] **Commitment or bail on postponement.** If a postponement is had the magistrate must commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this code, as security for his appearance at the time to which the examination is postponed. [R. S. § 7569.]

Hist. Cr. Prac. '64, § 147; R. S. § 7569, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 862: Kerr's C. ib.
N. D. Similar: C. Cr. P. § 10600.

§ 8748. [7570] **Form of commitment.** The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect:

> The within named A. B. having been brought before me under this warrant, is committed for examination to the sheriff of.....

If the sheriff is not present, the defendant may be committed to the custody of a peace officer. [R. S. § 7570.]

Hist. Cr. Prac. '64, § 148; R. S. § 7570, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 863: Kerr's C. ib.
N. D. Analogous: C. Cr. P. § 10601

§ 8749. [7571] **Subpoenas for witnesses.** At the examination the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or defense. [R. S. § 7571.]

Hist Cr. Prac. '64, § 149; R. S. § 7571, reen. R. C. ib., reen. C. L. ib.
Comp. leg.—Cal. Same: Pen. C. 1872, § 864: Kerr's C. ib.
N. D. Similar: C. Cr. P. § 10602.
Cited: S. v. McGann (1901) 8 I. 40, 66 P. 823: S. v. Carlson (1913) 23 I. 544, 130 P. 463.

§ 8750. [7572] **Examination of witnesses.** The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf. [R. S. § 7572.]

Hist. Cr. Prac. '64, § 150; R. S. § 7572, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10605.

Comp. leg.—Cal. Same: Pen. C. 1872, § 865: Kerr's C. ib.

§ 8751. [7573] **Same: For defendant.** When the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined. [R. S. § 7573.]

Hist. R. S. § 7573, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10606.

Comp. leg.—Cal. Same: Pen. C. 1872, § 866: Kerr's C. ib.

§ 8752. [7574] **Exclusion of witnesses.** While a witness is under examination the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined. [R. S. § 7574.]

Hist. Cr. Prac. '64, § 157; R. S. § 7574, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10604.

Comp. leg.—Cal. Same: Pen. C. 1872, § 867: Kerr's C. ib.

§ 8753. [7575] **Exclusion of other persons.** The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the prosecuting attorney of the county, the defendant and his counsel, and the officer having the defendant in custody. [R. S. § 7575.]

Hist. Cr. Prac. '64, § 158; R. S. § 7575, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 868; Kerr's C. ib.

§ 8754. Form of depositions. In all cases which must afterward be investigated by the grand jury, or prosecuted by information, the examination must be taken, unless the person charged with the offense shall waive his right to such examination, and can not be unreasonably delayed by either party.

The testimony must either be reduced to writing by the magistrate or under his direction or be taken in shorthand by a stenographer and transcribed.

The deposition must state the name of the witness, his place of residence and his business or profession. It must contain the questions put to the witness and his answers thereto. If a question put be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

The evidence must be authenticated as follows:

1. If the deposition is taken in writing each answer must be distinctly read to the witness as it is taken down, and must be corrected or added to until it conforms to what he declares is the truth; it must be subscribed and sworn to by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it; or,

2. If the deposition is taken by a stenographer in shorthand it shall be transcribed by him and certified to as true and correct; and

3. Unless certified by the county stenographer, the deposition must also be signed and certified by the magistrate. [C. L. § 7576.]

Hist. R. S. § 7576; am. '05, p. 376, reen. R. C. § 7576; amended by implication by '09, p. 146, H. B. 146 (§ 3660) providing for county stenographer; rewritten to make meaning clearer in conformity with S. v. Carlson (1913) 23 I. 545, 130 P. 463, but recognizing the taking of testimony by an unofficial stenographer; compiled and reen. C. L. § 7576.

Cross ref. Duties of county stenographer at preliminary examinations: § 3660.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 869; as amended: Kerr's C. ib.

Cited: Terr. v. Evans (1890) 2 I. 651, 23 P. 232; S. v. Potter (1899) 6 I. 584, 57 P. 431; S. v. Zarlonga (1908) 14 I. 305, 94 P. 55; (In dis. op.) S. v. Marren (1910) 17 I. 766, 107 P. 993.

Provisions mandatory: This section is mandatory in its requirements as to a preliminary examination, and the district court has no jurisdiction to try a person on information until this section is complied with. S. v. Baithwaite (1891) 3 I. 119, 27 P. 731; S. v. Yturaspe (1912) 22 I. 360, 125 P. 802; S. v. Carlson (1913) 23 I. 545, 130 P. 463.

Sufficiency of authentication: Where the record shows before whom the preliminary examination was had; the date of such examination; the presence of the defendant; the reading of the complaint to the defendant and his plea thereto; that each witness stated his name, age, residence and occupation; and contains the questions put to each witness, and the answers thereto, and each deposition is signed by the witness and has a jurat signed by the magistrate, and further shows that the depositions are the basis of the information filed by the district attorney, the law is substantially complied with although the depositions do not contain the certificate of the magistrate. S. v. Clark (1894) 4 I. 7, 35 P. 710.

This section must be substantially complied with, and the magistrate is required to make a final certificate that its requirements have been complied with. The magistrate is not required to attach a separate certificate to the testimony of each witness. S. v. Yturaspe, supra.

Where evidence is taken by the county stenographer and transcribed and certified by him the certificate of the magistrate to the testimony becomes unnecessary. (Ailshie, C. J., dissents) S. v. Carlson, supra.

Amendment of certificate: The committing magistrate may amend his certificate to the depositions with leave of court at the county seat although the county seat is outside of his precinct. S. v. McGann (1901) 8 I. 40, 66 P. 823.

§ 8755. [7577] **Custody of depositions.** The magistrate must keep the depositions taken on the information or on the examination until they are returned to the proper court; and must not permit them to be examined or copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney general, prosecuting attorney, or other prosecuting attorney, and the defendant and his counsel. [R. S. § 7577.]

Hist. R. S. § 7577, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or his clerk," inserted after "magistrate": Pen. C. 1872, § 870: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10607.

§ 8756. [7578] **Discharge of defendant.** If, after hearing the proofs it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the deposition signed by him, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged." [R. S. § 7578.]

Hist. Cr. Prac. '64, § 159; R. S. § 7578, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 871: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10609.

Cited: S. v. Carlson (1913) 23 I. 545, 130 P. 463.

Discharge on habeas corpus: Upon petition for writ of habeas corpus the court can go back of the order of commitment and inquire into the question of probable cause. Re Baugh (1917) 30 I. 387, 164 P. 529.

§ 8757. [7579] **Commitment: When and how made.** If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the depositions an order, signed by him, to the following effect: "It appearing to me that the offense in the within depositions mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that

there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same." [R. S. § 7579.]

Hist. Cr. Prac. '64, § 160; R. S. § 7579, reen. R. C. ib., reen. C. L. ib.

Cross ref. Commitment of boy or girl held for felony to industrial training school: § 1154.

Comp. leg.—Cal. Same: Pen. C. 1872, § 872; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10611.

Cited: S. v. Carlson (1913) 23 I. 545, 130 P. 463.

Nature of examination: A preliminary examination is not in any sense a trial but its only purpose is to ascertain whether a crime has been committed and whether there is probable cause for believing that the accused is guilty thereof and should be tried therefor. S. v. Bond (1906) 12 I. 424, 86 P. 43.

Sufficiency of evidence: On a preliminary examination it is only necessary for the state to introduce sufficient evidence to satisfy the magistrate that a public offense has been committed and that the defendant is guilty thereof in order to justify the magistrate in holding the defendant to answer. Re Sly (1904) 9 I. 779, 76 P. 766.

In a preliminary examination the state is not bound to produce all of its evidence or to establish the guilt of the accused "beyond a reasonable doubt," and if it produces sufficient to satisfy the committing magistrate that a crime has been committed, and that there is reasonable or probable cause to believe that the petitioner committed it, it is the duty of the magistrate to hold the petitioner for trial. Re Squires (1907) 13 I. 624, 92 P. 754.

Failure to indorse commitment: The fact that the order of commitment is not indorsed on the depositions, does not deprive the same of its validity where the order is reduced to writing and entered in the official docket of the magistrate. S. v. Clark (1894) 4 I. 7, 35 P. 710. S. v. Yturaspe (1912) 22 I. 360, 125 P. 802.

§ 8758. [7580] **Same: Offense not bailable.** If the offense is not bailable the following words must be added to the indorsement: "And he is hereby committed to the sheriff of the county of....." [R. S. § 7580.]

Hist. Cr. Prac. '64, § 161, R. S. § 7580, reen. R. C. ib., reen. C. L. ib.

Cross ref. Offenses not bailable: § 9094.

Comp. leg.—Cal. Same: Pen. C. 1872, § 873; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10612.

§ 8759. [7581] **Same: Bailable offense.** If the offense is bailable, and the defendant is admitted to bail, the following words must be added to the order indorsed on the deposition: "And that he is admitted to bail in the sum of.....dollars, and is committed to the sheriff of the county of .....until he gives such bail." [R. S. § 7581.]

Hist. Cr. Prac. '64, § 163, R. S. § 7581, reen. R. C. ib., reen. C. L. ib.

Cross ref. Bailable offenses: § 9095.

Comp. leg.—Cal. Same except "but bail has not been taken" inserted after "bail": Pen. C. 1872, § 875; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10613.

§ 8760. [7582] **Order of commitment.** If the magistrate order the defendant to be committed he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace officer, who must deliver the defendant into the proper custody, together with the commitment. [R. S. § 7582.]

Hist. Cr. Prac. '64, § 164, R. S. § 7582, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 876; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10615.

§ 8761. [7583] **Same: Form of commitment.** The commitment must be to the following effect:

County of (as the case may be). The State of Idaho to the sheriff of the county of.....:

An order having been this day made by me, that A. B. be held to answer upon a charge of (stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated this .....day of....., 19..... [R. S. § 7583.]

Hist. Cr. Prac. '64, § 165, R. S. § 7583, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 877; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10616.

§ 8762. [7584] **Undertaking of witnesses to appear.** On holding the defendant to answer the magistrate may take from each of the material witnesses examined before him on the part of the people a written undertaking to the effect that he will appear and testify at the court to which the depositions and statements are to be sent, or that he will forfeit the sum of $500. [R. S. § 7584.]

Hist. Cr. Prac. '64, § 166, R. S. § 7584, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 878; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10617.

§ 8763. [7585] **Same: Security for appearance.** When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section. [R. S. § 7585.]

Hist. Cr. Prac. '64, § 167, R. S. § 7585, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 879; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10618.

Cited: S. v. Zarlenga (1908) 14 I. 305, 94 P. 55.

§ 8764. [7586] **Same: Infants and married women.** Infants and married women who are material witnesses against the defendant may be required to procure sureties for their appearance, as provided in the last section. [R. S. § 7586.]

Hist. Cr. Prac. '64, § 168, R. S. § 7586, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 880; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10619.

§ 8765. [7587] **Commitment for failure to give security.** If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged. [R. S. § 7587.]

Hist. Cr. Prac. '64, § 169, R. S. § 7587, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 881; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10620.

§ 8766. [7588] **Conditional examination.** When, however, it satisfactorily appears by examination on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people. Such examination must be by question and answer in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this chapter to be conducted, and the witness thereupon be discharged; but this section does not apply to an accomplice in the commission of the offense charged. [R. S. § 7588.]

Hist. Cr. Prac. '64, § 170, R. S. § 7588, reen. R. C. ib., reen. C. L. ib.

Cross ref. Witness charged with public offense: § 9140.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 882; similar as amended: Kerr's C. ib.

Cited: T. v. Evans (1890) 2 I. 651, 23 P. 232.

Use of deposition: A deposition in a criminal case taken under the provisions of this section is admissible as evidence. S. v. White (1900) 7 I. 150, 61 P. 517.

The deposition may be used if it is first shown that due diligence has been ineffectually exercised to procure the attendance of the witness. S. v. Ireland (1904) 9 I. 686, 75 P. 257.

Before a deposition taken conditionally can be admitted in evidence, the state must show that the deposition was taken before the magistrate who conducted the preliminary examination or the judge of the court to which defendant has been held for trial; that it was shown to such magistrate or judge, on oath, that there was reason to believe that such witness whose deposition was sought would not appear and testify unless security was given; that an order was made requiring such witness to enter into a written undertaking, with sureties, under § 8763; that thereupon it was shown that the witness was unable to procure sureties; that the defendant had been advised of his right to counsel and to be represented by such; that the defendant was present in person and by counsel, if he desired counsel, or that he had notice of such examination, if on bail; that the examination was conducted in the same manner as an examination before a committing magistrate, and certified as required by § 8754; that the witness is unable to attend by reason of his death, infirmity, sickness or insanity, or of absence from the state, and that due diligence has been exercised to procure the presence of such witness at the trial. S. v. Zarlenga (1908) 14 I. 305, 94 P. 55.

§ 8767. [7589] **Return of papers to court.** When a magistrate has discharged a defendant or has held him to answer, he must return, without delay, to the clerk of the court at which the defendant is required to appear, the warrant, if any, the depositions, and all undertakings of bail or for the appearance of witnesses taken by him. [R. S. § 7589.]

Hist. Cr. Prac. '64, § 172, R. S. § 7589, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 883; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10624.

Cited: S. v. Frederic (1916) 28 I. 709, 155 P. 977.

CHAPTER 318.

PROCEEDINGS AFTER COMMITMENT.

ARTICLE 1.

PRELIMINARY PROVISIONS.

§ 8768. [7600] **Mode of prosecution.** All public offenses triable in the district court must be prosecuted by indictment, or information, except as provided in the next section. [R. C. § 7600.]

Hist. (Cr. Prac. '64, § 173) R. S. § 7600, modified by '99, § 125; am. R. C. § 7600, reen. C. L. ib.

Cross ref. Prosecutions only by indictment or information: Const. I, 8.

Comp. leg.—Cal. Same: Pen. C. 1872, § 888; superior court system as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10625.

Cited: Fox v, Flynn (1915) 27 I. 580, 150 P. 44. Re Winn (1916) 28 I. 461, 154 P. 497.

§ 8769. [7601] **Same: For removal of officers.** When the proceedings are had for the removal of district, county, municipal or precinct officers they may be commenced by an accusation or information, in writing, as provided in article 2 of chapter 420. [R. S. § 7601.]

Hist. (See Cr. Prac. '64, § 174) R. S. § 7601, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 889; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10626.

§ 8770. [7602] **Indictments and accusations: Where found.** All accusations against district, county, municipal and precinct officers, and all indictments, must be found in the district court. [R. S. § 7602.]

Hist. Cr. Prac. '64, § 175, R. S. § 7602, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 890; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10627.

ARTICLE 2.

FORMATION OF THE GRAND JURY.

Cross ref. Grand jury defined: § 6514. Constitution of grand jury: § 6546.

§ 8771. [7607] **Challenge: By whom made.** The people, or a person held to answer a charge for a public offense, may challenge the panel of a grand jury, or an individual juror. [R. S. § 7607.]

Hist. (See Cr. Prac. '64, § 177) R. S. § 7607, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 894; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10636.

§ 8772. [7608] **Grounds for challenge to panel.** A challenge to the panel may be interposed for one or more of the following causes only:

1. That the requisite number of ballots was not drawn from the jury box of the county.
2. That notice of the drawing of the grand jury was not given.
3. That the drawing was not had in the presence of the officers designated by law. [R. S. § 7608.]

Hist. Cr. Prac. '64, § 178, R. S. § 7608, reen. R. C. ib., reen. C. L. ib.

Cross ref. Drawing of jury: Notice: § 6530; attendance of officers: § 6531; conduct of drawing: § 6534.

Comp. leg.—Cal. Same: Pen. C. 1872, § 895; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10639.

§ 8773. [7609] **Grounds for challenge to individual jurors.** A challenge to an individual grand juror may be interposed for one or more of the following causes:

1. That he is a minor.
2. That he is an alien.
3. That he is insane.
4. That he is a prosecutor upon a charge aginst the defendant.
5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such.
6. That he has formed or expressed an unqualified opinion or belief that the defendant is guilty or not guilty of the offense charged; but a hypothetical opinion, founded on hearsay or information supposed to be true, unaccompanied with malice or ill will, shall not disqualify a grand juror or be a cause of challenge.
7. That a state of mind exists on his part in reference to the case, or to either party, which satisfies the court that he can not act impartially and without prejudice to the substantial rights of the party challenging. [R. S. § 7609.]

Hist. (See Cr. Prac. '64, § 179) R. S. § 7609, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 896; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10641.

Cited: S. v. Hardy (1895) 4 I. 478, 42 P. 507.

§ 8774. [7610] **Form of challenge.** The challenges mentioned in the last three sections may be oral, or in writing, and must be tried by the court. [R. S. §7610.]

Hist. Cr. Prac. '64, § 180, R. S. § 7610, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 897; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10642.

§ 8775. [7611] **Decision upon challenge.** The court must allow or disallow the challenge, and the clerk must enter its decisions upon the minutes. [R. S. § 7611.]

Hist. Cr. Prac. '64, § 181, R. S. § 7611, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 898; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10643.

§ 8776. [7612] **Challenge to panel: Effect of allowance.** If a challenge to the panel is allowed the grand jury are prohibited from inquiring into the charge against the defendant, by whom the challenge was interposed. If, notwithstanding, they do so, and find an indictment against him, the court must direct it to be set aside. [R. S. § 7612.]

Hist. Cr. Prac. '64, § 182, R. S. § 7612, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10640.

Comp. leg.—Cal. Same: Pen. C. 1872, § 899; Kerr's C. ib.

§ 8777. [7613] **Challenge to individual: Effect of allowance.** If a challenge to an individual grand juror is allowed he can not be present or take part in the consideration of the charge as to which he was challenged against the defendant who interposed the challenge, or the deliberations of the grand jury thereon. The grand jury must inform the court of a violation of this section, and it is punishable by the court as a contempt. [R. S. § 7613.]

Hist. Cr. Prac. '64, §§ 183, 184, R. S. § 7613, reen. R. C. ib., reen. C. L. ib.

Cross ref. Participation in considering a charge after challenge sustained a misdemeanor: § 8195.

Comp. leg.—Cal. Same: Pen. C. 1872, § 900; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10644.

Unauthorized presence of juror: When a grand juror is disqualified he should not be present or take any part in the consideration of the charge as to which he is disqualified, but he still remains a member of the grand jury. If he takes part in such deliberations, notwithstanding the injunction of the court, he should be punished for contempt, but it is not ground for setting aside the indictment. T. v. Staples (1891) 3 I. 35, 26 P. 166.

§ 8778. [7614] **Manner of filling panel after sustaining challenge.** If more than three challenges to individual grand jurors are allowed to the same defendant in reference to the same charge, the court must fill the panel to 16 as to that charge by causing a sufficient number of competent jurors from those summoned and not before called, or if a sufficient number are not in attendance, then from the bystanders or from the body of the county to be sworn to act as jurors with the regular panel, upon the examination of that charge; and, if necessary to secure the full number of 16 competent jurors, the court may require the sheriff to summon the required number. [R. S. § 7614.]

Hist. R. S. § 7614, reen. R. C. ib., reen. C. L. ib.

§ 8779. [7615] **Objections must be by challenge.** A person held to answer to a charge for a public offense can take advantage of any objection to the panel or to any individual grand juror in no other mode than by challenge. [R. S. § 7615.]

Hist. Cr. Prac. '64, § 185, R. S. § 7615, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 10646.

Comp. leg.—Cal. Same: Pen. C. 1872, § 901; Kerr's C. ib.

§ 8780. [7616] **Appointment of foreman.** From the persons summoned to serve as grand jurors and appearing, the court must appoint a foreman. The court must also appoint a foreman when the person already appointed is excused or discharged before the grand jury is dismissed. [R. S. § 7616.]

Hist. Cr. Prac. '64, § 186, R. S. § 7616, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10649.

Comp. leg.—Cal. Same: Pen. C. 1872, § 902; Kerr's C. ib.

§ 8781. [7617] **Oath of foreman.** The following oath must be administered to the foreman of the grand jury:

You, as foreman of the grand jury, will diligently inquire into and true presentment make, of all public offenses against the state of Idaho, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel, and that of your fellows, and of the government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said nor the manner in which you or any other grand juror may have voted in any matter before you. You will present no person through malice, hatred, or ill will, nor leave any unpresented through fear, favor or affection, or for any reward or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God.

[R. S. § 7617.]

Hist. Cr. Prac. '64, § 187, R. S. § 7617, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 903; same as amended except "the people of this state" for "the state of Idaho": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10650.

§ 8782. [7618] **Oath of jurors.** The following oath must be immediately thereupon administered to the other grand jurors present:

The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part, so help you God. [R. S. § 7618.]

Hist. Cr. Prac. '64, § 188, R. S. § 7618, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 904; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10651.

§ 8783. [7619] **Charge to jury.** The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury. [R. S. § 7619.]

Hist. Cr. Prac. '64, § 189, R. S. § 7619, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 905; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10652.

§ 8784. [7620] **Retirement and discharge of jury.** The grand jury must then retire to a private room and inquire into the offenses cognizable by them. On the completion of the business before them, they must be discharged by the court, but, whether the business is completed or not, they are discharged by the final adjournment of the court. [R. S. § 7620.]

Hist. Cr. Prac. '64, §§ 190, 191, R. S. § 7620, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 906; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10653, 10655.

§ 8785. [7621] **Special grand jury.** If an offense is committed during the sitting of the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered that the sheriff summon another grand jury. [R. S. § 7621.]

Hist. Cr. Prac. '64, § 192, R. S. § 7621, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 907; repealed 1905.

N. D. Analogous: C. Cr. P. § 10647.

§ **8786.** [7622] **Same: Contents and delivery of order.** The order must require the sheriff to summon 20 persons, qualified to serve as grand jurors, to appear at a time specified, and a copy thereof, under the seal of the court, must, by the clerk be delivered to the sheriff. [R. S. § 7622.]

Hist. (See Cr. Prac. '64, § 193) R. S. § 7622, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "sixteen" for "twenty": Pen. C. 1872, § 908; repealed 1905.

§ **8787.** [7623] **Same: Execution and return of order.** The sheriff must execute the order and return it, with a list of names of the persons summoned. [R. S. § 7623.]

Hist. Cr. Prac. '64, § 194, R. S. § 7623, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 909; repealed 1905.

§ **8788.** [7624] **Drawing of special jury.** At the time appointed the list must be called over, and the names of those in attendance be written by the clerk on separate ballots and put into a box, from which a grand jury must be drawn. [R. S. § 7624.]

Hist. Cr. Prac. '64, § 195, R. S. § 7624, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 910; repealed 1905.

ARTICLE 3.

POWERS AND DUTIES OF A GRAND JURY.

§ **8789.** [7630] **Powers and duties in general.** The grand jury must inquire into all public offenses committed or triable within the county, and present them to the court, either by presentment or by indictment. [R. S. § 7630.]

Hist. Cr. Prac. '64, § 201, R. S. § 7630, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 915; same as amended except "either by presentment or" omitted: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10656.

Jurisdiction: After a preliminary examination and the filing of an information the court acquires jurisdiction of the defendant and of the offense with which he is charged, from which it can not be deprived by any action of a grand jury convened at a subsequent term. Re Winn (1916) 28 I. 461, 154 P. 497.

§ **8790.** [7631] **Presentment defined.** A presentment is a formal statement in writing, by the grand jury, representing to the court that a public offense has been committed which is triable in the county, and that there is reasonable ground for believing that a particular individual named or described therein has committed it. [R. S. § 7631.]

Hist. Cr. Prac. '64, § 203, R. S. § 7631, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "informal" for "formal": Pen. C. 1872, § 916; repealed 1905:

N. D. Similar: C. Cr. P. § 10657.

§ **8791.** [7632] **Indictment defined.** An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense. [R. S. § 7632.]

Hist. Cr. Prac. '64, § 202, R. S. § 7632, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 917; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10526.

Cited: T. v. Evans (1888) 2 I. 425, 17 P. 139.

§ **8792.** [7633] **Foreman may administer oaths.** The foreman may administer an oath to any witness appearing before the grand jury. [R. S. § 7633.]

Hist. Cr. Prac. '64, § 204, R. S. § 7633, reen. R. C. ib., reen. C. L. ib.

Cross ref. Form of oath: § 8065.

Comp. leg.—Cal. Same: Pen. C. 1872, § 918; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10658.

§ **8793.** [7634] **Evidence receivable by grand jury.** In the investigation of a charge for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by

witnesses produced and sworn before them except as hereinafter provided, or furnished by legal documentary evidence, or the deposition of a witness in the cases provided by this code. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence, but no witness whose testimony has been taken and reduced to writing on a preliminary examination must be subpoenaed or required to appear before the grand jury, until such testimony has been first submitted to and considered by the grand jury, but if such testimony has been lost or can not be found, or if the grand jury after considering the same still desires the presence of any such witnesses, they may be subpoenaed. [R. S. § 7634.]

Hist. (See Cr. Prac. '64, §§ 205-6) R. S. § 7634, reen. R. C. ib., reen. C. L. ib.

Cross ref. Legal evidence: §§ 7933-78.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 919; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10659-60.

Application: This section refers to the use of dispositions before the grand jury only, and not to their use before the trial jury. T. v. Evans (1890) 2 I. 651, 23 P. 232.

§ 8794. [7635] **Same: For defendant.** The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the prosecuting attorney to issue process for the witnesses. [R. S. § 7635.]

Hist. Cr. Prac. '64, § 207, R. S. § 7635, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 920; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10661.

§ 8795. [7636] **Sufficiency of evidence to warrant indictment.** The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury. [R. S. § 7636.]

Hist. Cr. Prac. '64, § 208, R. S. § 7636, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 921; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10662.

§ 8796. [7637] **Duty of juror having knowledge of offense.** If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors, who must thereupon investigate the same. [R. S. § 7637.]

Hist. Cr. Prac. '64, § 209, R. S. § 7637, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 992; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10663.

§ 8797. [7638] **Matters of inquiry.** The grand jury must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge and not indicted; into the condition and management of the public prisons within the county; and into the wilful and corrupt misconduct in office of public officers of every description, within the county. [R. S. § 7638.]

Hist. Cr. Prac. '64, § 210, R. S. § 7638, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 923; same as amended except "or" for "and" before "corrupt": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10664.

§ 8798. [7639] **Access to prisons and public records.** They are also entitled to free access, at all reasonable times, to the public prisons, and

to the examination, without charge, of all public records within the county. [R. S. § 7639.]

Hist. Cr. Prac. '64, § 211, R. S. § 7639, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 924; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10665.

§ 8799. [7640] Who may be present at sessions of jury. The grand jury may, at all reasonable times, ask the advice of the court, or the judge thereof, or of the prosecuting attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The prosecuting attorney of the county may at all times appear before the grand jury for the purpose of giving them information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he think it necessary, but no other person is permitted to be present during the sessions of the grand jury, except the members and witnesses actually under examination, and an interpreter, when necessary, and no person must be permitted to be present during the expressions of their opinions, or giving their votes upon any matter before them. [R. S. § 7640.]

Hist. Cr. Prac. '64, § 212, R. S. § 7640, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 925; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10666.

Members of panel: The latter clause of this section, which prescribes who may be present at sessions of the grand jury, means that no persons except members of the grand jury, witnesses, etc., may be present and does not refer to members of the panel although they are witnesses: T. v. Staples (1891) 3 I. 35, 26 P. 166.

Stenographer: Where the prosecuting attorney has a stenographer in the grand jury room for the purpose of taking down the evidence in shorthand for the use of the prosecution, unless it appears that the accused suffered in some way by the presence of the stenographer the action of the grand jury can not be disturbed. S. v. Barber (1907) 13 I. 65, 76, 88 P. 418.

§ 8800. [7641] Proceedings to be secret. Every member of the grand jury must keep secret whatever he himself, or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony, or upon trial therefor. [R. S. § 7641.]

Hist. (See Cr. Prac. '64, §§ 213, 214) R. S. § 7641, reen. R. C. ib., reen. C. L. ib.

Cross ref. Disclosure of indictment or presentment before arrest a misdemeanor: § 8199. Disclosure of deliberations a misdemeanor: § 8200.

Comp. leg.—Cal. Same: Pen. C. 1872, § 926; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10667-8.

§ 8801. [7642] Juror not to be questioned. A grand juror can not be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors. [R. S. § 7642.]

Hist. Cr. Prac. '64, § 215, R. S. § 7642, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 927; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10669.

ARTICLE 4.

PRESENTMENT AND PROCEEDINGS THEREON.

§ 8802. [7647] Presentment: How found. A presentment can not be found without the concurrence of at least 12 grand jurors. When so found, it must be signed by the foreman. [R. S. § 7647.]

Hist. Cr. Prac. '64, § 216, R. S. § 7647, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 931; repealed 1905.

N. D. Identical: C. Cr. P. § 10670.

§ 8803. [7648] **Must be presented to court.** The presentment, when found, must be presented by the foreman, in presence of the grand jury, to the court, and must be filed with the clerk. [R. S. § 7648.]

Hist. Cr. Prac. '64, § 217, R. S. § 7648, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 932, repealed 1905.

N. D. Similar: C. Cr. P. § 10671.

§ 8804. [7649] **Court may order bench warrant.** If the facts stated in the presentment constitute a public offense, triable in the county, the court must direct the clerk to issue a bench warrant for the arrest of the defendant. [R. S. § 7649.]

Hist. Cr. Prac. '64, § 220, R. S. § 7649, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 933; repealed 1905.

N. D. Similar: C. Cr. P. § 10672.

§ 8805. [7650] **Issuance of bench warrant.** The clerk, on the application of the judge or prosecuting attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench warrant under his signature and the seal of the court into one or more counties. [R. S. § 7650.]

Hist. Cr. Prac. '64 § 221, R. S. § 7650, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 934; repealed 1905.

N. D. Similar: C. Cr. P. § 10673.

§ 8806. [7651] **Form of bench warrant.** The bench warrant, upon presentment, must be substantially in the following form:

> County of ..... The state of Idaho to any sheriff, constable, marshal or policeman in this state: A presentment having been made on the .....day ....., 19..... to the district court of the county of....., charging C. D. with the crime of ....., (designating it generally) you are therefore commanded forthwith to arrest the above named C. D., and take him before E. F., a magistrate of this county, or in case of his absence or inability to act, before the nearest and most accessible magistrate in this county. Given under my hand with the seal of said court affixed, this .....day of ....., A. D. 19.....
>
> By order of the court.
>
> [Seal.] G. H., Clerk.

[R. S. § 7651.]

Hist. Cr. Prac. '64, § 222, R. S. § 7651, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 935; repealed 1905.

N. D. Similar: C. Cr. P. § 10674.

§ 8807. [7652] **Service of bench warrant.** The bench warrant may be served in any county, and the officer serving it must proceed thereon as upon a warrant of arrest on an information. [R. S. § 7652.]

Hist. (See Cr. Prac. '64, § 223) R. S. § 7652, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 936; repealed 1905.

Cross ref. Proceedings on warrant of arrest: §§ 8724-40.

N. D. Similar: C. Cr. P. § 10675.

§ 8808. [7653] **Proceedings of magistrate.** The magistrate, when the defendant is brought before him, must proceed upon the charges

contained in the presentment, in the same manner as upon a warrant of arrest on an information. [R. S. § 7653.]

Hist. Cr. Prac. '64, § 224, R. S. § 7653, reen. R. C. ib., reen. C. L. ib.

Cross ref. Examination before magistrate: §§ 8743-67.

Comp. leg.—Cal. Same: Pen. C. 1872, § 937; repealed 1905.

N. D. Similar: C. Cr. P. § 10676.

ARTICLE 5.

PROCEEDINGS BY INFORMATION.

§ 8809. [7655] Power and jurisdiction of courts. The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information for crimes, misdemeanors and offenses, to issue writs and process, and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments. ['90-91, p. 184, § 1.]

Hist. '90-91, p. 184, § 1, reen. '99, p. 125, § 1, reen. R. C. § 7655, reen. C. L. ib.

Comp. leg.—Neb. Identical: R. S. § 2751. S. v. Silva (1912) 21 I. 247 120 P. 85.

Cited: Re Marshall (1899) 6 I. 516, 56 P. 470; Davis v. Burke (1900) 179 U. S. 399, 45 L. ed. 249, 21 S. C. R. 210; Hodges v. Tucker (1914) 25 I. 563, 580, 581, 138 P. 1139.

Construed: Informations are of equal dignity with indictments, subject only to the limitations contained in Const. I, 8, to the effect that a defendant may be only accused by information after commitment by a magistrate and that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor. Re Winn (1916) 28 I. 461, 154 P. 497.

After a preliminary examination and the filing of an information the court acquires jurisdiction of the defendant and of the offense with which he is charged, from which it can not be deprived by any action of a grand jury convened at a subsequent term. Ib.

Change of venue: District court has no jurisdiction to transfer for trial from one county to another, criminal action not based on information or indictment. S. v. Cowen (1916) 29 I. 783, 162 P. 674.

§ 8810. Filing and indorsement of information. All informations shall be filed in the court having jurisdiction of the offense specified therein by the prosecuting attorney as informant; he shall subscribe his name thereto and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may rule or otherwise prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him: *Provided, however,* That the witnesses called by the state in rebuttal need not be indorsed upon the information. ['15, c. 68, § 1, p. 176.]

Hist. '90-91, p. 184, § 2, reen. '99, p. 125, § 2, modified by '99, p. 24, § 7; am. R. C. § 7656; am. '13, c. 41, p. 144; am. '15 c. 68 § 1, p. 176, reen. C. L. § 7656.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2722.

N. D. See C. Cr. P. § 10631.

Construed: This section is not mandatory, in the strict sense of that term; it is the duty of the trial court to enforce it, and of the prosecutor to comply with its terms. But this requirement does not mean that an information shall be quashed or that the prosecution shall in no case be permitted to have names indorsed upon the information after the same is filed, where good cause is shown at the time the application is made why the name or names were not indorsed at the time the information was filed, or why application was not sooner made after such information was filed. S. v. Allen (1911) 20 I. 263, 117 P. 849.

Clerk must file information: It is the duty of the clerk to file an information when presented by the prosecuting attorney; the consent of the judge or court to the filing of the same need not be obtained, and an order of the court or judge directing the clerk not to file an information so presented is without jurisdiction and does not excuse the clerk from filing the same. S. v. Quarles (1907) 13 I. 252, 89 P. 636.

Endorsement of additional witnesses: It is not error to permit the prosecuting attorney to indorse the names of additional witnesses to an information after the trial jury has been empaneled, where it is shown that such witnesses were unknown to him at that time. S. v. Wilmbusse (1902) 8 I. 608, 70 P. 849; S. v. Rooke (1904) 10 I. 388, 79 P. 82. But a showing should be made by affidavit or otherwise that the names of such additional witnesses were not known to the prosecuting attorney at the time the information was filed. S. v. Crea (1904) 10 I. 88, 76 P. 1013.

If additional witnesses to those whose names are endorsed on the indictment or information are discovered during the

trial, the prosecuting attorney should be required to show where he obtained the information concerning such witnesses, and, if the showing is sufficient, the court should then order the names of the witnesses placed on the indictment or information without delay. It is error to permit such additional witnesses to testify without their names being first endorsed on the indictment or information. S. v. Barber (1907) 13 I. 65, 88 P. 418.

The name of a witness may be indorsed upon an information after it is filed, where good cause is shown why it was not done before, as, by reason of the oversight and neglect of the prosecutor, and upon a showing that the defendant has not been and will not be misled or prejudiced by such failure; particularly where the court offers to grant a continuance, giving the defendant the necessary time in which to secure evidence to meet the testimony of the witness whose name is so indorsed. S. v. Allen, supra.

Witnesses in rebuttal: This section does not require the indorsement of the names of witnesses on the information that are called for the purpose of rebutting the testimony given on behalf of the defendant. S. v. Silva (1912) 21 I. 247, 120 P. 835.

§ 8811. [7657] **Statement of offense charged.** The offense charged in all informations shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases, and in all cases defendant or defendants shall have the same rights as to proceedings therein as he or they would have if prosecuted for the same offense upon indictment. ['93, p. 164, § 1.]

Hist. '90-91, p. 184, § 3; am. '93, p. 164, § 1, reen. '99, p. 125, § 3, reen. R. C. § 7657, reen. C. L. ib.

Cross ref. Requisites of indictment: §§ 8825-34.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2723.

Cited: S. v. Neil (1907) 13 I. 539, 90 P. 860; S. v. Andrus (1916) 29 I. 1, 156 P. 421; S. v. Lottridge (1916) 29 I. 53, 60, 155 P. 487.

Name of offense: Where the information incorrectly names an offense, but states special facts showing what the offense really is, the defendant is not prejudiced by the mistake in designating the offense. S. v. Curtis (1916) 29 I. 724, 161 P. 578.

Allegations: An indictment or information must allege all the facts constituting the offense sought to be charged. S. v. Scheminisky, 31 I. 504, 174 P. 611; S. v. Cole, 31 I. 603, 174 P. 131.

§ 8812. [7658] **Provisions concerning indictment applicable to information.** The provisions of this code in relation to indictments, and all other provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations and all prosecutions and proceedings thereon. [R. C. § 7658.]

Hist. '90-91, p. 184, § 4, reen. '99, p. 125, § 4; am. R. C. § 7658, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2724.

Cited: S. v. Clark (1894) 4 I. 7, 35 P. 710; Re Marshall (1899) 6 I. 516, 56 P. 470.

§ 8813. [7659] **Commitment and bail pending information.** Any person who may according to law be committed to jail, or become recognized or held to bail with sureties for his appearance in court to answer to any indictment may, in like manner, so be committed to jail or become recognized and held to bail for his appearance to answer to any information or indictment, as the case may be. ['90-91, p. 184, § 5.]

Hist. '90-91, p. 184, § 5, reen. '99, p. 125, § 5, reen. R. C. § 7659, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2725.

§ 8814. [7660] **Prosecuting attorney to inquire into facts.** It shall be the duty of the prosecuting attorney to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense wherein the offender shall be committed to jail or become recognized or held to bail, and if the prosecuting attorney shall determine in any such case that an information ought not to be filed, he shall

make, subscribe and file with the clerk of the court a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and such statement shall be filed at and during the term of court at which the offender shall be held for his appearance: *Provided,* That in such case such court may examine said statement, together with the evidence filed in the case; and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial. ['90-91, p. 184, § 6.]

Hist. '90-91, p. 184, § 6, reen. '99, p. 125, § 6, reen. R. C. § 7660, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2726.

N. D. C. Cr. P. § 10629.

§ 8815. [7661] **Grand jury to be drawn only by direction of judge.** Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within the state, as provided by law, unless the judge thereof shall so direct in writing, under his hand, and filed with the clerk of said court. ['90-91, p. 184, § 7.]

Hist. '90-91, p. 184, § 7, reen. '99, p. 125, § 7, reen. R. C. § 7661, reen. C. L. ib.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2727.

Order for grand jury: This section authorizes a district judge sitting at chambers in one county in his district, to make an order for a grand jury in another county, and is not, because it confers such authority, in conflict with Const. I, 8, which provides that a grand jury may be summoned upon the order of the "district court." S. v. Barber (1907) 13 I. 65, 88 P. 418.

§ 8816. [7662] **Preliminary examination necessary.** No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination: *Provided,* That information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon, as provided by law in like cases of demand upon indictment filed. ['90-91, p. 184, § 8.]

Hist. '90-91, p. 184, § 8, reen. '99, p. 125, § 8, reen. R. C. § 7662; compiled and reen. C. L. ib.

Cross ref. Commitment by magistrate prerequisite to information: Const. I, 8.

Comp. leg.—Neb. See Cobbey's Ann. St. vol. 1, § 2728.

Provision mandatory: This section is mandatory and one accused of crime can not be prosecuted by information until he shall have had a preliminary examination, or until he has waived his right to such examination, unless he is a fugitive from justice. S. v. Braithwaite (1891) 3 I. 119, 27 P. 731; S. v. Farris (1897) 5 I. 666, 51 P. 772.

The public prosecutor has no power to file an information against an accused person until after such person has been committed by a magistrate; and then he can file his information only for the offense for which the accused was committed. S. v. McGreevey (1909) 17 I. 453, 105 P. 1047.

Setting aside information: An information will not be set aside on the ground that the defendant had no preliminary examination as required by law where the motion is based on the fact that the witness who testified on such preliminary examination failed, on objection of counsel to answer questions incriminating her. S. v. Bond (1906) 12 I. 424, 86 P. 43.

Waiver of examination: This section authorizes the defendant to waive preliminary examination. S. v. Larkins (1897) 5 I. 200, 47 P. 945.

Allegation of examination: It is not necessary for the information to allege that the defendant has had a preliminary examination, or waived the same, but it is better practice to make such averment. S. v. Farris, supra.

Fugitive from justice: Where one of several defendants is a fugitive from justice that fact may be properly inserted in information. S. v. Curtis (1916) 29 I. 724, 161 P. 578.

CHAPTER 319.

INDICTMENT.

ARTICLE 1.

FINDING AND PRESENTMENT OF THE INDICTMENT.

§ 8817. [7665] **Indictment: How found.** An indictment can not be found without the concurrence of at least 12 grand jurors. When so found it must be indorsed, a true bill, and the indorsement must be signed by the foreman of the grand jury. [R. S. § 7665.]

Hist. Cr. Prac. '64, § 225, R. S. § 7665, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 940; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10677.

Presumptions: An indictment indorsed "A true bill. A Rossi, foreman. Presented and filed in open court in presence of the grand jury," will be presumed, in the absence of a showing to the contrary, to have been found by a legal grand jury although there is no showing of the number of persons comprising the grand jury. P. v. Buchanan (1878) 1 I. 681.

§ 8818. [7666] **Failure to find indictment: Return of depositions.** If 12 grand jurors do not concur in finding an indictment against a defendant who has been held to answer, the depositions, if any, transmitted to them must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed. [R. S. § 7666.]

Hist. Cr. Prac. '64, § 226, R. S. § 7666, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except the words "and statement" inserted after "depositions": Pen. C. 1872, § 941; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10678.

§ 8819. [7667] **Resubmission of charge after dismissal.** The dismissal of the charge does not prevent its resubmission to a grand jury as often as the court may direct, but without such direction it cannot be resubmitted. [R. S. § 7667.]

Hist. Cr. Prac. '64, § 227, R. S. § 7667, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 942; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10679.

§ 8820. [7668] **Indorsement of names of witnesses.** When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court. [R. S. § 7668.]

Hist. Cr. Prac. '64, § 228, R. S. § 7668, reen. R. C. ib., reen. C. L. ib.

Cross ref. Indorsement of information: § 8810.

Comp. leg.—Cal. Same: Pen. C. 1872, § 943; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10680.

Cited: S. v. Allen (1911) 20 I. 263, 117 P. 849.

Indorsement of additional witnesses: This provision of the statute is mandatory and should be enforced at all times in prosecutions either by indictment or information, and if additional witnesses to those whose names are indorsed on the indictment or information are discovered during the trial, the prosecuting attorney should be required to show where he obtained the information concerning such witnesses and, if the showing is sufficient, the court should then order the names of the witnesses placed on the indictment or information without delay. It is error to permit such additional witnesses to testify without their names first being indorsed on the indictment or information. S. v. Barber (1907) 13 I. 65, 88 P. 418.

§ 8821. [7669] **Presentment and filing of indictment.** An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk. [R. S. § 7669.]

Hist. (See Cr. Prac. '64, § 229) R. S. § 7669, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 944; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10681.

Clerk must file indictment: It is the duty of the clerk to file an indictment when presented by the grand jury, and

the consent of the judge or court to the filing of the same need not be obtained, and an order of the court or judge directing the clerk not to file an indictment so presented is without jurisdiction, and does not excuse the clerk from filing the same. S. v. Quarles (1907) 13 I. 252, 89 P. 636.

§ 8822. [7670] Indictment of defendant not in custody. When an indictment is found against a defendant not in custody, the same proceedings must be had as are described by sections 8847 to 8862, against a defendant who fails to appear for arraignment. [R. S. § 7670.]

Hist. Cr. Prac. '64, § 230, R. S. § 7670, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 945; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10682.

ARTICLE 2.

RULES AND PLEADINGS.

Cross ref. Provisions relating to indictment apply to information: § 8812.

§ 8823. [7675] Rules of pleading. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this code. [R. S. § 7675.]

Hist. Cr. Prac. '64, § 231, R. S. § 7675, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 948; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10683.

Common law forms abolished: This section was enacted in order to abrogate the strictness of the common law form of indictment, and it is not necessary that an indictment or information should charge the offense with all the strictness and particularity required at common law. S. v. Sly (1905) 11 I. 110, 80 P. 1125; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

Procedure exclusive: There is no statutory authority for entertaining a demurrer to a plea of once in jeopardy, as appears from an examination of §§ 8879, 8903, 8904, and art. 1, § 7, of the constitution. S. v. Crawford, 32 I. —, 179 P. 511.

§ 8824. [7676] First pleading is indictment. The first pleading on the part of the people is the indictment. [R. S. § 7676.]

Hist. Cr. Prac. '64, § 232, R. S. § 7676, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 949; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10684.

§ 8825. [7677] Requirements of indictment. The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. [R. S. § 7677.]

Hist. Cr. Prac. '64, § 233, R. S. § 7677, reen. R. C. ib., reen. C. L. ib.

Cross ref. For cases construing indictments for a particular offense, see the specific offense.

Comp. leg.—Cal. Same: Pen. C. 1872, § 950; "or information" inserted after "indictment" as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10685.

Cited: Perry v. S. (1894) 4 I. 224, 38 P. 655; S. v. Webb (1899) 6 I. 428, 55 P. 892; S. v. Shuff (1903) 9 I. 115, 72 P. 664; S. v. Adams (1904) 9 I. 582, 75 P. 258; S. v. Collett & Ireland (1904) 9 I. 608, 75 P. 271; S. v. Rooke (1904) 10 I. 388, 79 P. 82; S. v. Sly (1905) 11 I. 110, 80 P. 1125; S. v. Wetter (1905) 11 I. 433, 83 P. 341; S. v. Swensen (1905) 13 I. 1, 81 P. 379; S. v. Neil (1907) 13 I. 539, 90 P. 860; S. v. Squires (1908) 15 I. 545, 98 P. 414; Re Dawson (1911) 20 I. 178, 117 P. 696.

Failure to state title: Failure to state the title of an action is not fatal. P. v. Walters (1869) 1 I. 271.

Name of offense: The offense need not be named. The facts alleged, rather than the designation of the offense, control. S. v. Mickey (1915) 27 I. 626, 150 P. 39.

Where an information incorrectly names an offense, but states special facts showing what it really is, the defendant is not prejudiced by the mistake in designation. S. v. Curtis (1916) 29 I. 724, 161 P. 578.

An information which merely names the offense without in any way stating how it was committed, or the acts committed which it is claimed consummated or culminated in the commission of the offense, is insufficient and will not serve to put the defendant upon his trial. S. v. Smith (1914) 25 I. 541, 138 P. 1107.

Indictment for murder: The failure of an indictment for murder to allege the killing to have been deliberate and pre-

meditated is not fatal where it alleges the killing to have been done with malice aforethought. P. v. AhChoy (1870) 1 I. 317; S. v. Ellington (1895) 4 I. 529, 43 P. 60; S. v. Shuff (1903) 9 I. 115, 72 P. 664. Contra, see P. v. O'Callaghan (1886) 2 I. 156, 9 P. 414.

Order of statement immaterial: The order in which the matters required by this section appear in the indictment is immaterial, and the "conclusions" may be construed with the charging part in order to sustain the indictment. T. v. Evans (1888) 2 I. 425, 17 P. 139.

Sufficiency in general: Under this and the following sections an indictment or information which charges the accused with some crime known to the statute, committed on or about a specified date, and alleges that the unlawful act was done wilfully, unlawfully and feloniously, and indicates the particular crime charged, with the time, place, circumstances and conditions of the same, is sufficient. S. v. Steers (1906) 12 I. 174, 85 P. 104.

An indictment is sufficient if it describes the offense in the language of the statute by which it is created or defined and the words employed make the charge clear to the common understanding. All that is necessary is that on its face, it is sufficient to advise the defendant of the nature of the charge against him, and that it describes the offense with such particularity as to serve as a shield in case of a second prosecution for the same offense. S. v. O'Neil (1913) 24 I. 582, 135 P. 60; S. v. Andrus (1916) 29 I. 1, 156 P. 421; S. v. Lottridge (1916) 29 I. 53, 155 P. 487; S. v. Rogers (1917) 30 I. 259, 163 P. 912; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

§ 8826. [7678] **Same: Form of indictment.** It may be substantially in the following form:

The state of Idaho against A. B., in the district court of the .....judicial district, in the county of..... .....term, A. D. 19.....

A. B. is accused by the grand jury of the county of..... by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like), committed as follows:

The said A. B., on the .....day of....., A. D. 19....., at the county of....., (here set forth the act or omission charged as an offense).

[R. S. § 7678.]

Hist. (See Cr. Prac. '64, § 234) R. S. § 7678, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872. § 951; similar as amended: Kerr's C. ib.

Cited: S. v. Webb (1899) 6 I. 428, 55 P. 892; S. v. Rathbone (1901) 8 I. 161, 67 P. 186; S. v. Shuff (1903) 9 I. 115, 72 P. 664; S. v. Adams (1904) 9 I. 582, 75 P. 258; S. v. Rooke (1904) 10 I. 388, 79 P. 82; S. v. Sly (1905) 11 I. 110, 80 P. 1125; S. v. Wetter (1905) 11 I. 533, 83 P. 341; S. v. Steers (1906) 12 I. 174, 85 P. 104; S. v. Swensen (1915) 13 I. 1, 81 P. 379; S. v. Neil (1907) 13 I. 539, 90 P. 860; Re Dawson (1911) 20 I. 178, 117 P. 696; S. v. Smith (1914) 25 I. 541, 138 P. 1107; S. v. Mickey (1915) 27 I. 626, 150 P. 39; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

Formal parts: An information may properly have four parts, (1) caption, (2) inducement or commencement, (3) charging part, and (4) conclusion. S. v. Flower (1915) 27 I. 223, 147 P. 786.

Conclusion: An information charging the unlawful sale of intoxicating liquors which concludes with the clause, "Contrary to the form, force and effect of the statutes in such cases made and provided and against the peace and dignity of the state of Idaho," is a sufficient allegation that the liquor was sold or disposed of contrary to law, whether it be the local option law or any other public statute. S. v. Schmitz (1911) 19 I. 566, 114 P. 1.

§ 8827. [7679] **Certainty required of indictment.** It must be direct and certain as it regards:

1. The party charged.
2. The offense charged.
3. The particular circumstances of the offense charged, when they are necssary to constitute a complete offense. [R. S. § 7679.]

Hist. Cr. Prac. '64, § 235, R. S. § 7679, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 952; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10686.

Cited: S. v. Webb (1899) 6 I. 428, 55 P. 892; S. v. Rathbone (1901) 8 I. 161, 67 P. 186; S. v. Shuff (1903) 9 I. 115, 72 P. 664; S. v. Adams (1904) 9 I. 582, 75 P. 258; S. v. Collett & Ireland (1904) 9 I. 608, 75 P. 271; S. v. Rooke (1904) 10 I. 388, 79 P. 82; S. v. Sly (1905) 11 I. 110, 80 P. 1125; S. v. Wetter (1905) 11 I. 433, 83 P. 341; S. v. Steers (1906) 12 I. 174, 85 P. 104; Re Moyer (1906) 12 I. 250, 85 P. 897; S. v. Swensen (1905) 13 I. 1, 81 P. 379; S. v. Neil (1907) 13 I. 539, 90 P. 860; Re Dawson (1911) 20 I. 178, 117 P. 696; S. v. O'Neil (1913) 24 I. 582, 135

P. 60; S. v. Smith (1914) 25 I. 541, 138 P. 1107; S. v. Drury (1914) 25 I. 787, 139 P. 1129; S. v. Mickey (1915) 27 I. 626, 150 P. 39; S. v. Curtis (1916) 29 I. 724, 161 P. 578; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

Name of defendant: An information containing the name of a defendant in the caption, but not in the charging part, is insufficient to charge such person with a crime. S. v. Flower (1915) 27 I. 223, 147 P. 786.

§ 8828. [7680] **Indictment by fictitious name.** When a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment. [R. S. § 7680.]

Hist. Cr. Prac. '64, § 236, R. S. § 7680, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 953; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10687.

Cited: S. v. Yturaspe (1912) 22 I. 360, 125 P. 802; (Erroneously for R. C. § 7860) S. v. Allen (1913) 23 I. 772, 131 P. 1112.

§ 8829. [7681] **Single offense to be charged.** The indictment must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count. [R. S. § 7681.]

Hist. (See Cr. Prac. '64, § 237) R. S. § 7681, reen. R. C. ib., reen. C. L. ib.

Cross ref. Joinder of offenses relating to sale of intoxicating liquors: § 2642.

Comp. leg.—Cal. Different: Pen. C. 1872, § 954; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10688.

Cited: Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813.

Separate counts: The rule established by this section is not violated by setting forth the same offense in different forms and under different counts. T. v. Guthrie (1888) 2 I. 432, 17 P. 39.

In an information charging murder in the first degree, the prosecutor may charge the same offense in two counts, one count alleging the murder to have been committed wilfully, deliberately and with malice aforethought, and the other count charging that the murder was committed in the perpetration of, or attempt to perpetrate, robbery. S. v. Gruber (1911) 19 I. 692, 115 P. 1.

§ 8830. [7682] **Allegation as to time.** The precise time at which the offense was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense. [R. S. § 7682.]

Hist. Cr. Prac. '64, § 238, R. S. § 7682, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 955; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10689.

§ 8831. [7683] **Erroneous designation of person injured.** When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material. [R. S. § 7683.]

Hist. Cr. Prac. '64, § 239, R. S. § 7683, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 956; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10690.

Proof of ownership: This section does not dispense with proof in larceny cases of ownership as laid in the indictment. P. v. Frank (1868) 1 I. 200. But this case was overruled on this point, and it was held that an information for larceny which alleges the title to the thing stolen to be in B is supported by proof of property in the firm of B & J. S. v. Ireland (1904) 9 I. 686, 75 P. 257.

Variance: The fact that an information charges murder to have been committed on one whose true name is unknown while the evidence showed the killing of a person of known name, is not a fatal variance. S. v. St. Clair (1898) 6 I. 109, 53 P. 1.

§ 8832. [7684] **Construction of words.** The words used in an indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning. [R. S. § 7684.]

Hist. Cr. Prac. '64, § 240, R. S. § 7684, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 957; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10691.

Cited: U. S. v. Kuntze (1889) 2 I. 480, 21 P. 407.

§ 8833. [7685] **Same: Statute words.** Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used. [R. S. § 7685.]

Hist. Cr. Prac. '64, § 241, R. S. § 7685, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 958; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10692.

Cited: S. v. Ellington (1895) 4 I. 529, 43 P. 60; S. v. Shuff (1903) 9 I. 115, 72 P. 664; (Dis. op.) S. v. Swensen (1905) 13 I. 1, 81 P. 379; S. v. Brill (1912) 21 I. 269, 121 P. 79; S. v. Mickey (1915) 27 I. 626, 150 P. 39.

§ 8834. [7686] **Sufficiency of indictment.** The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. That it was found by a grand jury of the county in which the court was held.

3. That the defendant is named, or, if his name cannot be discovered that he is described by a fictitious name, with a statement that his true name is to the jury unknown.

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein.

5. That the offense was committed at some time prior to the time of finding the indictment.

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case. [R. S. § 7686.]

Hist. Cr. Prac. '64, § 242, R. S. § 7686, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 959; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10693.

Cited: U. S. v. Kuntze (1889) 2 I. 480, 21 P. 407; S. v. Ellington (1895) 4 I. 529, 43 P. 60; S. v. Alcorn (1901) 7 I. 599, 64 P. 1014; S. v. Shuff (1903) 9 I. 115, 72 P. 664; S. v. Neil (1907) 13 I. 539, 90 P. 860; (Dis. op.) S. v. Swensen (1905) 13 I. 1, 81 P. 379; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

Omission of title: Failure of the indictment to state the title of the action is not fatal. P. v. Walters (1869) 1 I. 271.

Indictment for murder: The failure of an indictment for murder to allege the killing to have been done deliberately and premeditatedly is not fatal where it alleges the killing to have been done with malice aforethought. P. v. Ah Choy (1870) 1 I. 317.

Information for manslaughter: Where the acts or elements which constitute the offense of involuntary manslaughter are sufficiently charged to enable a person of common understanding to know what is intended, the information is sufficient even though it fails to allege that the defendant is charged with involuntary manslaughter, and makes the general charge of manslaughter. The facts alleged, rather than the designation of the offense, control. S. v. Mickey (1915) 27 I. 626, 150 P. 39.

Venue: The venue of an offense must be laid in the complaint, indictment or information. S. v. Cole, 31 I. 603, 174 P. 131.

§ 8835. [7687] **Same: Defects of form.** No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits. [R. S. § 7687.]

Hist. (See Cr. Prac. '64, § 243) R. S. § 7687, reen. R. C. ib., reen. C. L. ib.

Cross ref. Formal defects in general disregarded: § 9191.

Comp. leg.—Cal. Same: Pen. C. 1872, § 960; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10694.

Cited: Re Marshal (1899) 6 I. 516, 56

P. 470; (In brief of counsel) S. v. Swensen (1905) 13 I. 1; S. v. Mickey (1915) 27 I. 626, 150 P. 39; S. v. Andrus (1916) 29 I. 1, 156 P. 421; S. v. Lottridge (1916) 29 I. 53, 155 P. 487; (Con. op.) S. v. Lundhigh (1917) 30 I. 365, 380, 164 P. 690.

Liberal construction: The rule of liberal construction of indictments and informations has been adopted in this state. S. v. Caldwell (1912) 21 I. 663, 123 P. 299.

Clerical errors: A clerical error charging the commission of the crime on November 15th, 1905, whereas the information was filed on March 15, 1905, is not fatal where it alleges that, prior to the filing thereof, the defendant had had a preliminary examination, and otherwise identifies the date intended to be charged as November 15, 1904. S. v. Roland (1905) 11 I. 490, 83 P. 337.

Indictment for murder: The failure of an indictment for murder to specifically allege that the killing was done "unlawfully, wilfully and with deliberation, premeditation and with malice aforethought" is not fatal. S. v. Ellington (1895) 4 I. 529, 43 P. 60. S. v. Shuff (1903) 9 I. 115, 72 P. 664.

Indictment for libel: An indictment for libel is sustained under this section where it sets out the libelous matter in haec verba prefaced by the words, "that is to say," although it did not use the technical phrase "to the tenor and effect following," or the "following words and figures." Bonney v. S. (1892) 3 I. 288, 29 P. 185.

§ 8836. [7688] **Presumptions and facts judicially noticed.** Neither presumptions of law nor matters of which judicial notice is taken, need be stated in an indictment. [R. S. § 7688.]

Hist. Cr. Prac. '64, § 244, R. S. § 7688, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 961; same except "or information" added: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10695.

§ 8837. [7689] **Pleading judgments.** In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial. [R. S. § 7689.]

Hist. Cr. Prac. '64, § 245, R. S. § 7689, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 962; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10696.

§ 8838. [7690] **Pleading private statutes.** In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof. [R. S. § 7690.]

Hist. Cr. Prac. '64, § 246, R. S. § 7690, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 963; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10697.

§ 8839. [7691] **Indictment for libel.** An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, or of the defamatory matter on which the indictment is founded; but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial. [R. S. § 7691.]

Hist. Cr. Prac. '64, § 247, R. S. § 7691, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 964; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10698.

§ 8840. [7692] **Misdescription of forged instrument.** When an instrument which is the subject of an indictment for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial. [R. S. § 7692.]

Hist. Cr. Prac. '64, § 248, R. S. § 7692, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 965; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10699.

§ 8841. [7693] **Indictment for perjury.** In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. [R. S. § 7693.]

Hist. Cr. Prac. '64, § 249, R. S. § 7693, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 966; as amended, "or information" inserted after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10700.

§ 8842. [7694] **Indictment for larceny or embezzlement.** In an indictment for the larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof. [R. S. § 7694.]

Hist. R. S. § 7694, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 967; same as amended except "or information" inserted after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10701.

§ 8843. [7695] **Indictment for selling obscene books.** An indictment for exhibiting, publishing, passing, selling, or offering to sell, or having in possession, with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof. [R. S. § 7695.]

Hist. R. S. § 7695, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 968; same except "or information" inserted after "indictment" as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10702.

§ 8844. [7696] **Conviction or acquittal of several defendants.** Upon an indictment against several defendants, any one or more may be convicted or acquitted. [R. S. § 7696.]

Hist. Cr. Prac. '64, § 250, R. S. § 7696, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 970; same except "or information" inserted after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10704.

Cited: (Erroneously for R. C. § 7679) S. v. Drury (1914) 25 I. 794, 139 P. 1129.

§ 8845. [7697] **Distinction between accessories and principals abolished.** The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal. [R. S. 7697.]

Hist. Cr. Prac. '64, § 251, R. S. § 7697, reen. R. C. ib., reen. C. L. ib.

Cross ref. Principals defined: § 8093. Accessories defined: § 8094.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 971; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10705.

Cited: S. v. Cramer (1911) 20 I. 639.

119 P. 30, S. v. Curtis (1917) 30 I. 537, 165 P. 999; S. v. Nolan (1917) 31 I. 71, 169 P. 295.

Charge against accessory: This section has so changed the rules of pleading that it is not necessary to charge an accessory before the fact as such. P. v. Ah Hop (1878) 1 I. 698. But an indictment charging an accessory as such is not bad. T. v. Guthrie (1888) 2 I. 432, 17 P. 39.

Instructions: It is not error to instruct the jury in the language of this section. S. v. Bland (1904) 9 I. 796, 76 P. 780.

An instruction that one who aids or abets in the commission of a crime, though absent at the time of its commission, shall be prosecuted, tried and punished as a principal, is erroneous, but is cured by other instructions to the effect that the jury must find from the evidence, beyond a reasonable doubt, that the defendant acted knowingly, and with a guilty purpose and intent. This last instruction excludes a possibility of a conviction because defendant innocently aided in the perpetration of a crime. S. v. Corcoran (1900) 7 I. 220, 61 P. 1034.

§ 8846. [7698] **Trial of accessories without principal.** An accessory to the commission of a felony may be indicted, tried, and punished, though the principal may be neither indicted nor tried. [R. S. § 7698.]

Hist. (See Cr. Prac. '64, § 252) R. S. § 7698, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 972; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10706.

Cited: Re Moyer (1906) 12 I. 250, 85 P. 897.

CHAPTER 320.

AFTER INDICTMENT AND BEFORE TRIAL.

ARTICLE 1.

ARRAIGNMENT.

§ 8847. [7710] **Place of arraignment.** When the indictment is filed, the defendant must be arraigned thereon before the court in which it is found. [R. S. § 7710.]

Hist. (See Cr. Prac. '64, § 254) R. S. § 7710, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 976; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10708.

§ 8848. [7711] **Presence of defendant.** If the indictment is for a felony the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel. [R. S. § 7711.]

Hist. Cr. Prac. '64, § 255, R. S. § 7711, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 977; same as amended except "or information" inserted after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10709.

§ 8849. [7712] **Order for production of defendant.** When his personal appearance is necessary, if he is in custody, the court may direct and the officer in whose custody he is must bring him before it to be arraigned. [R. S. § 7712.]

Hist. (See Cr. Prac. '64, § 256) R. S. § 7712, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 978; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10710.

§ 8850. [7713] **Issuance of bench warrant.** If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear to be arraigned when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench warrant for his arrest. [R. S. § 7713.]

Hist. Cr. Prac. '64, § 257; R. S. § 7713, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 979; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10711.

§ 8851. [7714] **Clerk to issue warrant.** The clerk, on the application of the prosecuting attorney, may, at any time after the order,

whether the court is sitting or not, issue a bench warrant to one or more counties. [R. S. § 7714.]

Hist. Cr. Prac. '64, § 258; R. S. § 7714, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 980; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10712.

§ 8852. [7715] **Form of bench warrant.** The bench warrant upon the indictment must, if the offense be a felony, be substantially in the following form:

County of .....

The state of Idaho, to any sheriff, constable, marshal or policeman of this state:

An indictment having been found on the .....day of....., A. D. 19....., in the district court of the.....judicial district, in and for the county of....., charging C. D. with the crime of..... (designating it generally); you are therefore commanded forthwith to arrest the above named C. D., and bring him before that court to answer said indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of.....

Given under my hand with the seal of said court affixed, this .....day of....., A. D.....

By order of said court.

(Seal.) E. F., Clerk.

[R. S. § 7715.]

Hist. Cr. Prac. '64, § 259, R. S. § 7715, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 981; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10713.

§ 8853. [7716] **Bail.** The defendant, when arrested under a warrant for an offense not bailable, must be held in custody of the sheriff of the county in which the indictment is found, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the bench warrant a direction to the following effect, "or, if he requires it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer to the indictment"; and the court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of .....dollars." [R. S. § 7716.]

Hist. (See Cr. Prac. '64, §§ 260, 261, 262) R. S. § 7716, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 982; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10714-16.

§ 8854. [7717] **Service of warrant.** The bench warrant may be served in any county, in the same manner as a warrant of arrest. [R. S. § 7717.]

Hist. (See Cr. Prac. '64, § 263) R. S. § 7717, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same with additional clause: Pen C. 1872, § 983; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10717.

§ 8855. [7718] **Proceedings on giving bail.** If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner

as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon. [R. S. § 7718.]

Hist. (See Cr. Prac. '64, § 264) R. S. § 7718, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 984; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10718.

§ 8856. [7719] **Increasing bail.** When the indictment is for a felony and the defendant, before the finding thereof, has given bail for his appearance to answer the charge, the court to which the indictment is presented may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order. [R. S. § 7719.]

Hist. Cr. Prac. '64, § 265, R. S. § 7719, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 985; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10719.

§ 8857. [7720] **Commitment of defendant.** If the defendant is present when the order is made he must be forthwith committed. If he is not present a bench warrant must be issued and proceeded upon in the manner provided in this article. [R. S. § 7720.]

Hist. Cr. Prac. '64, § 266, R. S. § 7720, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 986; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10720.

§ 8858. [7721] **Right to counsel.** If the defendant appears for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel the court must assign counsel to defend him. [R. S. § 7721.]

Hist. (See Cr. Prac. '64, § 267) R. S. § 7721, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 987; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10721.

§ 8859. [2086] **Appointment of counsel for accused.** Whenever upon the trial of a person in the district court, upon an information or indictment, it appears to the satisfaction of the court that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which service such counsel must be paid out of the county treasury, upon order of the judge of the court, as follows: In all cases of misdemeanor the sum of $10; in all cases of felony other than murder the sum of $25, and in cases of murder the sum of $50. ['97, p. 74, § 6.]

Hist. '97, p. 74, § 6, reen. '99, p. 26, § 1, reen. R. C. § 2086, reen. C. L. § 7721a.

Cited: Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

§ 8860. [7722] **Arraignment: How made.** The arraignment must be made by the court, or by the clerk or prosecuting attorney, under its direction, and consists in reading the indictment to the defendant and delivering to him a copy thereof and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment. [R. S. § 7722.]

Hist. Cr. Prac. '64, § 268, R. S. § 7722, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 988; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10722.

§ 8861. [7723] **Same: Question as to true name.** When the defendant is arraigned he must be informed that if the name by which he is indicted is not his true name, he must then declare his true name, or be

proceeded against by the name in the indictment. If he gives no other name the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted. [R. S. § 7723.]

Hist. Cr. Prac. '64, §§ 269, 270, 271; R. S. § 7723, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 989; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10723-5.

§ 8862. [7724] Time allowed for answer. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the indictment. He may, in answer to the arraignment, move to set aside, demur, or plead to, the indictment. [R. S. § 7724.]

Hist. (See Cr. Prac. '64, §§ 272, 273) R. S. § 7724, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 990; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10726-7.

ARTICLE 2.

SETTING ASIDE THE INDICTMENT.

§ 8863. [7730] Grounds for setting aside indictment. The indictment must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

1. When it is not found, indorsed and presented as prescribed in this code.

2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon.

3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in article 3 of chapter 318.

4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror. [R. S. § 7730.]

Hist. Cr. Prac. '64, §§ 274, 275; R. S. § 7730, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 995; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10728.

Cited: T. v. Staples (1891) 3 I. 35, 26 P. 166.

Time for motion: A motion to quash an indictment must be made before demurrer or plea. P. v. Butler (1869) 1 I. 231.

Grounds of motion: The statute in defining and allowing the grounds stated in this section for setting aside an indictment excludes all others; therefore the failure of the district attorney to sign a bill of indictment as required by Laws 3d Terr. Ses. c. 187, § 3, is not ground for setting aside an indictment. Ib.

This clause means that no person except a member of the grand jury must be present and does not refer to members of the panel, and an indictment will not be set aside because of the presence of a grand juror who was a witness against the defendant. T. v. Staples (1891) 3 I. 35, 26 P. 166.

Requisites of motion: A motion to set aside an indictment on the ground that certain of the grand jurors had formed an unqualified opinion as to the guilt of the defendant prior to the examination by them of the case as grand jurors, should be supported by proof, at least to the extent of the oath of the defendant, and when not so supported the court can not be required to summon such grand jurors into court to be examined on the charges so made against them. S. v. Hardy (1895) 4 I. 478, 42 P. 507.

Waiver of defects: An objection to an information on the ground that the depositions taken before the committing magistrate on the preliminary examination are not certified by the magistrate as required by law, is waived, unless raised on motion to quash or to set aside the information before plea. S. v. Clark (1894) 4 I. 7, 35 P. 710.

An irregularity in failing to verify an information can be taken advantage of by the defendant only by motion to set

aside the information. Re Marshall (1899) 6 I. 516, 56 P. 470.

A defendant who is under arrest and appears in open court with his counsel at the time the grand jury is impaneled and declines to challenge the panel or any of the individual jurors can not thereafter move to set aside the indictment on any ground which would have been cause for challenge to the grand jury. S. v. Corcoran (1900) 7 I. 220, 61 P. 1034.

§ 8864. [7731] **Waiver of objections.** If the motion to set aside the indictment is not made the defendant is precluded from afterward taking the objections mentioned in the last section. [R. S. § 7731.]

Hist. Cr. Prac. '64, § 276, R. S. § 7731, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 996; "or information" after "indictment" as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10729.

Waiver of objection: An objection to an information because not verified is waived if not made by motion. Re Marshall (1899) 6 I. 516, 56 P. 470.

§ 8865. [7732] **Hearing and disposition of motion.** The motion must be heard at the time it is made, unless for cause the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury. [R. S. § 7732.]

Hist. Cr. Prac. '64, §§ 277, 278, 279; R. S. § 7732, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 997; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10730-2.

§ 8866. [7733] **Order for resubmission.** If the court directs the case to be resubmitted, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment; and, unless a new indictment is found before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make the order prescribed by the preceding section. [R. S. § 7733.]

Hist. Cr. Prac. '64, §§ 280, 281, R. S. § 7733, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 998; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10733.

§ 8867. [7734] **Order no bar to future prosecution.** An order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense. [R. S. § 7734.]

Hist. Cr. Prac. '64, § 282, R. S. § 7734, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 999; "or information" after "indictment" as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10734.

ARTICLE 3.

DEMURRER.

§ 8868. [7740] **Pleadings by defendant.** The only pleading on the part of the defendant is either a demurrer or a plea. [R. S. § 7740.]

Hist. Cr. Prac. '64, § 283, R. S. § 7740, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1002; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10735.

§ 8869. [7741] **Same: When interposed.** Both the demurrer and plea must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose. [R. S. § 7741.]

Hist. Cr. Prac. '64, § 284, R. S. § 7741, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1003; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10736.

§ 8870. [7742] **Ground for demurrer.** The defendant may demur to the indictment when it appears upon the face thereof, either:

1. That the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county.

2. That it does not substantially conform to the requirements of sections 8825, 8826 and 8827.

3. That more than one offense is charged in the indictment.

4. That the facts stated do not constitute a public offense.

5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. [R. S. § 7742.]

Hist. Cr. Prac. '64, § 285, R. S. § 7742, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 1004; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10737.

Cited: S. v. Hinckley (1895) 4 I. 490, 42 P. 510; Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

§ 8871. [7743] **Form of demurrer.** The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it must be disregarded. [R. S. § 7743.]

Hist. Cr. Prac. '64, § 286, R. S. § 7743, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1005; "or information" inserted after "indictment" as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10738.

§ 8872. [7744] **Argument on demurrer.** Upon the demurrer being filed, the argument upon the objections presented thereby must be heard, either immediately or at such time as the court may appoint. [R. S. § 7744.]

Hist. Cr. Prac. '64, § 287, R. S. § 7744, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1006; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10739.

§ 8873. [7745] **Judgment on demurrer.** Upon considering the demurrer, the court must give judgment either allowing or disallowing it, and an order to that effect must be entered upon the minutes. [R. S. § 7745.]

Hist. Cr. Prac. '64, § 288; R. S. § 7745, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1007; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10740.

Cited: Re Pierce (1901) 8 I. 183, 67 P. 316.

§ 8874. [7746] **Effect of judgment.** If the demurrer is allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be resubmitted to the same or another grand jury. [R. S. § 7746.]

Hist. Cr. Prac. '64, § 289, R. S. § 7746, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1008; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10741.

Leave to file new information: An order sustaining a demurrer to an information and granting the county attorney leave to file a new information is equivalent to directing the county attorney to file a new information, in so far as to authorize the filing of the same and the trial of the accused thereunder. Re Pierce (1901) 8 I. 183, 67 P. 316.

§ 8875. [7747] **Discharge of defendant.** If the court does not direct the case to be resubmitted, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him. [R. S. § 7747.]

Hist. Cr. Prac. '64, § 290, R. S. § 7747, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1009; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10742.

Cited: Re Pierce (1901) 8 I. 183, 67 P. 316.

§ 8876. [7748] **Resubmission of charge.** If the court directs that the case be resubmitted, the same proceedings must be had thereon as when the indictment is set aside on motion. [R. S. § 7748.]

Hist. (See Cr. Prac. '64, § 291) R. S. § 7748, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1010; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10743.

§ 8877. [7749] **Plea after disallowance.** If the demurrer is disallowed, the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may direct. If he does not plead, the plea of not guilty must be entered for him. [R. S. § 7749.]

Hist. Cr. Prac. '64, § 292, R. S. § 7749, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "judgment may be pronounced against him" for "the plea of not guilty must be entered for him": Pen. C. 1872, § 1011; Kerr's C. ib.

N. D. Analogous in part: C. Cr. P. § 10744.

§ 8878. [7750] **Objections must be taken by demurrer.** When the objections declared grounds of demurrer by this article appear upon the face of the indictment, they can only be taken by demurrer, except that the objections to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial under the plea of not guilty, or after the trial in arrest of judgment. [R. S. § 7750.]

Hist. Cr. Prac. '64, § 293, R. S. § 7750, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1012; as amended: Kerr's C. ib .

N. D. Analogous: C. Cr. P. § 10745.

Waiver of objections: An objection that an indictment charges more than one offense is waived by failure to demur. P. v. Nash (1868) 1 I. 206.

An objection that an information does not state facts sufficient to constitute a public offense, in order to be available on appeal, must be raised by demurrer or by motion in arrest. It can not be raised for the first time in the supreme court. S. v. Hinckley (1895) 4 I. 490, 42 P. 510.

The failure of an indictment for murder to state that death occurred within a year and a day is waived if not raised by demurrer. Re Alcorn (1900) 7 I. 101, 60 P. 561.

The necessity of alleging, in an information for grand larceny, in taking property from one's person, the value of the property is a question going to the sufficiency of the information. It is not a question of jurisdiction, and the only way in which such question can be raised is by demurrer at the trial, under the plea of not guilty; or, after the trial, in arrest of judgment. If the defendant pleads guilty, and no motion in arrest of judgment is made, the objection that the information does not charge a public offense, in not alleging the value of the property taken, is waived. Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

ARTICLE 4.

PLEA.

§ 8879. [7755] **Kinds of pleas.** There are four kinds of pleas to an indictment. A plea of:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense

charged, which may be pleaded either with or without the plea of not guilty.

4. Once in jeopardy. [R. S. § 7755.]

Hist. (See Cr. Prac. '64, § 294) R. S. § 7755, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same through subd. 3 except "three" for "four"; subd. 4 omitted: Pen. C. 1872, § 1016; same as amended except "or information" inserted after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10746.

Cited: S. v. Gutke (1914) 25 I. 737, 139 P. 346.

Effect of plea of guilty: Where the accused, with a full knowledge of his constitutional rights, enters a plea of guilty and presents no issue of fact for trial, there can be no trial. The conviction is the accused's admission, and takes the place of a verdict of a jury. Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

Plea not demurrable: The plea of once in jeopardy is not demurrable, as under § 7780 it raises an issue of fact, triable only by jury. S. v. Crawford, 32 I —, 179 P. 511.

§ 8880. [7756] **Form of pleas.** Every plea must be oral, and entered upon the minutes of the court in substantially the following form:

1. If the defendant pleads guilty: "The defendant pleads that he is guilty of the offense charged."

2. If he pleads not guilty: "The defendant pleads that he is not guilty of the offense charged."

3. If he pleads a former conviction or acquittal: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of.....(naming it) rendered at .....(naming the place), on the.....day of....."

4. If he pleads once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place and court.)" [R. S. § 7756.]

Hist. (See Cr. Prac. '64, §§ 295, 296) R. S. § 7756, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1017; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10747.

Cited: S. v. Suttles (1907) 13 I. 88, 88 P. 238; (In brief of counsel) S. v. Gutke (1914) 25 I. 737-8.

§ 8881. [7757] **Plea of guilty.** A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment against a corporation, in which case it may be put in by counsel. The court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted: *Provided,* That upon the application of the defendant, a plea of guilty may be received, and sentence may be passed, at chambers as provided in section 6493 of the Code of Civil Procedure. [R. C. § 7757.]

Hist. Cr. Prac. '64, §§ 297, 298) R. S. § 7757, modified by '07, p. 317, § 1; am. R. C. § 7757, reen. C. L. ib.

Cross ref. Plea of guilty may be received upon application of defendant and judgment may be entered at chambers: § 6493.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1018; same except "or information" inserted after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10748-9.

Cited: Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

§ 8882. [7758] **Plea of not guilty.** The plea of not guilty puts in issue every material allegation of the indictment. [R. S. § 7758.]

Hist. Cr. Prac. '64, § 299, R. S. § 7758, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1019; "or information" added, as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10750.

§ 8883. [7759] **Evidence admissible under plea of not guilty.** All matters of fact tending to establish a defense other than former conviction or acquittal, or once in jeopardy, may be given in evidence under the plea of not guilty. [R. S. § 7759.]

Hist. (See Cr. Prac. '64, § 300) R. S. § 7759, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1020; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10751.

§ 8884. [7760] **What is not a former acquittal.** If the defendant was formerly acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense. [R. S. § 7760.]

Hist. Cr. Prac. '64, § 301, R. S. § 7760, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1021; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10752.

§ 8885. [7761] **What is a former acquittal.** Whenever the defendant is acquitted on the merits he is acquitted of the same offense, notwithstanding any defect in form or substance in the indictment on which the trial was had. [R. S. § 7761.]

Hist. Cr. Prac. '64, § 302, R. S. § 7761, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1022; "or information" inserted after "indictment" as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10753.

Cited: S. v. Gutke (1914) 25 I. 737, 139 P. 346.

§ 8886. [7762] **Conviction or acquittal bars included offenses.** When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment, the conviction, acquittal or jeopardy is a bar to another indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense included therein, of which he might have been convicted under that indictment. [R. S. § 7762.]

Hist. Cr. Prac. '64, § 303; R. S. § 7762, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1023; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. 10754.

Cited: S. v. Gutke (1914) 25 I. 737, 139 P. 346.

§ 8887. [7763] **Refusal to answer.** If the defendant refuses to answer the indictment by demurrer or plea, a plea of not guilty must be entered. [R. S. § 7763.]

Hist. Cr. Prac. '64, § 304, R. S. § 7763, reen. R. C. ib., reen. C. L. ib.

Cross ref. Refusal to plead after demurrer is overruled: § 8877.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1024; "or information" inserted after "indictment," as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10755.

ARTICLE 5.

REMOVAL OF THE ACTION BEFORE TRIAL.

§ 8888. [7768] **Ground for removal.** A criminal action, prosecuted by indictment, may be removed from the court in which it is pending, on the application of the defendant, on the ground that a fair and impartial trial can not be had in the county where the indictment is pending. [R. S. § 7768.]

Hist. Cr. Prac. '64, § 305, R. S. § 7768, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1033; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10756.

Cited: S. v. Reed (1894) 3 I. 754, 35 P. 706.

Discretion of court: The refusal of a change of venue is largely discretionary with the trial court, and the refusal of such change is not ground for a reversal of the conviction, where it manifestly appears that the defendant had a fair and impartial trial, and that no trouble was experienced in securing a jury. S. v. Gilbert (1902) 8 I. 346, 69 P. 62.

Conflicting affidavits: An application for change of venue on the ground of popular prejudice was properly denied where the affidavits as to whether the defendant could have a fair trial or not were about equally divided. S. v. Rooke (1904) 10 I. 388, 79 P. 82.

Appeal from justice court not transferable: A district court to which an appeal in a misdemeanor case has been taken from a judgment of a justice of the peace has no jurisdiction to transfer the case for trial to the district court of another county. S. v. Cowen (1916) 29 I. 783, 162 P. 674.

§ 8889. [7769] **Form of application: Hearing in absence of defendant.** The application must be made in open court and in writing, verified by the affidavit of the defendant, a copy of which must be served upon the prosecuting attorney at least one day before the application is made. Whenever the affidavit shows that the defendant can not safely appear in person to make the application, because the popular excitement against him is so great as to endanger his personal safety, and such statement is sustained by other testimony, the application may be made by counsel, and heard and determined in the absence of the defendant, though he is indicted for felony, and has not at the time of such application been arrested, or given bail, or been arraigned, or pleaded or demurred to the indictment. [R. S. § 7769.]

Hist. (See Cr. Prac. '64, § 306) R. S. § 7769, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1934; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10757.

Counter affidavits: The prosecution may file counter affidavits in opposition to those filed by the defendant. S. v. Reed (1894) 3 I. 754, 35 P. 706.

Presumptions: The fact that affidavits in support of a motion for a change of venue filed at one term of the court showed a condition of affairs under which the defendant could not procure an impartial trial, does not raise a presumption that the same condition of affairs continues at a succeeding term to which the case was adjourned without objection, and at which the motion was renewed. Ib.

§ 8890. [7770] **Order of removal.** If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection. [R. S. § 7770.]

Hist. Cr. Prac. '64, § 307, R. S. § 7770, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1035; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10758.

Cited: S. v. Reed (1894) 3 I. 754, 35 P. 706.

Discretion of court: An application for a change of venue is addressed to the discretion of the trial court, and it is not error to overrule the same when based upon the unsupported affidavit of the defendant. S. v. St. Clair (1898) 6 I. 109, 53 P. 1.

§ 8891. [7771] **Transfer of cause.** The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses. [R. S. § 7771.]

Hist. Cr. Prac. '64, § 308, R. S. § 7771, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1036; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10759.

§ 8892. [7772] **Removal of defendant.** If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned to the custody of the sheriff of the county to which the action is removed. [R. S. § 7772.]

Hist. Cr. Prac. '64, § 309, R. S. § 7772, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1037; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10760.

§ 8893. [7773] **Proceedings after removal.** The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, upon application of the prosecuting attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retain-

ed. The costs accruing upon such removal and trial are a charge against the county in which the indictment was found. [R. S. § 7773.]

Hist. Cr. Prac. '64, §§ 310, 674, R. S. § 7773, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1038; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10763.

Cited: S. v. Steers (1906) 12 I. 174, 85 P. 104.

§ 8894. [7774] **Certification of costs.** The clerk of the court in the county to which such action is, or may be, removed must certify the amount of said costs to the auditor of the proper county, which must be allowed and paid as other county charges. [R. S. § 7774.]

Hist. Cr. Prac. '64, § 675, R. S. § 7774, reen. R. C. ib., reen. C. L. ib.

§ 8895. [7775] **Removal on application of state.** The district courts of this state, within their respective districts, are hereby empowered to change the place of trial in criminal cases, other than misdemeanors, upon the application of the state, on the relation of the county attorney of the county in which any indictment or information may be filed, or upon the relation of any attorney duly and especially appointed to prosecute said cause, such application to be sustained by the affidavits of at least two resident taxpayers in the county where the offense is alleged to have been committed, on the ground that a fair and impartial trial can not be had in the county where the criminal act is alleged to have been committed. ['07, p. 168, § 1.]

Hist. '07, p. 168, § 1, reen. R. C. § 7775, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 10768.

Justice court appeal not transferable: The district court has no jurisdiction to transfer for trial from one county to another a criminal action not based on information or indictment. S. v. Cowen (1916) 29 I. 783, 162 P. 674.

§ 8896. [7776] **Form of application.** Such application must be made in open court and in writing, verified by the affidavit of the relator, a copy of which must be served upon the defendant or his attorney at least one day before the application is made. ['07, p. 168, § 2.]

Hist. '07, p. 168, § 2, reen. R. C. § 7776, reen. C. L. ib.

§ 8897. [7777] **Order of removal.** If the court is satisfied, from the facts set forth in such application and affidavit, that a fair and impartial trial can not be had, an order must be made for the removal of the action to the proper court of a county free from a like objection. ['07, p. 168, § 3.]

Hist. '07, p. 168, § 3, reen. R. C. § 7777, reen. C. L. ib.

§ 8898. [7778] **Transfer of cause.** The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses. ['07, p. 168, § 4.]

Hist. '07, p. 168, § 4, reen. R. C. § 7778, reen. C. L. ib.

§ 8899. [7779] **Removal of defendant.** If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned to the custody of the sheriff of the county to which the action is removed. ['07, p. 168, § 5.]

Hist. '07, p. 168, § 5, reen. R. C. § 7779, reen. C. L. ib.

§ 8900. [7779a] **Proceedings after transfer.** The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, upon application of the county attorney or the relator, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained. The costs accruing upon such removal and trial are a charge against the county from which such criminal action was removed. ['07, p. 168, § 6.]

Hist. '07, p. 168, § 6, reen. R. C. § 7779a, reen. C. L. ib.

§ 8901. [7779b] **Certificate of costs.** The clerk of the court in the county to which said action is, or may be, removed must certify the amount of said costs to the auditor of the proper county, which must be allowed and paid as other county charges. ['07, p. 168, § 7.]

Hist. '07, p. 168, § 7, reen. R. C. § 7779b, reen. C. L. ib.

§ 8902. [7779c] **Appeal from order denying application.** The sufficiency, in both law and fact, of the application and supporting affidavits may be reviewed by the supreme court on appeal from an order of the district court denying such application, and such appeal may be taken by the state on the relation of the county attorney of the county in which such application is made, or of any other attorney duly appointed and acting in the prosecution of such cause, and the procedure governing such appeal shall be, as near as may be, the same as provided by law for appeals in other criminal cases. ['07, p. 168, § 8.]

Hist. '07, p. 168 § 8, reen. R. C. § 7779c, reen. C. L. ib.

ARTICLE 6.

MODE OF TRIAL.

§ 8903. [7780] **Issue of fact defined.** An issue of fact arises:

1. Upon a plea of not guilty.
2. Upon a plea of a former conviction or acquittal of the same offense.
3. Upon a plea of once in jeopardy. [R. S. § 7780.]

Hist. (See Cr. Prac. '64, § 311) R. S. § 7780, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1041; Kerr's C. ib. S. v. Gutke (1914) 25 I. 737, 744, 139 P. 346.

N. D. Identical: C. Cr. P. § 10769.

Cited: S. v. Chambers (1904) 9 I. 678, 75 P. 274; S. v. Gutke (1914) 25 I. 737, 139 P. 346.

Triable only by jury: The plea of once in jeopardy raises an issue of fact under this section and is not demurrable. S. v. Crawford, 32 I. —, 179 P. 511.

§ 8904. [7781] **Trial by jury.** Issues of fact must be tried by jury, unless a trial by jury be waived, in criminal cases not amounting to felony, by the consent of both parties expressed in open court and entered in the minutes. In case of misdemeanor, the jury may consist of 12 or any number less than 12 upon which the parties may agree in open court, but five-sixths of the jury may render a verdict, which verdict shall have the same effect as a unanimous verdict. ['90-91, p. 165, § 1.]

Hist. R. S. § 7781; am. '90-91, p. 165, § 1, reen. '99, p. 110, § 1, reen. R. C. § 7781, reen. C. L. ib.

Cross ref. Waiver of trial by jury: Const. I, 7. Five-sixths verdict in cases of misdemeanor: Ib.

Comp. leg.—Cal. See C. C. P. 1872, § 194; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10770.

Cited: S. v. Gutke (1914) 25 I. 737, 139 P. 346.

Trial: "Trial" means an issue of fact presented by the plea of the accused, in which event, if the offense charged be a felony, a jury can not be waived; in such a case the court is without juris-

diction to try such issue of fact and there can be no conviction except upon trial by jury. Re Dawson (1911) 20 I. 178, 117 P. 696, 35 L. R. A. (N. S.) 1146.

Plea of guilty: If an accused person, with full knowledge of his constitutional right to a trial by jury, enters a plea of guilty and presents no issue of fact for trial, there can be no trial; in that event the conviction of the accused, by his own admission, takes the place of the verdict of a jury. Ib.

Plea of once in jeopardy: The plea of once in jeopardy presents an issue of fact which must be tried by a jury and is not demurrable. S. v. Crawford, 32 I. —, 179 P. 511.

§ 8905. [7782] **Presence of defendant.** If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant. [R. S. § 7782.]

Hist. R. S § 7782, reen R C ib, reen. C. L. ib.

Comp. leg.—Cal. Same with additional provisions: Pen. C. 1872, § 1043; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10771.

Cited: S. v. Baker (1916) 28 I. 727, 156 P. 103.

Temporary absence: While this section is mandatory, yet a brief, temporary and voluntary absence of the defendant from the courtroom during the argument of counsel and ruling on a motion for a view, is not such a violation of the statute as to be ground for reversal. S. v. McGinnis (1906) 12 I. 336, 85 P. 1089.

ARTICLE 7.

FORMATION OF TRIAL JURY.

§ 8906. [7787] **Jury to be formed as in civil actions.** Trial juries for criminal actions are formed in the same manner as trial juries in civil actions. [R. S. § 7787.]

Hist. Cr. Prac. '64, § 313, R. S. § 7787, reen. R. C. ib., reen. C. L. ib.

Cross ref. Formation of trial juries in civil actions: §§ 6524, 6539.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1046; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10774.

Repeal: The provision of Cr. Prac. act, § 313, trial juries in criminal actions shall be chosen in the same manner as trial juries in civil actions, if it was intended to apply to the impaneling of trial juries, was repealed to that extent by the Code of Civil Procedure, § 111 (R. S. § 3974). P. v. Kuok Wah Choi (1885) 2 I. 90, 6 P. 112.

§ 8907. [7788] **Preparation of calendar.** The clerk must prepare a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail. [R. S. § 7788.]

Hist. Cr. Prac. '64, § 314, R. S. § 7788, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1047; similar as amended: Kerr's C. ib.

§ 8908. [7789] **Order of trying cases.** The issues on the calendar must be disposed of in the following order, unless upon application of either party, for good causes shown by affidavit, and upon two days' notice to the opposite party, with service of a copy of the affidavit in support of the application, the court shall direct an indictment to be tried out of its order:

1. Indictments for felony, when the defendant is in custody.
2. Indictments for misdemeanor, when the defendant is in custody.
3. Indictments for felony, when the defendant is on bail.
4. Indictments for misdemeanor, when the defendant is on bail.

[R. S. § 7789.]

Hist. Cr. Prac. '64, § 315, R. S. § 7789, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1048; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10772.

§ 8909. [7790] **Time to prepare for trial.** After his plea the defendant is entitled to at least two days to prepare for trial. [R. S. § 7790.]

Hist. Cr. Prac. '64, § 316, R. S. § 7790, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1049; Kerr's C. ib.

Time for preparation: Under this section, the defendant is entitled to two days after plea, but not necessarily to two days after the cause is set for hearing, in which to prepare for trial. S. v. Steers (1906) 12 I. 174, 85 P. 104.

ARTICLE 8.

POSTPONEMENT OF TRIAL.

§ 8910. [7795] **Trial may be postponed for cause.** When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day of the same or of the next term. [R. S. § 7795.]

Hist. Cr. Prac. '64, § 317, R. S. § 7795, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "shown by affidavit" inserted after "cause": Pen. C. 1872, § 1052; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10787.

Right to postponement: Defendant not entitled to continuance as a matter of right, but must make statutory showing. S. v. Fleming (1910) 17 I. 471, 482, 106 P. 305.

Discretion of court: An application for continuance is addressed to the sound judicial discretion of the court, which will not be reviewed unless abused. T. v. Guthrie (1888) 2 I. 432, 17 P. 39; S. v. St. Clair (1898) 6 I. 109, 53 P. 1; S. v. Rice (1901) 7 I. 762, 66 P. 87; S. v. Rooke (1904) 10 I. 388, 79 P. 82; S. v. Wetter (1905) 11 I. 433, 83 P. 341; S. v. Steers (1906) 12 I. 174, 85 P. 104; S. v. Cannon (1914) 26 I. 182, 140 P. 963.

Absence of witnesses: To entitle the defendant to a postponement of the trial on the ground of the absence of a witness, he must show what he expects to prove by such witness; that such evidence is material to his defense; that such evidence is true; that the witness is not absent by his procurement or with his consent; that he has used due diligence to procure the presence of said witness at the trial, and failed to do so; and that there is a reasonable probability that he can and will procure the attendance of said witness at the next term of the court. S. v. Corcoran (1900) 7 I. 220, 61 P. 1034.

It is not error to overrule an application for a continuance on the ground of absence of witnesses, where it is not shown that the evidence of the absent witness can be furnished at a future term of court, or what it is proposed to prove by the absent witnesses. S. v. Rooke (1904) 10 I. 388, 79 P. 82; S. v. Allen (1911) 20 I. 263, 117 P. 849.

There is no abuse of discretion in denying an application for continuance where the party applying fails to show that if the continuance should be granted he could procure material evidence tending to establish his defense, which he could not reasonably expect to produce unless such continuance should be granted. S. v. Gruber (1911) 19 I. 692, 115 P. 1.

Same: Admission of showing: It is not error to deny a continuance in a criminal case where the prosecuting attorney admits that if the witnesses were present they would testify as set forth in the affidavit for a continuance. S. v. St. Clair (1898) 6 I. 109, 53 P. 1.

CHAPTER 321.

DURING TRIAL AND BEFORE JUDGMENT.

ARTICLE 1.

CHALLENGING THE JURY.

§ 8911. [7815] **Kinds of challenge.** A challenge is an objection made to trial jurors and is of two kinds:

1. To the panel.
2. To an individual juror. [R. S. § 7815.]

Hist. Cr. Prac. '64, § 318, R. S. § 7815, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1055; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10788.

§ 8912. [7816] **Defendants must join in challenge.** When several defendants are tried together they can not sever their challenges, but must join therein. [R. S. § 7816.]

Hist. Cr. Prac. '64, § 319, R. S. § 7816, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1056; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10789.

§ 8913. [7817] **Panel defined.** The panel is a list of jurors returned by a sheriff to serve at a particular court or for the trial of a particular action. [R. S. § 7817.]

Hist. Cr. Prac. '64, § 320, R. S. § 7817, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1057; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10790.

§ 8914. [7818] **Challenge to panel defined.** A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party. [R. S. § 7818.]

Hist. Cr. Prac. '64, § 321, R. S. § 7818, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1058; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10791.

Cited: Heitman v. Morgan (1905) 10 I. 562, 79 P. 225; S. v. Jordan (1911) 19 I. 192, 199, 112 P. 1049.

§ 8915. [7819] **Grounds of challenge to panel.** A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn. [R. S. § 7819.]

Hist. Cr. Prac. '64, § 322, R. S. § 7819, reen. R. C. ib., reen. C. L. ib.

Cross ref. Drawing and return of jury in civil actions: §§ 6524-36.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1059; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10792.

Cited: Heitman v. Morgan (1905) 10 I. 562, 79 P. 225.

Invalid objections: An objection to the panel of a jury in a criminal prosecution on the ground that some of the jurors were summoned under a special venire on Sunday is properly overruled. S. v. Gilbert (1902) 8 I. 346, 69 P. 62, 1 Ann. Cas. 280.

The fact that a person may be exempt from jury service but is drawn for such service is not a cause of challenge to the panel. S. v. Silva (1912) 21 I. 247, 120 P. 835.

§ 8916. [7820] **When and how taken.** A challenge to the panel must be taken before a juror is sworn, and must be in writing, and must plainly and distinctly state the facts constituting the ground of challenge. [R. S. § 7820.]

Hist. Cr. Prac. '64, § 323, R. S. § 7820, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or be noted by the phonographic reporter" inserted after "writing": Pen. C. 1872, § 1060; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10793.

Cited: S. v. Jordan (1911) 19 I. 192, 112 P. 1049.

Mandatory: This provision is mandatory. S. v. Scoble (1916) 28 I. 721, 155 P. 969.

Waiver: Where defendant and his counsel knew before the trial that the sheriff would be a state witness, and failed to challenge the panel on that ground, such objection is waived. S. v. Steen (1916) 29 I. 337, 158 P. 499.

§ 8917. [7821] **Exception to challenge.** If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered on the minutes of the court, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true. [R. S. § 7821.]

Hist. Cr. Prac. '64, §§ 324, 325, R. S. § 7821, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or of the phonographic reporter" inserted after "court": Pen. C. 1872, § 1061; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10794.

Nature of exception: An exception to a challenge is practically a demurrer thereto, and admits the facts stated therein; consequently, if a challenge is good in point of law, it should be sustained over an exception. P. v. Armstrong (1887) 2 I. 298, 13 P. 342.

§ 8918. [7822] **Overruling or allowance of exception.** If, on the exception, the court finds the challenge sufficient, it may, if justice require it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception is allowed the court may, in like manner, permit an amendment of the challenge. [R. S. § 7822.]

Hist. Cr. Prac. '64, § 326, R. S. § 7822, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1062; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10795.

§ 8919. [7823] **Denial of challenge: Trial.** If the challenge is denied, the denial may be oral, and must be entered on the minutes of the court, and the court must proceed to try the question of fact; and upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. [R. S. § 7823.]

Hist. Cr. Prac. '64, §§ 327, 328, R. S. § 7823, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or of the phonographic reporter" inserted after "court": Pen. C. 1872, § 1063; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10796-7.

§ 8920. [7824] **Challenge for bias of officers.** When the panel is formed, or in part formed, from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror. [R. S. § 7824.]

Hist. Cr. Prac. '64, § 329, R. S. § 7824, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or in part formed" omitted: Pen. C. 1872, § 1064; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10798.

Officer a witness for the prosecution: In connection with § 8930 a challenge to the special panel may be taken for the implied bias of the officer summoning the same, when it appears that he is a witness for the prosecution. S. v. Jordan (1911) 19 I. 192, 112 P. 1049.

Where defendant did not interpose a challenge to the panel because of the implied bias of the sheriff by reason of being a witness for the prosecution, the failure of the trial court to dismiss the jury was not error. S. v. Steen (1916) 29 I. 337, 158 P. 439.

§ 8921. [7825] **Discharge of jury on sustaining challenge.** If, either upon an exception to the challenge or a denial of the facts, the challenge is allowed, the court must discharge the jury, so far as the trial of the indictment in question is concerned. If it is disallowed, the court must direct the jury to be impaneled. [R. S. § 7825.]

Hist. Cr. Prac. '64, § 330, R. S. § 7825, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1065; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10799.

§ 8922. [7826] **Instruction as to right of challenge.** Before a juror is called the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so before the jury is sworn. [R. S. § 7826.]

Hist. (See Cr. Prac. '64, § 311) R. S. § 7826, reen. R. C. ib., reen. C.L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1066; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10800.

Record need not show compliance: The record need not affirmatively show that the defendant was instructed as to his right to challenge a juror, as required by this section, the presumption being that the statute was complied with. S. v. Suttles (1907) 13 I. 88, 88 P. 238; S. v. O'Brien (1907) 13 I. 112, 88 P. 425.

Failure to comply nonprejudicial: Where a defendant is represented by counsel on the trial and exercises his right to challenge jurors, he is not prejudiced by the neglect of the trial court to advise him, in accordance with the statute, that, if he intends to challenge an individual juror, he must do so before the jury is sworn. S. v. Smith (1917) 30 I. 337, 164 P. 519.

§ 8923. [7827] **Kinds of challenge to individual juror.** A challenge to an individual juror is either:

1. For cause; or,
2. Peremptory. [R. S. § 7827.]

Hist. Cr. Prac. '64, § 332, R. S. § 7827, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1067; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10801.

§ **8924.** [7828] **Time for challenge.** It must be taken before the jury is sworn to try the cause. [R. S. § 7828.]

Hist. Cr. Prac. '64, § 333, R. S. § 7828, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1068; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10802.

Impaneling a jury: This in connection with other relevant sections of the criminal practice act contemplate that in trials for murder, after a jury has been called, he shall remain under the control of the court until he is rejected as incompetent; or, if accepted, until the termination of the trial. This justifies the practice of requiring the parties to exercise all their challenges, either peremptory or for cause, before another juror is called. But it is proper, in the discretion of the court, to modify this practice by permitting the clerk to draw 12 names from the box before any challenges are interposed, and after these are passed upon for cause, to allow others to be drawn to take the place of those excused, and thus permit the defendant to pass upon and examine all those called before exercising his peremptory challenges. But in case of recess or adjournment, the peremptory challenges should be exercised or waived upon all those passed for cause, and those accepted should be sworn to try the cause, and should remain under the control of the court. P. v. Kuok Wah Choi (1885) 2 I. 90, 6 P. 112.

§ **8925.** [7829] **Peremptory challenge defined.** A peremptory challenge can be taken by either party and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him. [R. S. § 7829.]

Hist. Cr. Prac. '64, § 334, R. S. § 7829, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1069; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10803.

§ **8926.** [7830] **Number of peremptory challenges.** If the offense charged is punishable with death or with imprisonment in the state prison for life, the defendant is entitled to 10 and the state to 10 peremptory challenges. On a trial for any other offense the defendant is entitled to six and the state to six peremptory challenges. ['07, p. 171, § 1.]

Hist. (See Cr. Prac. '64, § 335) R. S. § 7830; am. '07, p. 171, § 1, reen. R. C. § 7830, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1070; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10804-5.

Cited: S. v. Browne (1896) 4 I. 723, 44 P. 552.

§ **8927.** [7831] **Challenge for cause defined.** A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either:

1. General—That the juror is disqualified from serving in any case; or,

2. Particular—That he is disqualified from serving in the action on trial. [R. S. § 7831.]

Hist. Cr. Prac. '64, 336, R. S. § 7831, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1071; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10806-7.

Cited: T. v. Evans (1890) 2 I. 651, 23 P. 232.

Waiver: Defendant can not urge as error on appeal refusal of court to allow challenge for cause, when he does not exercise all his peremptory challenges. S. v. Fondren (1913) 24 I. 663, 135 P. 265.

§ **8928.** [7832] **General causes of challenge.** General causes of challenge are:

1. A conviction of felony.

2. A want of any of the qualifications prescribed by law to render a person a competent juror.

3. Unsoundness of mind, or such defect in the faculties of the mind

or organs of the body as render him incapable of performing the duties of a juror. [R. S. § 7832.]

Hist. Cr. Prac. '64, § 337, R. S. § 7832, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1072; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10808.

Cited: T. v. Evans (1890) 2 I. 651, 23 P. 232.

§ 8929. [7833] **Particular causes of challenge.** Particular causes of challenge are of two kinds:

1. For such a bias as, when the existence of the fact is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality, and which is known in this code as actual bias. [R. S. § 7833.]

Hist. Cr. Prac. '64, § 338, R. S. § 7833, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar with additional provisions: Pen. C. 1872, § 1073; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10809.

Cited: T. v. Evans (1890) 2 I. 651, 23 P. 232.

§ 8930. [7834] **Grounds of challenge for implied bias.** A challenge for implied bias may be taken for all or any of the following causes and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family or boarder or lodger of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being a party adverse to the defendant in a civil action or having complained against or been accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment.

5. Having served on a trial jury which has tried another person for the offense charged in the indictment.

6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside or which was discharged without a verdict after the case was submitted to it, or being a witness for the prosecution, or subpoenaed as such.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.

9. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror. [R. S. § 7834.]

Hist. Cr. Prac. '64, § 339, R. S. § 7834, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1074; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10810.

Cited: S. v. Jordan (1911) 19 I. 192, 112 P. 1049; S. v. Clark (1915) 27 I. 48, 146 P. 1107; S. v. Steen (1916) 29 I. 337, 158 P. 499.

Form of challenge: The specific ground upon which a challenge for implied bias is made must be stated, but failure to have such grounds stated, unless preju-

dicial to the defendant, is not ground for reversal. S. v. Gordon (1897) 5 I. 297, 48 P. 1061.

Grounds of challenge: When the relation of client and attorney exists between one of the jurors and defendant's attorney, it is proper for the court to sustain a challenge for implied bias. S. v. McGraw (1899) 6 I. 635, 59 P. 178.

Insufficient ground for challenge: Where a juror has been summoned upon an open venire by the coroner of the county, and it appears that he had been summoned upon a previous open venire by the sheriff of the county, which previous panel had been quashed by the court for implied bias of the sheriff, such facts are not ground of challenge to the individual juror for implied bias under this section. S. v. Scoble (1916) 28 I. 721, 155 P. 969.

§ 8931. [7835] **Exemption not ground for challenge.** An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted. [R. S. § 7835.]

Hist. Cr. Prac. '64, § 340, R. S. § 7835, reen. R. C. ib., reen. C. L. ib.

Cross ref. Exemption from jury service: §§ 6520-1.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1075; Kerr's C ib.

N. D. Identical: C. Cr. P. § 10811.

Cited: S. v. Silva (1912) 21 I. 247, 120 P. 835.

§ 8932. [7836] **Challenge for bias: How stated.** In a challenge for implied bias, one or more of the legal causes must be alleged. In a challenge for actual bias, it must be alleged that the juror is biased against the party challenging. In either case the challenge may be oral, but must be entered on the minutes of the court. [R. S. § 7836.]

Hist. Cr. Prac. '64, § 341, R. S. § 7836, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1076; additional provisions as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10812.

Prejudice against attorney: Prejudice of a juror against the attorney for a defendant in a criminal case is not ground of challenge for actual bias. S. v. Gordon (1897) 5 I. 297, 48 P. 1061.

Grounds: To sustain a challenge for implied bias, one or more of the causes set forth in § 8930 must be stated. But while the court does not err in overruling the challenge, where that is not done, it ought, where the defendant is charged with a serious offense and where great prejudice may exist against him, to be very careful, in the selection of a jury, to reject all persons who are actually biased and prejudiced in the matter. S. v. Clark (1915) 27 I. 48, 146 P. 1107.

§ 8933. [7837] **Exceptions to challenge.** The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon. The adverse party may also orally deny the facts alleged as the ground of challenge. [R. S. § 7837.]

Hist. Cr. Prac. '64, § 342, R. S. § 7837, reen. R. C. ib., reen. C. L. ib.

Cross ref. Exception to challenge to panel: § 7817.

Comp. leg.—Cal. Analogous: Pen. C. 1872, § 1077; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10813.

§ 8934. [7838] **Trial of challenge.** If the facts are denied the challenge must be tried by the court. ['05, p. 9, § 1.]

Hist. (See Cr. Prac. '64, § 343) R. S. § 7838; am. '05, p. 9, § 1, reen. R. C. § 7838, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 10814.

§ 8935. [7841] **Examination of challenged juror.** Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry. [R. S. § 7841.]

Hist. Cr. Prac. '64, § 346, R. S. § 7841, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1081; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10815.

Further examination of jurors: Until the jury is accepted and sworn, it is within the sound discretion of the court to permit either the state or the defendant to further examine the jurors. S. v. Crea (1904) 10 I. 88, 76 P. 1013.

Duty of defendant's counsel: The law requires counsel for the defendant in selecting a juror to try diligently to ascertain his state of mind and his qualification as a juror. If he neglects to do so, the defendant can not complain after the trial. S. v. O'Neil (1913) 24 I. 582, 135 P. 60.

§ 8936. [7842] **Examination of witnesses.** Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge. [R. S. § 7842.]

Hist. Cr. Prac. '64, § 347, R. S. § 7842, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1082; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10816.

§ 8937. [7843] **Disposition of challenge for bias.** On the trial of a challenge for either implied or actual bias, the court must determine the law and the fact, and must either allow or disallow the challenge, and direct an entry accordingly upon the minutes. ['05, p. 9, § 1.]

Hist. (See Cr. Prac. '64, §§ 348, 349) R. S. § 7843; am. '05, p. 9, § 1, reen. R. C. § 7843, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1083; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10817.

§ 8938. [7846] **Exhaustion of challenges for cause.** All challenges to an individual juror, except peremptory, must be taken, first by the people, and then by the defendant, and each party must exhaust all his challenges for cause before the other begins. [R. S. § 7846.]

Hist. Cr. Prac. '64 § 351, R. S. § 7846, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: Pen. C. 1872, § 1086; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10818.

Exhaustion of challenges: It is not error to permit the district attorney to exhaust his challenges for cause to each juror before passing such juror to the defense. S. v. Gordon (1897) 5 I. 297, 48 P. 1061.

§ 8939. [7847] **Order of challenges for cause.** The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel.
2. To an individual juror, for a general disqualification.
3. To an individual juror, for an implied bias.
4. To an individual juror, for an actual bias. [R. S. § 7847.]

Hist. Cr. Prac. '64, § 352, R. S. § 7847, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1087; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10819.

§ 8940. [7848] **Alternation of peremptory challenges.** After the jury is passed for cause, both parties alternately, beginning with the people, may take their peremptory challenges. But no challenge is lost by failure to alternate if the panel is opened by the other party; and each party is entitled to a full panel before exercising a peremptory challenge. [R. S. § 7848.]

Hist. (See Cr. Prac. '64, § 353) R. S. § 7848, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 1088; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10820.

Alternation of challenges: Where the statute gives to the state in criminal cases only half the number of peremptory challenges allowed the defendant, and requires such challenges to be made alternately, the defendant should be required to exercise two peremptory challenges to the state's one. S. v. Browne (1896) 4 I. 723, 44 P. 552.

ARTICLE 2.

THE TRIAL.

§ 8941. [7855] **Order of trial.** The jury having been impaneled and sworn, the trial must proceed in the following order:

1. If the indictment is for a felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.

2. The prosecuting attorney or other counsel for the people must open the cause and offer the evidence in support of the indictment.

3. The defendant or his counsel may then open the defense and offer his evidence in support thereof.

4. The parties may then respectively offer rebutting testimony only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the prosecuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude, the argument.

6. The judge must then charge the jury if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact; such charge must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally. [R. S. § 7855.]

Hist. (See Cr. Prac. '64, § 354) R. S. § 7855, reen. R. C. ib., reen. C. L. ib.

Cross ref. Charging the jury: § 8972.

Comp. leg.—Cal. Same except additional clause added to subd. 6: Pen. C. 1872, § 1093; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10821.

Cited: T. v. Nelson (1890) 2 I. 614, 23 P. 537; (In brief of counsel) S. v. Barber (1907) 13 I. 65; S. v. Bogris (1914) 26 I. 587, 144 P. 789; Ex parte Allen (1918) 31 I. 295, 170 P. 921; S. v. Scheminisky, 31 I. 504, 174 P. 611.

Statement of plea: The reading of the indictment and statement of the plea to the jury is a formality, and the failure to perform these actions is not fatal to a conviction in the absence of prejudice. P. v. Ah Hop (1878) 1 I. 698.

The failure of the clerk to read the indictment or information, and to state the defendant's plea to the jury in a felony case is reversible error. S. v. Chambers (1904) 9 I. 673, 75 P. 274; S. v. Crea (1904) 10 I. 88, 76 P. 1013. But where the plea of the defendant was in fact stated to the jury and the stenographer's notes do not show that fact it may be shown by affidavit. S. v. Lancaster (1904) 10 I. 410, 78 P. 1081.

Where the record is silent as to whether the indictment and plea have been read as required by this section, it will be presumed that the law was complied with. S. v. Lottridge (1916) 29 I. 53, 155 P. 487.

In the separate trial of one of several defendants, a general objection to reading the indictment is insufficient to raise the question of the propriety of reading a specific clause respecting the other defendants. S. v. Curtis (1916) 29 I. 724, 161 P. 578.

Swearing of witnesses: It is not error to swear all the witnesses for the prosecution in a body at the commencement of the trial. S. v. Rooke (1904) 10 I. 388, 79 P. 82.

Closing of argument: The district attorney is not required to close the argument in person, but that duty may be left to assistant counsel. S. v. Williams (1895) 4 I. 502, 42 P. 511.

Rebuttal: By the provisions of subd. 4, a large discretion is vested in the trial court, and unless grossly abused its exercise will not be interfered with upon appeal. S. v. Waln (1905) 14 I. 1, 4, 80 P. 221.

Instructions: The court in charging the jury may state the testimony and declare the law. P. v. Bernard (1886) 2 I. 193, 10 P. 30.

This section does not conflict with § 8963 which prohibits the court from charging with respect to matters of fact; the court is the judge of whether the evidence is sufficient to warrant a conviction. (Dis. op.) T. v. Neilson (1890) 2 I. 614, 23 P. 537.

Where the charge is given orally under subd. 6, the record must show that mutual consent was given to an oral charge. T. v. McKern (1891) 3 I. 15, 26 P. 123.

It is a violation of subd. 6 for the court to instruct the jury to acquit; that is a charge as to matters of fact. S. v. Peck (1908) 14 I. 712, 95 P. 515.

Same: Reduction to writing: The act of the stenographic reporter in reducing the charge to writing as it is given to the jury by the court is a sufficient compliance with this section. S. v. Preston (1894) 4 I. 215, 38 P. 694.

Where the court gives his instructions in writing, the conviction will not be reversed because the court makes a verbal answer to a further question asked him by a juror as to the effect to be given to certain testimony. S. v. McGann (1901) 8 I. 40, 66 P. 823.

It will be presumed, in the absence of a showing to the contrary, that the defendant assented to the granting of an oral instruction, and if he desires to raise any question of error in not reducing the charge to writing, the bill of exceptions should show that his charge was given orally without his consent. S. v. Preston, supra.

§ 8942. [7856] Same: When departed from. When the state of the pleadings requires it, or in any other case for good reasons, and in the

sound discretion of the court, the order prescribed in the last section may be departed from. [R. S. § 7856.]

Hist. Cr. Prac. '64, § 355, R. S. § 7856, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1094; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10826.

Cited: S. v. Williams (1895) 4 I. 502, 42 P. 511.

§ 8943. [7857] **Argument to jury.** If the indictment is for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it is for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side. [R. S. § 7857.]

Hist. (See Cr. Prac. '64, § 356) R. S. § 7857, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1095; same as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10830.

Necessity of objection: Failure to follow the order of beginning and closing the argument prescribed in this section, can not be urged as error on appeal in the absence of an objection made in the trial court. P. v. Ah Hop (1878) 1 I. 698.

§ 8944. [7858] **Presumption of innocence: Reasonable doubt.** A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. [R. S. § 7858.]

Hist. Cr. Prac. '64, § 357, R. S. § 7858, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1096; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10831.

Instructions: This section does not authorize an instruction to acquit "if the jury are in doubt upon any material fact sought to be proved by the prosecution." P. v. Stapleton (1884) 2 I. 47, 3 P. 6.

§ 8945. [7859] **Doubt as to degree of crime.** When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only. [R. S. § 7859.]

Hist. Cr. Prac. '64, § 358, R. S. § 7859, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1097; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10832.

§ 8946. Trial of joint defendants. When two or more defendants are jointly indicted or informed against for a felony or for any criminal offense, the defendants may be tried separately or jointly, in the discretion of the court. ['11, c. 112, p. 368.]

Hist. (See Cr. Prac. '64, § 359) R. S. § 7860, reen. R. C. ib.; am. '11, c. 112, p. 368, reen. C. L. § 7860.

Comp. leg.—Cal. Analogous: Pen. C. 1872, § 1098; amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10833.

Cited: S. v. Knudtson (1905) 11 I. 524, 83 P. 226; S. v. Smith (1917) 30 I. 337, 164 P. 519.

Discretion of court: Under this statute it was not an abuse of the discretion of the trial court to refuse to grant separate trials to defendants, where each of the defendants desired to be a witness for the other and also a witness in his own trial on his own behalf. S. v. Allen (1913) 23 I. 772, 131 P. 1112.

§ 8947. [7861] **Discharge of codefendant for use as witness.** When two or more persons are included in the same indictment, the court may, at any time before the defendants have gone into their defense, on the application of the prosecuting attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people. [R. S. § 7861.]

Hist. Cr. Prac. '64, § 370, R. S. § 7861, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1099; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10834.

Cited: S. v. Knudtson (1905) 11 I. 524, 83 P. 226.

§ 8948. [7862] **Same: To testify for codefendants.** When two or more persons are included in the same indictment, and the court is of opinion that in regard to a particular defendant there is not sufficient

evidence to put him on his defense, it must order him to be discharged from the indictment before the evidence is closed, that he may be a witness for his codefendants. [R. S. § 7862.]

Hist. Cr. Prac. '64, § 361, R. S. § 7862, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1100; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10835.

Cited: S. v. Knudtson (1905) 11 I. 524, 83 P. 226.

§ 8949. [7863] **Same: Discharge equivalent to acquittal.** The order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense. [R. S. § 7863.]

Hist. Cr. Prac. '64, § 362, R. S. § 7863, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1101; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10836.

§ 8950. [7864] **Rules of evidence.** The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code. [R. S. § 7864.]

Hist. R. S. § 7864, reen. R. C. ib., reen. C. L. ib.

Cross ref. Rules of evidence in civil actions: §§ 7933-78.

Comp. leg.—Cal. Same: Pen. C. 1872, §1102; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10838.

Cited: T. v. Guthrie (1888) 2 I. 432, 17 P. 39.

Waiver of motion to acquit: A defendant who, after a motion for peremptory instruction to acquit is overruled, introduces defensive testimony, waives his right to assign error on the action of the court in overruling the motion, the same as in civil cases. (Sweet, J. dissents) T. v. Neilson (1890) 2 I. 614, 23 P. 537.

Use of depositions: This section authorizes the use of depositions taken in the presence of the defendant on behalf of the state in a criminal case when, on account of death or other good cause, the presence of the witness can not be had. T. v. Evans (1890) 2 I. 651, 23 P. 232. (Overruled, S. v. Potter (1899) 6 I. 584, 57 P. 431.)

§ 8951. [7865] **Conspiracy: Sufficiency of evidence.** Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant can not be convicted unless one or more overt acts are eprxessly alleged in the indictment, nor unless one of the acts alleged is proved; but other overt acts not alleged in the indictment may be given in evidence. [R. S. § 7865.]

Hist. R. S. § 7865, reen. R. C. ib., reen. C. L. ib.

Cross ref. Conspiracy defined: § 8204.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1104; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10840.

Other crimes: Evidence of the common purpose to commit like crimes and the commission of such offenses by the defendant admissible as incidents in the commission of the common criminal design included in the conspiracy. S. v. Hammock (1910) 18 I. 424, 110 P. 169.

§ 8952. [7866] **Murder: Burden of proof in mitigation.** Upon a trial for murder the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable. [R. S. § 7866.]

Hist. Cr. Prac. '64, § 363, R. S. § 7866, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "on the part of the prosecution" for "in the case": Pen. C. 1872, § 1105; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10860.

Circumstances in mitigation: While the burden of proving circumstances in mitigation of homicide rests with the defendant, he is not required to establish such circumstances by a preponderance of evidence, but to establish circumstances so that jury has reasonable doubt of his guilt. S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

§ 8953. [7867] **Bigamy: Proof of marriage.** Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved

by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge. [R. S. § 7867.]

Hist. R. S. § 7867, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1106; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10861.

§ 8954. [7868] **Forging bank bills: Proof of incorporation and experts.** Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing or attempting to pass, or having in his possession, with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by a general reputation, and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited. [R. S. § 7868.]

Hist. (See Cr. and P. '64, §§ 85, 86) R. S. § 7868, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1107; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10862.

§ 8955. [7869] **Abortion and abduction: Corroborating testimony.** Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of eighteen years, for the purpose of prostitution, or aiding or assisting therein, the defendant can not be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence. [R. S. § 7869.]

Hist. R. S. § 7869, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "twenty-five" for "eighteen": Pen. C. 1872, § 1108; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10843.

§ 8956. [7870] **False pretense: Sufficiency of evidence.** Upon a trial for having, with intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person, any money, personal property, or valuable thing, the defendant can not be convicted if the false pretense was expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the hand writing of the defendant, or unless the pretense be proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property. [R. S. § 7870.]

Hist. R. S. § 7870, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1110; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10843.

§ 8957. [7871] **Testimony of accomplice: Corroboration.** A conviction can not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof. [R. S. § 7871.]

Hist. Cr. Prac. '64, § 364, R. S. § 7871, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1111; Kerr's C. ib. S. v. Grant (1914) 26 I. 189, 195, 140 P. 959.

N. D. Similar: C. Cr. P. § 10841.

Applied: On a charge of incest, the prosecutrix if over age is an accomplice, and a conviction can not be had on her uncorroborated testimony. S. v. Clark (1915) 27 I. 48, 146 P. 1107.

Accomplice defined: In order to make a person an accomplice in the commission of a crime, some aiding, abetting or actual encouragement by such person must be shown. Mere presence at the plotting of a crime or silent acquiescence in its commission is not, in the absence of a legal duty, to act, sufficient to constitute one an accomplice. The failure to disclose known facts regarding the commission of a crime does not render one having such knowledge an accomplice of the person who committed the crime. S. v. Grant (1914) 26 I. 189, 140 P. 959; S. v. Altwater (1916) 29 I. 107, 111, 157 P. 256.

Jury to determine who is accomplice: When the question as to whether a witness is an accomplice arises it is the duty of the trial court to instruct the jury on the law of accomplices, and leave the question as to whether or not any witness is an accomplice in the commission of the offense charged, for the decision of the jury as a matter of fact, unless it appear without substantial conflict in the testimony that such witness was an accomplice. S. v. Grant, supra.

Sufficiency of corroboration: The corroborating evidence must be upon some material fact or circumstance which, standing alone and independent of the evidence of the accomplice, tends to connect the defendant with the commission of the offense. S. v. Knudtson (1905) 11 I. 524, 83 P. 226; S. v. Bond (1906) 12 I. 424, 86 P. 43. But it is not necessary that the accomplice be corroborated in every detail. The law contemplates that some weight should be given testimony of an accomplice. S. v. Smith (1917) 30 I. 337, 164 P. 519.

§ 8958. [7872] **Discharge of jury for want of jurisdiction, or insufficient facts.** The court may direct the jury to be discharged where it appears that it has not jurisdiction of the offense, or that the facts charged in the indictment do not constitute an offense punishable by law. [R. S. § 7872.]

Hist. Cr. Prac. '64, § 367, R. S. § 7872, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1113; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10847.

§ 8959. [7873] **Same: Offenses committed out of state.** If the jury is discharged because the court has not jurisdiction of the offense charged in the indictment, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged. [R. S. § 7873.]

Hist. Cr. Prac. '64, § 368, R. S. § 7873, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1114; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10848.

§ 8960. [7874] **Same: Offense committed in another county.** If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only, it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment, and of all the papers filed in the action, to the prosecuting attorney of the proper county, the expense of which transmission is chargeable to that county. [R. S. § 7874.]

Hist. Cr. Prac. '64, §§ 369, 370, R. S. § 7874, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1115; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10849-50.

§ 8961. [7875] **Same.** If the defendant is not arrested on a warrant from the proper county, as provided in the last section, he must be discharged from custody, or his bail in the action exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate. [R. S. § 7875.]

Hist. Cr. Prac. '64, §§ 371, 372, R. S. § 7875, reen. R. C. ib., reen. C. L. ib.

Cross ref. Proceedings on arrest of a person triable in another county: §§ 8722-3.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1116; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10851-2.

§ 8962. [7876] **Same: Discharge for want of facts.** If the jury is discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case it may direct that the case be submitted to the same or another grand jury. [R. S. § 7876.]

Hist. Cr. Prac. '64, § 373, R. S. § 7876, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same with additional provision: Pen. C. 1872, § 1117; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10853.

§ 8963. [7877] **Advisory instruction to acquit.** If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant. But the jury are not bound by the advice. [R. S. § 7877.]

Hist. (See Cr. Prac. '64, § 375) R. S. § 7877, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1118; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10854.

Cited: S. v. Horn (1915) 27 I. 782, 152 P. 275.

Discretion of court: The giving of the instruction authorized by this section is a matter of discretion with the trial court and its action in the premises is not reviewable by the supreme court. S. v. Haverly (1895) 4 I. 484, 42 P. 506. Contra see dis. op. T. v. Neilson (1890) 2 I. 614, 23 P. 537; S. v. Murphy (1916) 29 I. 42, 156 P. 908; S. v. Simpson, 31 I. 591, 173 P. 748.

Form of motion: A motion for nonsuit is improper in a criminal case. P. v. Barnes (1886) 2 I. 161, 9 P. 532. But if the prosecution fails to make a case, the court should instruct the jury to acquit regardless of a verbal mistake of the attorney for the defendant in framing his motion. (Dis. op.) T. v. Neilson, supra.

Form of instruction: The court may advise the jury to acquit but can not take the facts from the jury by a peremptory instruction to acquit. T. v. Neilson, supra; S. v. Peck (1908) 14 I. 712, 95 P. 515.

It is not error for the court to refuse to instruct the jury to find the defendant not guilty; the court may advise the jury to acquit the defendant, but the jury is not bound by the advice. S. v. Wright (1906) 12 I. 212, 85 P. 493.

If the court advises the jury to acquit, it ought also to advise them that they are not bound by such advice, but may bring in a verdict of conviction regardless of it. S. v. Downing (1913) 23 I. 540, 130 P. 461.

§ 8964. [7878] **View of premises by jury.** When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time. [R. S. § 7878.]

Hist. Cr. Prac. '64, §§ 376, 377, R. S. § 7878, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1119; Kerr's C. ib. S. v. Moon (1911)

20 I. 202, 204, 117 P. 757, Ann. Cas. 1913A 724.

N. D. Similar: C. Cr. P. § 10855.

Presence of defendant on view: Where the defendant requests a view of the premises where the crime was committed, the fact that the defendant does not accompany the jury upon such view, is not ground for a new trial in the absence of any request that the defendant should be permitted to accompany them. S. v. Reed (1894) 3 I. 754, 35 P. 706. But doubts are expressed as to the correctness of this ruling in S. v. McGinnis (1906) 12 I. 336, 85 P. 1089. And in case a view is ordered it is error to deny the defendant the right to be present at the view if he requests such right either in person or by counsel. Ib.

It is now settled that whatever rights a defendant may have under this section may be waived by his failure to make timely objection. S. v. Moon (1911) 20 I. 202, 117 P. 757, Ann. Cas. 1913A 724; S. v. Baker (1916) 28 I. 727, 156 P. 103.

Time of view: No precise time is fixed by the statute when the view shall be had. S. v. Moon, supra. This section contemplates a view prior to the argument of counsel and the giving of instructions by the court. It was not intended by this section to give the jury permission to view the premises after the cause had been submitted to them. S. v. Baker (1916) 28 I. 727, 156 P. 103.

Extraneous evidence: Where evidence has been improperly received by a jury engaged in a view under this section the presumption arises, in the case of one being prosecuted for the commission of an offense, that the jury has been prejudicially influenced by receiving evidence other than a view of the premises. Ib.

Waiver: Objection to a view of the premises by the jury must be made at the time such view is requested, else it will be waived. Timely objection must be made if advantage is to be taken of the absence of the trial judge at the view. S. v. Moon, supra.

While it is improper to allow the jury to view the premises after the charge to the jury, yet when the defendant expressly consents to such view, and with his counsel accompanied the jury on such view, he thereby waives such irregularity, and in effect joins in the request. S. v. Baker, supra.

§ 8965. [7879] **Disclosure of facts known by juror.** If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact which could be evidence in the cause, as of his own knowledge, the jury may return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties. [R. S. § 7879.]

Hist. Cr. Prac. '64, § 378, R. S. § 7879, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1120; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10856.

§ 8966. [7880] **Custody of jury during trial.** The jury sworn to try an indictment for any offense, except murder, may, at any time during the trial, before the submission of the cause, in the discretion of the court, be permitted to separate, or they may be kept together, in charge of a proper officer. In case the court orders the jury to be kept together the sheriff must provide a suitable place for the board and lodging of the jury, at the expense of the county, and at each recess and adjournment the officer must be sworn to keep the jury together until the next meeting of the court; to suffer no person to speak to or communicate with them, or either of them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof. In all trials for murder the jury must be kept together. [R. S. § 7880.]

Hist. Cr. Prac. '64, § 379; am. '81, p. 227, § 4; R. S. § 7880, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar but no reference to murder trials: Pen. C. 1872, § 1121; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10857.

Separation of jury: Where the defendant in a murder case shows the jury have separated in violation of the statute, he has made a sufficient prima facie showing to entitle him to a new trial and to shift the burden on to the state of showing clearly and beyond a reasonable doubt that nothing transpired during the separation, or on account of the separation, that did or could prejudice the defendant, and if the state succeeds in making such a showing, a new trial should be denied. S. v. Sly (1905) 11 I. 110, 80 P. 1125.

§ 8967. [7881] **Admonishment of jury on adjournments.** The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it

is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them. [R. S. § 7881.]

Hist. Cr. Prac. '64, § 380, R. S. § 7881, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1122; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10858.

Record need not show compliance: The fact that the court duly admonished the jury on each adjournment as required by this section need not be shown by the record, the presumption being that the statute was complied with. S. v. Suttles, 13 I. 88, 88 P. 238.

§ **8968.** [7882] **Discharge of juror for illness or disability.** If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled. [R. S. § 7882.]

Hist. Cr. Prac. '64, § 381, R. S. § 7882, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1123; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10859.

§ **8969.** [7883] **Decision of questions of law.** The court must decide all questions of law which arise in the course of a trial. [R. S. § 7883.]

Hist. Cr. Prac. '64, § 382, R. S. § 7883, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1124; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10827.

Incompetency of witness: The question of the incompetency of a witness to testify is one of law to be determined by the court. S. v. Simes (1906) 12 I. 310, 85 P. 914.

§ **8970.** [7884] **Same: Trial for libel.** On the trial of an indictment for libel, the jury have the right to determine the law and the fact. [R. S. § 7884.]

Hist. Cr. Prac. '64, § 383, R. S. § 7884, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1125; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10828.

§ **8971.** [7885] **Jury bound by instructions.** On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court, questions of fact by the jury; and although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court. [R. S. § 7885.]

Hist. Cr. Prac. '64, § 384, R. S. § 7885, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1126; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10829.

Cited: S. v. Marren (1910) 17 I. 766, 788, 107 P. 993.

§ **8972.** [7886] **Instructions to jury: Requests.** In charging the jury, the court must state to them all matters of law necessary for their information. Either party may present to the court any written charge and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must indorse and sign its decision. If part be given and part refused, the court must distinguish, showing by the indorsement what part of the charge was given and what part refused. [R. S. § 7886.]

Hist. Cr. Prac. '64, §§ 385, 386, 387, R. S. § 7886, reen. R. C. ib., reen. C. L. ib.

Cross ref. Charging the jury: § 8941.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1127; similar as amended: Kerr's C. ib. Pen. C. § 1127; S. v. Marren (1910) 17 I. 766, 107 P. 993.

N. D. Analogous: C. Cr. P. § 10822; similar: C. Cr. P. § 10863.

Presumption of compliance: In the absence of any showing to the contrary, it will be presumed that the court charged the jury as provided in this section. S. v. O'Brien (1907) 13 I. 112, 88 P. 425.

Failure to instruct: Request necessary: In felony cases the court should instruct the jury in writing on all the material issues of the case, but his failure to do so is not reversible error in the absence of a request for the charge, and a notation of the refusal thereof. S. v. Harness (1904) 10 I. 18, 76 P. 788.

Notation on instructions given and refused: The court should not indicate to the jury what instructions are given of his own motion, or at the instance of counsel for plaintiff or defendant. S. v. Marren (1910) 17 I. 766, 107 P. 993.

Authorities should not be cited at the foot of instructions given to the jury, such citations should be detached before the instructions are handed to the jury to be taken to the jury room. S. v. Sage (1912) 22 I. 489, 495-6, 126 P. 403, Ann. Cas. 1914B 251.

Where the jury could not, upon the record, have found any other verdict than that of guilty, the giving of an instruction upon which there appeared at the end the word "guilty," instead of the word "given," followed by the name of the trial judge, is not reason for reversal. S. v. Grigg (1914) 25 I. 411, 138 P. 506. (Ailshie, C. J. dissents.) A judge does not comply with the statute by simply making a scroll or pencil mark across the face of disapproved instructions. S. v. Buster (1915) 28 I. 110, 152 P. 196.

Character of instructions: The court in instructing the jury should state propositions of law concisely and intelligibly so that the jury may without indulging in any fine-spun theories, understand what the law applicable to the facts of the particular case is. S. v. Marren, supra.

It is not proper for the court to enter into a discussion as to the weight of any specific class of evidence or the effect which should be given to the evidence by the jury as compared with any other class of evidence. Ib.

It is the duty of the court in its instructions to state the rules of law applicable to the evidence and not to give a dissertation on what some may conceive to be the policy of the law. S. v. Reel (1911) 19 I. 463, 465, 113 P. 721.

Under the provisions of this section it is the duty of the court to instruct the jury upon the law of the case, but it is equally the duty of the jury to determine for itself what facts have been proved, and of this they are the sole judges. It is not the duty of the court in instructing the jury to draw inferences from the facts, or to point out to the jury what inferences they might or could draw from such facts. S. v. Jones (1916) 28 I. 428, 154 P. 378.

Nonprejudicial erroneous instruction: Even though an instruction is erroneous and ordinarily the error would be material, yet if the evidence of the defendant's guilt is such as ordinarily produces moral certainty, or conviction in an unprejudiced mind, and the result would not have been different had the instruction been omitted, the case will not be reversed because of such erroneous instruction. S. v. Brill (1912) 21 I. 269, 121 P. 79.

§ 8973. [7887] **Retirement of jury: Oath of bailiff.** After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not permit any person to speak or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court. [R. S. § 7887.]

Hist. (See Cr. Prac. '64, § 388) R. S. § 7887, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1128; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10864.

Cited: S. v. Bland (1904) 9 I. 796, 76 P. 780.

§ 8974. [7888] **Commitment of defendant pending trial.** When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly. [R. S. § 7888.]

Hist. Cr. Prac. '64, § 389, R. S. § 7888, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1129; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10866.

§ 8975. [7889] **Absence of prosecuting attorney.** If the prosecuting attorney fails to attend the trial, the court must appoint some attorney at law to perform the duties of the prosecuting attorney on such trial. [R. S. § 7889.]

Hist. R. S. § 7889, reen. R. C. ib., reen. C. L. ib.

Cross ref. See § 3654.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1130; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10867.

ARTICLE 3.

CONDUCT OF JURY.

§ 8976. [7900] **Jury room to be provided by commissioners.** A room must be provided by the commissioners of each county for the use of the jury upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the commissioners neglect, the court may order the sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge. [R. S. § 7900.]

Hist. Cr. Prac. '64, § 390, R. S. § 7900, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1135; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10868.

Necessary expenses: Barber service: An expense incurred by order of the court for shaving jurors and hair-cutting while the jury was kept together in the progress of the trial is not such a necessary expense incident to and necessary in the administration of justice as to become a county charge. Schmelzel v. Comrs. of Ada Co. (1909) 16 I. 32, 100 P. 106, 133 A. S. R. 89, 21 L. R. A. (N. S.) 199, 17 Ann. Cas. 1226.

§ 8977. [7901] **Provision of food and lodging for jury.** While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging. [R. S. § 7901.]

Hist. Cr. Prac. '64, § 391, R. S. § 7901, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1136; additional provision as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10869.

Cited: Schmelzel v. Comrs. of Ada Co. (1909) 16 I. 32, 100 P. 106, 133 A. S. R. 89, 21 L. R. A. (N. S.) 199, 17 Ann. Cas. 1226.

§ 8978. Papers which may be taken by jury. Upon retiring for deliberation, the jury may take with them all exhibits and all papers (except depositions) which have been received in evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person. ['11, c. 23, § 1, p. 49.]

Hist. Cr. Prac. '64, §§ 392, 393, R. S. § 7902, reen. R. C. ib.; am. '11, c. 23, § 1, p. 49 reen. C. L. § 7902.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1137; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10870.

Cited: S. v. Moon (1911) 20 I. 202, 117 P. 757, Ann. Cas. 1913A 724.

Provisions not mandatory: The jury may take with them to the jury-room the written instructions given by the court, but they are not obliged to do so. S. v. Grigg (1914) 25 I. 405, 137 P. 371.

Taking exhibits to jury room: (Before amendment.) No other exhibits than those mentioned in this section should be sent to the jury room; thus, in a prosecution for murder, it was held error to permit the jury to take with them the clothes of the deceased, straps, a piece of a mug, and a revolver. S. v. Crea (1904) 10 I. 88, 76 P. 1013.

Instructions not given: It is error to permit to be taken into the jury room requested but refused instructions. S. v. Buster (1915) 28 I. 110, 152 P. 196.

§ 8979. [7903] **Return of jury for information.** After the jury have retired for deliberation, if there is any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney and the defendant or his counsel, or after they have been called. [R. S. § 7903.]

Hist. (See Cr. Prac. '64, § 394) R. S. § 7903, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1138; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10871.

Presence of judge in jury room: It is reversible error for the judge to enter the jury room upon the request of a juror,

after the jury have retired for deliberation, and in the absence of defendant and his counsel, and to address the jury in answer to questions put by them as to any matter connected with the case or their verdict. S. v. Bland (1904) 9 I. 796, 76 P. 780.

§ 8980. [7904] **Discharge of jury for illness or accident.** If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged. [R. S. § 7904.]

Hist. Cr. Prac. '64, § 395, R. S. § 7904, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1139; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10872.

§ 8981. [7905] **When jury may be discharged.** Except as provided in the last section, the jury can not be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree. [R. S. § 7905.]

Hist. Cr. Prac. '64, § 396, R. S. § 7905, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1140; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10873.

Discretion of court: The exercise of the power of discharging the jury is discretionary with the court, and it is not necessary that the record affirmatively show express consent to such discharge, or the necessity which induced the same. S. v. Jorgenson (1893) 3 I. 620, 32 P. 1129. And the action of the trial court in discharging a jury will not be disturbed in the absence of a palpable abuse of discretion. S. v. Crump (1897) 5 I. 166, 47 P. 814.

§ 8982. [7906] **Retrial after discharge of jury.** In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial or after the cause is submitted to them, the cause may be again tried at the same or another term. [R. S. § 7906.]

Hist. Cr. Prac. '64, § 397, R. S. § 7906. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1141; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10874.

§ 8983. [7907] **Adjournment during absence of jury.** While the jury are absent, the court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. [R. S. § 7907.]

Hist. Cr. Prac. '64, § 398, R. S. § 7907, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1142; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10875.

§ 8984. [7908] **Final adjournment of the court discharges the jury.** A final adjournment of the court discharges the jury. [R. S. § 7908.]

Hist. Cr. Prac. '64, § 399, R. S. § 7908, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1143; repealed 1880.

N. D. Similar: C. Cr. P. § 10875.

§ 8985. [7909] **Expenses to be paid by what county.** When two or more counties are joined for judicial purposes, the expense of the trial of a cause must be paid by the county where the offense is alleged to have been committed. [R. S. § 7909.]

Hist. (See Cr. Prac. '64, § 400) R. S. § 7909, reen. R. C. ib., reen. C. L. ib.

ARTICLE 4.

THE VERDICT.

§ 8986. [7915] **Return of jury.** When the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried at the same or another term. [R. S. § 7915.]

Hist. Cr. Prac. '64, § 401, R. S. § 7915, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1147; similar as amended: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10876.

§ 8987. [7916] **Presence of defendant.** If indicted for a felony, the defendant must, before the verdict is received, appear in person. If for a misdemeanor, the verdict may be rendered in his absence. [R. S. § 7916.]

Hist. Cr. Prac. '64, § 402, R. S. § 7916, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1148; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10877.

Presence of defendant: In cases of felony, defendant should be present at the rendition of the verdict and the record should show that fact. S. v. Watkins (1900) 7 I. 35, 59 P. 1106.

§ 8988. [7917] **Manner of taking verdict.** When the jury appear they must be asked by the court or clerk whether they have agreed upon their verdict, and if the foreman answers in the affirmative they must, on being required, declare the same. [R. S. § 7917.]

Hist. Cr. Prac. '64, § 403, R. S. § 7917, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1149; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10878.

§ 8989. [7918] **General and special verdicts.** The jury may render a general verdict, or, when they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict. [R. S. § 7918.]

Hist. Cr. Prac. '64, § 404, R. S. § 7918, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1150; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10879.

§ 8990. [7919] **Forms of general verdict.** A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged the verdict must be "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment and the proof, the verdict must be "not guilty by reason of variance between indictment and proof." [R. S. § 7919.]

Hist. '75, p. 361, § 403, R. S. § 7919, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1151; same as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10881.

Verdict against joint defendants: Where two defendants are jointly charged and tried for grand larceny, verdicts brought in separately against each and entitled as if the defendant named in each verdict were the only defendant on trial, are not void for uncertainty, and are sufficient to authorize judgment and sentence. S. v. Cotterel (1906) 12 I. 572, 86 P. 527.

§ 8991. [7920] **Special verdict defined.** A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence,

and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them. [R. S. § 7920.]

Hist. Cr. Prac. '64, § 406, R. S. § 7920, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10882.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1152; Kerr's C. ib.

§ 8992. [7921] **Same: How rendered.** The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged. [R. S. § 7921.]

Hist. Cr. Prac. '64, § 107, R. S. § 7921, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10883.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1153; Kerr's C. ib.

§ 8993. [7922] **Same: Form of special verdict.** The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury. [R. S. § 7922.]

Hist. Cr. Prac. '64, § 408, R. S. § 7922, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10884.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1154; Kerr's C. ib.

§ 8994. [7923] **Judgment on special verdict.** The court must give judgment upon the special verdict as follows:

1. If the plea is not guilty and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under that indictment, judgment must be given accordingly. But if otherwise, judgment of acquittal must be given.

2. If the plea is a former conviction or acquittal of the same offense, the court must give judgment of acquittal or conviction, as the facts prove or fail to prove the former conviction or acquittal. [R. S. § 7923.]

Hist. Cr. Prac. '64, § 409, R. S. § 7923, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 10886.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1155; Kerr's C. ib.

§ 8995. [7924] **Defective special verdict: New trial.** If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence, as established to their satisfaction, the court must order a new trial. [R. S. § 7924.]

Hist. Cr. Prac. '64, § 410, R. S. § 7924, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 10887.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1156; Kerr's C. ib.

§ 8996. [7925] **Jury to find degree of crime.** Whenever a crime is distinguished into degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty. [R. S. § 7925.]

Hist. '75, p. 363, § 409, R. S. § 7925, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1157; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10888.

Cited: Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813.

Question for jury: The degree of crime is a question for the jury to determine from the evidence, and it is not essential that the words fixing the degree of murder should be set forth in the indictment in order to make the indictment good for murder in the first degree. (P. v. O'Callaghan, 2 I. 156, 9 P. 414, overruled.) S. v. Ellington (1895) 4 I. 529, 43 P. 60.

Under this and the following sections the court must leave to the jury, in a prosecution for murder, the duty of determining the degree and grade of the offense; whether murder in the first or second degree, or manslaughter; the court can not rule as a matter of law, that a

certain kind of killing, such as by poison, is murder in the first degree, and instruct the jury that they must find the defendant guilty of that grade of offense or acquit him. The fact that the jury finds the defendant guilty of a lower grade of offense than that established by the evidence, is not ground for a reversal of the conviction. S. v. Phinney (1907) 13 I. 307, 89 P. 634, 12 Ann. Cas. 1079, 12 L. R. A. (N. S.) 935.

§ 8997. [7926] **Conviction of included offense.** The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense. [R. S. § 7926.]

Hist. Cr. Prac. '64, § 411, R. S. § 7926, reen. R. C. ib., reen. C. L. ib.

Cross ref. Inclusion of offense when crime is consummated: § 8606.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1159; similar as amended: Kerr's C. ib.

Miss. Similar: Code 1880, §§ 3078, 3016. Re McLeod (1913) 23 I. 257, 128 P. 1106, 43 L. R. A. (N. S.) 813.

N. D. Similar: C. Cr. P. § 10890.

Cited: S. v. Phinney (1907) 13 I. 307, 89 P. 634, 12 Ann. Cas. 1079, 12 L. R. A. (N. S.) 935.

Conviction of lesser offense: Under an indictment charging murder in the first degree a verdict of guilty of manslaughter is proper and is in accordance with the provisions of this section. Re Alcorn (1900) 7 I. 101, 60 P. 561; S. v. Alcorn (1901) 7 I. 599, 64 P. 1014.

The crime of assault with a deadly weapon or instrument is not necessarily included in the statutory definition of murder, and unless the information charging murder also alleges an assault, the defendant can not be convicted of an assault. Re McLeod, supra.

§ 8998. [7927] **Verdict against joint defendants.** On an indictment against several, if the jury can not agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the others may be tried by another jury. [R. S. § 7927.]

Hist. Cr. Prac. '64, § 412, R. S. § 7927, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1160; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10891.

§ 8999. [7928] **Reconsideration of verdict.** When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court can not require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it, and it can not be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the court. [R. S. § 7928.]

Hist. Cr. Prac. '64, §§ 413, 414; R. S. § 7928, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1161; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10894-5.

§ 9000. [7929] **Judgment on informal verdict.** If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict. [R. S. § 7929.]

Hist. Cr. Prac. '64, § 415, R. S. § 7929, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1162; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10896.

Verdict approved: A verdict finding the defendant "guilty as charged in the complaint" is good. S. v. Schweitzer (1910) 18 I. 609, 111 P. 130.

§ **9001.** [7930] **Polling the jury.** When a verdict is rendered and before it is recorded, the jury may be polled at the request of either party, in which case they must be severally asked whether it is their verdict; and if five-sixths answer in the affirmative, then the verdict shall be recorded; but if a less number answer in the affirmative, the jury must be sent out for further deliberation. ['90-91, p. 165, § 2.]

Hist. (See Cr. Prac. '64, § 416) R. S. § 7930; am. '90-91, p. 165, § 2, reen. '99, p. 110, § 2, reen. R. C. § 7930, reen. C. L. ib.

Cross ref. Authority for five-sixths verdict: Const. I, 7.

Comp. leg.—Cal. See Pen. C. 1872, § 1163; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10897.

§ **9002.** [7931] **Recording verdict.** When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case. [R. S. § 7931.]

Hist. Cr. Prac. '64, § 417, R. S. § 7931, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1164; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10898.

§ **9003.** [7932] **Discharge or detention of defendant on acquittal.** If judgment of acquittal is given on a general verdict and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention to the end that a new indictment may be preferred, in the same manner and with like effect as provided in case where the indictment does not state a public offense. [R. S. § 7932.]

Hist. (See Cr. Prac. '64, § 418) R. S. § 7932, reen. R. C. ib., reen. C. L. ib.

Cross ref. Proceedings on discharge of jury for insufficient indictment: § 8962.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1165; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10899.

§ **9004.** [7933] **Committal of defendant on conviction.** If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail he may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant. [R. S. § 7933.]

Hist. Cr. Prac. '64, § 419, R. S. § 7933, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1166; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10900.

§ **9005.** [7934] **Acquittal for insanity.** If the jury render a verdict of acquittal on the ground of insanity the court may order a jury to be summoned from the jury list of the county to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the prosecuting attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane he shall

be committed by the sheriff to the state insane asylum. If the jury find the defendant sane, he shall be discharged. [R. S. § 7934.]

Hist. R. S. § 7934, reen. R. C. ib., reen. C. L. ib.

Cross ref. Inquiry into insanity before trial or after verdict: §§ 9166-72.

Comp. leg.—Cal. Same: Kerr's C. § 1167.

N. D. Analogous: C. Cr. P. § 10901.

ARTICLE 5.

BILLS OF EXCEPTION.

§ 9006. [7940] Exceptions to rulings during trial. On the trial of an indictment exceptions may be taken by the defendant to a decision of the court:

1. In disallowing a challenge to the panel of the jury, or to an individual juror, for implied bias.

2. In admitting or rejecting testimony on the trial of a challenge to a juror for actual bias.

3. In admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue. [R. C. § 7940.]

Hist. Cr. Prac. '64, § 420; R. S. § 7940, modified by '05, p. 9; am. R. C. § 7940, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1170; amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10908.

Cited: S. v. Reed (1893) 3 I. 554, 32 P. 202; S. v. Larkin (1897) 5 I. 200, 47 P. 945; Hall v. Jensen (1908) 14 I. 165, 93 P. 962.

Exceptions to instructions: Instructions given by the court of its own motion must be excepted to at the trial and embodied in a bill of exceptions in order to be available on appeal. P. v. Biles (1885) 2 I. 114, 6 P. 120; S. v. Suttles (1907) 13 I. 88, 88 P. 238; S. v. O'Brien (1907) 13 I. 112, 88 P. 425; S. v. Gallagher (1908) 14 I. 656, 94 P. 581; S. v. Harris (1910) 18 I. 620, 111 P. 406.

Exceptions to sustaining challenges: This section allows exceptions only in matters of challenge based on implied or actual bias, and does not authorize an exception to an order overruling a challenge on the ground of disqualification of the juror. T. v. Evans (1890) 2 I. 651, 23 P. 232.

Necessity of bill of exceptions: The supreme court is authorized to consider the exceptions mentioned in this section, but only when those exceptions are saved and incorporated into a bill of exceptions duly settled after notice as provided by law. S. v. Smith (1897) 5 I. 291, 48 P. 1060; S. v. Peck (1908) 14 I. 712, 95 P. 515.

§ 9007. Same: Service and settlement of bill. When a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days, to the prosecuting attorney, to the judge for settlement, within 10 days after judgment has been rendered against him, unless further time is granted by the judge or by a justice of the supreme court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled the bill must be signed by the judge and filed with the clerk of the court: *Provided,* That any party desiring to procure a review on appeal to the supreme court of any ruling of the district court made during the trial, or the sufficiency of the evidence to sustain the verdict or decision, in an action or special proceeding, may, in lieu of preparing, serving and procuring the settlement of the bill of exceptions as in this article provided, procure a transcript of the testimony and proceedings, including the instructions given or refused, and exceptions thereto on the trial, and such part thereof as may be necessary. ['15, c. 147, p. 320.]

Hist. (See Cr. Prac. '64, § 422) R. S. § 7941, reen. R. C. ib.; am. '15, c. 147, p. 320, reen. C. L. § 7941.

Comp. leg.—Cal. See Pen. C. 1872, § 1171; amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10904.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945; Hall v. Jensen (1908) 14 I. 165, 93 P. 962; S. v. Peck (1908) 14 I. 712, 95 P. 515; S. v. Lottridge (1916) 29

I. 53, 57, 155 P. 487; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690; S. v. Maguire (1917) 31 I. 24, 169 P. 175.

Exception to sustaining challenge: An exception to sustaining a challenge by the state for implied bias must be saved by a bill of exceptions as provided in this section. S. v. McGraw (1899) 6 I. 635, 59 P. 178.

Necessity of notice: Notice required by this section of the time that a bill of exceptions will be presented to the judge for settlement must be given to the district attorney, or on an appeal the bill of exceptions will not be considered; the record must show that all the provisions of this section have been complied with. S. v. Smith (1897) 5 I. 291, 48 P. 1060; S. v. Gordon (1897) 5 I. 297, 48 P. 1061.

Extension of time: The power vested by this section in the court or judge to extend the time in which the draft of a bill of exceptions may be served, can not be exercised by the parties by stipulation. S. v. Dupuis (1901) 7 I. 614, 65 P. 65. But if a stipulation is made and entered into between the attorneys with the knowledge and acquiescence of the court, the bill will not be stricken because not presented within the time required by the statute. S. v. Rice (1901) 7 I. 762, 66 P. 87.

§ 9008. [7942] **Exceptions to rulings not made during trial.** Exceptions may be taken by either party to the decision of a court or judge upon a matter of law:

1. In granting or refusing a motion to set aside an indictment.
2. In allowing or disallowing a demurrer to an indictment.
3. In granting or refusing a motion in arrest of judgment.
4. In granting or refusing a motion for a new trial.
5. In making, or refusing to make, an order after judgment, affecting any substantial right of the parties. [R. S. § 7942.]

Hist. R. S. § 7942, reen. R. C. ib., reen. C. L. ib.

This section is not amended by '15, cc. 146-150, p. 319. S. v. Maguire (1917) 31 I. 24, 169 P. 175.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1172; same as amended except "or information" added after "indictment": Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10905.

Cited: Hall v. Jensen (1908) 14 I. 165, 169, 93 P. 962; S. v. Peck (1908) 14 I. 712, 716, 95 P. 515.

Necessity of exception: In order to procure a review of an order denying a new trial an exception to such order must be saved in the record. S. v. Smith (1896) 4 I. 733, 44 P. 554.

To procure a review of an order of trial court in refusing to set aside an indictment or information or overruling a demurrer an exception to such order must be saved in the record. S. v. Maguire (1917) 31 I. 24, 169 P. 175; S. v. Crawford, 32 I. —, 179 P. 511.

§ 9009. [7943] **Same: Refusing change of venue or continuance.** Exceptions may be taken by the defendant to a decision of the court upon a matter of law:

1. In refusing to grant a motion for a change of the place of trial.
2. In refusing to postpone the trial on motion of the defendant. [R. S. § 7943.]

Hist. R. S. § 7943, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1173; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10906.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945; Hall v. Jensen (1908) 14 I. 165, 169, 93 P. 962.

Order denying change of venue: An order denying a change of venue can not be brought before the supreme court by writ of error, but is reviewable only on appeal from the final judgment accompanied by appropriate bills of exceptions. S. v. Reed (1893) 3 I. 554, 32 P. 202.

§ 9010. [7944] **Same: Settlement of bill.** When a party desires to have the exceptions mentioned in the last two sections settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the judge for settlement, within 10 days after the order or ruling complained of is made, unless further time is granted by the judge, or by a justice of the supreme court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge and filed with the clerk of the court. If the judge in any case refuse to allow an

exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause. If the judge who presided at the trial ceases to hold office before the bill is tendered or settled he may, nevertheless, settle such bill, or the party may, as provided in this section, apply to the supreme court to prove the same. [R. S. § 7944.]

Hist. R. S. § 7944, reen. R. C. ib., reen. C. L. ib.

This section is not amended by '15, cc. 146-150, p. 319. S. v. Maguire (1917) 31 I. 24, 169 P. 175.

Comp. leg.—Cal. See Pen. C. 1872, § 1174; amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §§ 10910-12.

Cited: Hall v. Jensen (1908) 14 I. 165, 169, 93 P. 962; S. v. Peck (1908) 14 I. 712, 716, 95 P. 515.

Matters to be included: Affidavits showing alleged newly discovered evidence must be incorporated in a bill of exceptions in order to obtain a review of an order denying a new trial on the ground of such newly discovered evidence; such affidavits can not be identified by affidavits of counsel. S. v. Larkin (1897) 5 I. 200, 47 P. 945. Exception to an order denying a new trial must be saved by a bill of exceptions. Ib. S. v. Smith (1897) 5 I. 291, 48 P. 1060.

Notice of settlement: Where the district attorney was present when the bill of exceptions was settled and made no objection to the settlement for want of notice it will be presumed on appeal that notice was given and the appeal will be sustained. S. v. Larkin, supra.

Bill of exceptions necessary to review: An order denying a motion for new trial can not be reviewed on appeal in the absence of a bill of exceptions settled as prescribed in this section. S. v. Park, 31 I. 694, 175 P. 813.

§ 9011. [7945] **Evidence to be contained in bill.** A bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken, and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all other matters contained therein. [R. S. § 7945.]

Hist. (See Cr. Prac. '64, § 423) R. S. § 7945, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1175; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10914.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945; Hall v. Jensen (1908) 14 I. 165, 169, 93 P. 962; S. v. Peck (1908) 14 I. 712, 717, 95 P. 515.

Consideration of evidence:. Testimony embraced in a bill of exceptions may be considered only for the purpose of determining the materiality of exceptions taken to some decision of the court; the whole testimony can not be brought up in order to determine whether the evidence justifies the verdict. P. v. Ah Hop (1878) 1 I. 698.

A bill of exceptions in a criminal case is presumed to contain all the evidence given at the trial bearing upon the point of objection, and it is the duty of the district attorney, in case it does not embrace all the evidence, to suggest an addition to the bill in the trial court; the supreme court can not consider a suggestion made by him in that court that the evidence is not all in the bill. (Dis. op.) T. v. Neilson (1890) 2 I. 614, 23 P. 537.

§ 9012. [7946] **Written charges need not be excepted to.** When written charges have been presented, given or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges with the indorsements showing the action of the court form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions. [R. S. § 7946.]

Hist. Cr. Prac. '64, § 425, R. S. § 7946, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1176; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10915.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945; Hall v. Jensen (1908) 14 I. 165, 169, 93 P. 962.

Review of instructions: Instructions given by the court on its own motion must be embodied in a bill of exceptions in order to be reviewed on appeal. P. v. Walter (1871) 1 I. 386; P. v. Biles (1885) 2 I. 114, 6 P. 120; P. v. O'Callaghan (1886) 2 I. 156, 9 P. 414; S. v. Suttles (1907) 13 I. 88, 88 P. 238; S. v. Peck (1908) 14 I. 712, 95 P. 515.

Written charges presented and requested by either the state or the defendant are deemed excepted to and the exceptions need not be embodied in a bill of exceptions. S. v. O'Brien (1907) 13 I. 112, 88 P. 425; S. v. Peck (1908) 14 I. 712, 95 P. 515.

Instructions in writing requested by state and given, or requested by defendant and refused, are deemed excepted to, and need not be preserved in bill of exceptions in order to be reviewable by appellate court. Objections to instructions given by court on own motion must be preserved by bill of exceptions in order to be reviewed by court. These provisions do not appear to have been affected by amendments to criminal code found under '15, cc. 146-150. S. v. Lundhigh (1917) 30 I. 365, 164 P. 690.

§ 9013. Transcript in lieu of bill of exceptions. Any party desiring to procure a record of the evidence and proceedings made during the trial in a criminal action in the district court, for use on appeal to the supreme court, may in lieu of preparing, serving and procuring the settlement of a bill of exceptions, procure a transcript of the evidence and proceedings and exceptions thereto on the trial, or such parts as may be necessary, in the following manner:

1. He shall first procure from the district judge an order directing the reporter to prepare said transcript, or specified portion thereof, which order shall limit the time within which the reporter shall complete and lodge the same. He shall then file said order with the clerk of the district court, and serve a copy thereof upon the reporter, who shall prepare an original and four carbon copies of said transcript. It shall be the duty of the reporter, upon service of said copy of the order, to forthwith, without charge, prepare said transcript and complete the same and lodge the original and copies with the clerk of the district court within the time allowed by said order or within such further time as the district judge may by order, allow. It shall be the duty of the reporter when he can not prepare the transcript within the time allowed by the order of the judge, to procure from the judge additional time for the preparation of such transcript, and a failure of the reporter so to do shall not in any wise impair the rights of the parties to the action. The reporter shall append to the transcript his certificate that the same is a true and correct copy of the testimony and proceedings taken at the trial, or of such part thereof as is designated by the order.

2. Upon receipt of said transcript the clerk shall mark the original and two copies as lodged on the date of said receipt, and shall deliver the remaining copies to the party procuring the same to be made, or to his attorney, and such party or his attorney shall, within 10 days from receipt thereof, serve one copy, together with a notice, particularly designating by page and line any errors or omissions which he claims to be disclosed by the transcript, in the event he claims that there are any such errors or omissions, upon the adverse party, or his attorney, or if there be more than one adverse party appearing by separate attorney in the district court, then on one of such attorneys, in which latter case, however, he shall notify, in the manner that notices are required to be served, the other adverse party or his attorney, of the party on whom he has made such service. The adverse parties, or any of them, shall have 10 days after such service upon them has been completed within which to likewise point out by notice errors in said transcript and to file said notice with the clerk of the court, and serve a copy thereof on the party serving the transcript.

3. At the expiration of the time limited for designating errors, the transcript, with any notice designating errors, shall be transmitted to the judge who tried the cause, by the clerk, on application of either party, and such judge shall forthwith settle the same, notifying the parties by such notice as he deems adequate of the time and place of settlement, and when so settled, said transcript shall have the force and effect of

a bill of exceptions duly settled and allowed, and shall be deemed adequate to present for review any ruling appearing therein to have been excepted to, or by statute deemed excepted to, or any question of insufficiency of the evidence which may afterward be properly presented by specification of insufficiency in the brief on appeal. In case no errors in the transcript are designated by either party within the time herein allowed, the transcript shall be deemed settled by the judge, and the certificate of the reporter shall be sufficient evidence of such settlement. The original transcript and copies thereof lodged with the clerk shall be by him marked, filed and retained by him for transmission on appeal to the clerk of the supreme court, as a part of the record on appeal.

4. Exhibits introduced at the trial may be certified to the supreme court by the clerk, as a part of the record on appeal, without incorporating the same in the transcript, or making any copies, unless said exhibits consist of some part of the public records, in which event the same shall be copied into the transcript at the appropriate place by the reporter, or a copy certified by the party having lawful custody of the records may be substituted and transmitted with the exhibits. ['15, c. 148, p. 321.]

Hist. R. C. § 7946a, enacted by '15, c. 148, p. 321, reen. C. L. § 7946a.

Cited: S. v. Lottridge (1916) 29 I. 53, 155 P. 487; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690; S. v. Maguire (1917) 31 I. 24, 169 P. 175.

§ 9014. [7947] **Rulings deemed excepted to.** The ruling and decision of the court in criminal cases disallowing a challenge to the panel of the jury, or to any individual juror, for any of the causes set forth in sections 8928 and 8929 shall be deemed excepted to on the part of the defendant. ['05, p. 328, § 1.]

Hist. '05, p. 328, § 1, reen. R. C. § 7947, reen. C. L. ib.

Comp. leg.—N. D. C. Cr. P. §§ 10905-6.

ARTICLE 6.

NEW TRIAL.

§ 9015. [7950] **New trial defined.** A new trial is a reexamination of the issue in the same court, before another jury, after a verdict has been given. [R. S. § 7950.]

Hist. (See Cr. Prac. '64, § 426) R. S. § 7950, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1179; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10916.

Cited: (Erroneously for R. C. § 7933) S. v. Burtenshaw (1914) 25 I. 607, 614, 138 P. 1105.

§ 9016. [7951] **Effect of new trial.** The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to either in evidence or in argument. [R. S. § 7951.]

Hist. Cr. Prac. '64, § 426, R. S. § 7951, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1180; additional clause as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10916.

§ 9017. [7952] **Grounds for new trial.** When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:

1. When the trial has been had in his absence, if the indictment is for a felony.

2. When the jury has received any evidence out of court other than that resulting from a view of the premises.

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors.

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable. [R. S. § 7952.]

Hist. '75, p. 363, § 424; R. S. § 7952, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1181; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10917.

Discretion of court: An order granting the defendant a new trial in a criminal case will be sustained where it appears that the evidence was conflicting, and the order does not state on what grounds it was based, and no error is manifest from the record. S. v. Driskell (1906) 12 I. 245, 85 P. 499.

Where a motion for a new trial in a criminal case is granted the action of the court will be sustained on appeal unless it appears that there was a clear abuse of discretion in granting such new trial. S. v. Barber (1908) 15 I. 96, 96 P. 116.

Grounds: The grounds for a new trial in a criminal case are prescribed by this section and the court can not provide any other ground by rule. S. v. Davis (1898) 6 I. 159, 53 P. 678.

Excusing juror: Error in excusing a juror unchallenged by the state is not one of the grounds for which a new trial may be granted. S. v. McGraw (1899) 6 I. 635, 59 P. 178.

Disqualification of juror: To entitle a person to a new trial on the ground of disqualification of a juror the showing should be clear and conclusive, and the trial court should be clearly satisfied that the defendant has been denied the impartial trial guaranteed to him by the constitution. S. v. Marren (1910) 17 I. 766, 107 P. 993.

Misconduct of jury: It is error to deliver a sealed letter to a juror in a criminal case after the cause has been finally submitted to the jury, but to entitle the juror to the delivery of the letter it should first be submitted to the court and examined by the judge and delivered to counsel for inspection. S. v. Bland (1904) 9 I. 796, 76 P. 780. The giving of a letter to a juror before verdict will not be deemed ground for reversal when the letter was as to trivial personal matters and was not known by the judge to have been delivered to the juror, and is not assigned as ground for a new trial. S. v. Rooke (1904) 10 I. 388, 79 P. 82.

The fact that the jury are furnished with liquor, under the direction of the court, during the trial, and again after they had agreed upon their verdict, is not ground for a new trial, where there is no claim of over-indulgence on the part of any member of the jury. (Modified Bernier v. Anderson, post.) S. v. Reed (1894) 3 I. 754, 35 P. 706; S. v. Corcoran (1900) 7 I. 220, 61 P. 1034.

It is error to permit a juror to use intoxicating liquors during the trial of a case or during the deliberations of the jury unless it is done by permission of the court upon the prescription of a practicing physician. (Modifying S. v. Reed, ante.) Bernier v. Anderson (1902) 8 I. 675, 70 P. 1027.

A new trial will not be granted for alleged misconduct of the jury established merely by ex parte affidavits to the effect that certain jurors, prior to the trial, had made statements that the defendant was guilty, where such jurors are shown by counter affidavits to be men of good standing and deny the making of the statements. S. v. Davis, supra.

Allowing jurors to read newspapers not in evidence, containing statements relative to the case prejudicial to defendant, justifies a new trial. S. v. Tilden (1915) 27 I. 262, 147 P. 1056.

If while viewing the scene of an assault with a deadly weapon the jurors make demonstrations with a broom to test the feasibility of the assault, consult each other on the subject and exchange remarks with strangers, this is misconduct by the jury, for which a new trial may be awarded. S. v. Baker (1916) 28 I. 727, 156 P. 103.

Same: Waiver of objections: But the defendant, with full knowledge of the misconduct of the jury in wrongfully receiving evidence out of court, having chosen not to complain to the court, but rather to take the risk of a verdict in his favor, could not afterward, because the verdict was against him, have a new trial on this ground. Ib.

Separation of jury: The fact that the jurors attend the theater during the progress of a murder trial and sit six in one box and six in another is not such a separation or misconduct of the jury as to require a new trial in the absence of any

showing of prejudice. S. v. Levy (1904) 9 I. 483, 75 P. 227.

Separation of the jury prior to the final submission of the case to them is not a specific ground for new trial, and while a showing of such separation in a homicide case establishes prima facie the defendant's right to a new trial, yet the effect of such showing may be overcome by the state's establishing affirmatively that no prejudice resulted from the separation. S. v. Sly (1905) 11 I. 110, 80 P. 1125.

The act of a juror in deliberately separating from his fellows after the submission of the case, explained only by his own uncorroborated affidavit to the effect that he spoke to on one about the case during such separation, is ground for a new trial. S. v. West (1905) 11 I. 157, 81 P. 107.

Newly discovered evidence: A new trial should never be granted on the ground of newly discovered evidence when such evidence is merely cumulative, nor when it was easily within the reach of the defendant, and with reasonable diligence could have been produced at the trial. S. v. Davis, supra; S. v. Fleming (1910) 17 I. 471, 106 P. 305; S. v. Lumpkin, 31 I. 175. 169 P. 939.

A new trial will not be granted on the ground of newly discovered evidence unless it is shown that the introduction of such evidence might change the result of the verdict, and sufficient reason must be shown why such evidence could not have been presented at the former trial. S. v. Bond (1906) 12 I. 424, 86 P. 43.

An application for a new trial on the ground of newly discovered evidence will not be granted unless due diligence is shown, and it is prboable that a different result may follow another trial. S. v. Williams (1906) 12 I. 483, 86 P. 53.

Where a defendant in a criminal case assumes the risk of standing trial, notwithstanding the absence of certain evidence which he deems material and of which he then knows, and makes no application for a continuance to enable him to procure such evidence, he can not procure a new trial on the ground of newly discovered evidence. S. v. Cook (1907) 13 I. 45, 88 P. 240.

Hearing: Where on motion for new trial in a criminal case the defendant files affidavit that a certain juror, previous to the trial, had stated with reference to the defendant that he ought to be hung, there is such an attack on the veracity of the juror (who had stated on his voir dire that he had expressed no opinion as to the guilt of the defendant) as to authorize the reception of sustaining affidavits on behalf of the state, to the effect that the juror's reputation for truth and veracity was good. S. v. Levy (1904) 9 I. 483, 75 P. 227.

Affidavits of jurors are not admissible to impeach their verdict after the same has been rendered. S. v. Ridgley (1900) 7 I. 292, 62 P. 679.

Counter showing by state: The right of the state to file counter affidavits to an application for a new trial has been frequently recognized. S. v. Fleming, supra.

§ 9018. [7953] **Time for application.** The application for a new trial may be made before or after judgment; and must be made within 10 days after verdict, unless the court or judge extends the time. [R. S. § 7953.]

Hist. (See Cr. Prac. '64, § 428) R. S. § 7953, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: Pen. C. 1872, § 1182; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10920. See also C. Cr. P. §§ 10918-9.

Time for application: An application for a new trial must be made within 10 days after verdict unless the time for making the same has been extended by the court or judge; if the application is not so made, an appeal from the order denying a new trial will be dismissed on motion. S. v. Dupuis (1901) 7 I. 614, 65 P. 65; S. v. Rice (1901) 7 I. 762, 66 P. 87; S. v. Davis (1901) 7 I. 776, 65 P. 429; S. v. Davis (1901) 8 I. 115, 66 P. 932.

Sufficiency of application: A notice of intention to apply for a new trial, served on the district attorney and filed with the clerk, is not an application for a new trial. S. v. Smith (1897) 5 I. 291, 48 P. 1060. But where defendant serves and files his notice of intention to move for a new trial and states therein the grounds upon which the application is based, and the trial court and the respective counsel treat such notice as an application for a new trial, the supreme court will so treat it, and will not dismiss the appeal from the order denying a new trial on the ground that formal application for a new trial was not made. S. v. Wright (1906) 12 I. 212, 85 P. 493.

ARTICLE 7.

ARREST OF JUDGMENT.

§ 9019. [7960] **Grounds for motion.** A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment that are grounds of demurrer, unless the objection to the indictment has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment. [R. S. § 7960.]

Hist. (See Cr. Prac. '64, §§ 429, 431) R. S. § 7960, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1185; amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10921.

Cited: S. v. Alcorn (1901) 7 I. 599, 64 P. 1014.

Defects in indictment: A defect in an indictment in that it fails to give the legal appellation of the offense charged can not be reached by a motion in arrest. P. v. Stapleton (1884) 2 I. 47, 3 P. 6.

§ 9020. [7961] **Arrest without motion.** The court may also, on its own view of any of these defects, arrest the judgment without motion. [R. S. § 7961.]

Hist. Cr. Prac. '64, § 430, R. S. § 7961, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1186; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10922.

§ 9021. [7962] **Effect of sustaining motion.** The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found. [R. S. § 7962.]

Hist. Cr. Prac. '64, § 432, R. S. § 7962, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1187; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10922.

§ 9022. [7963] **Discharge or detention of defendant.** If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment can be framed, upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new indictment. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution or indictment. But if no evidence appears sufficient to charge him with any offense he must, if in custody, be discharged; or if admitted to bail, his bail is exonerated; or if money has been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment was founded. [R. S. §7963.]

Hist. Cr. Prac. '64, § 433, R. S. § 7963, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1188; similar as amended: Kerrs' C. ib.

N. D. Similar: C. Cr. P. § 10923.

CHAPTER 322.

JUDGMENT AND EXECUTION.

ARTICLE 1.

THE JUDGMENT.

§ 9023. [7980] **Time for judgment.** After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed. [R. S. § 7980.]

Hist. (See Cr. Prac. '64, §§ 434, 435) R. S. § 7980, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1191; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10924-5.

§ 9024. [7981] **Determination of degree of crime.** Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree. [R. S. § 7981.]

Hist. R. S. § 7981, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1192; Kerr's C ib.

N. D. Analogous: C. Cr. P. § 10936.

N. J. Similar: See Hallinger v. Davis, 146 U. S. 314, 13 S. C. R. 106, 36 L. ed. 986.

§ 9025. [7982] **Presence of defendant.** For the purpose of judgment, if the conviction is for felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence. [R. S. § 7982.]

Hist. Cr. Prac. '64, § 436, R. S. § 7982, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1193; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10926.

§ 9026. [7983] **Defendant to be brought before court.** When the defendant is in custody the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so. [R. S. § 7983.]

Hist. (See Cr. Prac. '64, § 437) R. S. § 7983, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1194; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10927.

§ 9027. [7984] **Bench warrant to enforce attendance.** If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest. [R. S. § 7984.]

Hist. Cr. Prac. '64, § 438, R. S. § 7984, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1195; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10928.

§ 9028. [7985] **Clerk to issue warrant.** The clerk, on the application of the prosecuting attorney, may, at any time after the order, whether the court be sitting or not, issue a bench warrant into one or more counties. [R. S. § 7985.]

Hist. Cr. Prac. '64, § 439, R. S. § 7985, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1196; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10929.

§ 9029. [7986] **Form of warrant.** The bench warrant must be substantially in the following form:

County of .....

The state of Idaho, to any sheriff, constable, marshal or policeman in this state:

A. B., having been on the .....day of....., A. D. 19.... duly convicted in the district court of the .....judicial district of the state of Idaho, in and for the county of....., of the crime of..... (designating it generally), you are therefore commanded forthwith to arrest the above named A. B. and bring him before that court for judgment; or if the court has adjourned for the term, that you deliver him into the custody of the sheriff of the county of.....

Given under my hand, with the seal of said court affixed, this.....day of....., A. D. 19.....

By order of the court.

(Seal) E. F., Clerk.

[R. S. § 7986.]

Hist. (Cr. Prac. '64, § 440, R. S. § 7986, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1197; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10930.

§ 9030. [7987] **Service of warrant.** The bench warrant may be served in any county in the same manner as a warrant of arrest, and when served in another county it need not be indorsed by a magistrate of that county. [R. S. § 7987.]

Hist. Cr. Prac. '64, § 441; R. S. § 7987, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1198; Kerr's C. ib.,

N. D. Similar: C. Cr. P. § 10931.

§ 9031. [7988] **Arrest of defendant.** Whether the bench warrant is served in the county in which it was issued or in another county, the officer must arrest the defendant and bring him before the court or commit him to the officer mentioned in the warrant, according to the command thereof. [R. S. § 7988.]

Hist. Cr. Prac. '64, § 442, R. S. § 7988, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1199; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10932.

§ 9032. [7989] **Arraignment for sentence.** When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the indictment and of his plea, and the verdict if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him. [R. S. § 7989.]

Hist. Cr. Prac. '64, § 443, R. S. § 7989, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1200; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10933.

§ 9033. [7990] **Grounds for withholding judgment.** He may show, for cause against the judgment:

1. That he is insane, and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried as provided in chapter 326. If, upon the trial of that question, the jury find that he is sane, judgment must be pronounced, but if they find him insane he must be committed to the state insane asylum until he becomes sane; and when notice is given of that fact, as provided in said chapter, he must be brought before the court for judgment.

2. That he has good cause to offer, either in arrest of judgment or for a new trial, in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial. [R. S. § 7990.]

Hist. Cr. Prac. '64, § 444, R. S. § 7990, reen. R. C. ib., reen. C. L. ib.

Cross ref. Feeble-minded or epileptic convicts: § 1214.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 1201; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10934.

§ 9034. [7991] **Pronouncement of judgment.** If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered. [R. S. § 7991.]

Hist. (See Cr. Prac. '64, § 445) R. S. § 7991, reen. R. C. ib., reen. '15, c. 104, § 1, p. 244; amendatory matter in '15 act appears below as §§ 9041-7, reen. C. L. § 7991.

Cross ref. Parole of youthful offenders: § 9041 et seq.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1202; Kerr's C. ib.

N. D. Similar in part: C. Cr. P. § 10835.

Suspension of sentence: Prior to the enactment of § 9041 et seq. the court had no authority to suspend a sentence. Re

Peterson (1911) 19 I. 433, 439, 113 P. 729, 33 L. R. A. (N. S.) 1067.

Effect of sentence not conforming to law: Where a sentence contains provisions unwarranted by law, prescribing a minimum and maximum sentence different from that provided by law, such judgment is not void except as to such unwarranted provisions and should not be interpreted in the light of the law upon which it is based, and the minimum fixed by the statutes should be read into and considered as part of the sentence and mittimus. Re Setters (1913) 23 I. 270, 279, 128 P. 1111.

§ 9035. Indeterminate sentence: Maximum and minimum. When any person shall be convicted of a felony, except treason or murder in the first degree, the punishment for which, as prescribed by law, may be imprisonment in the state penitentiary, the court imposing sentence shall not fix a definite term of imprisonment but shall fix a minimum term of imprisonment which shall not be less than the minimum prescribed by law, nor less than six months in any case.

The maximum penalty provided by law shall be the maximum sentence in all cases, except as herein provided, and shall be stated by the judge in passing sentence.

The maximum term of imprisonment shall not exceed the longest term fixed by law for the punishment of the offense of which the person sentenced is convicted, and the minimum term of imprisonment fixed by the court shall not exceed one-half of the maximum term of imprisonment fixed by statute: *Provided further*, That in all cases when the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing the sentence shall fix a maximum sentence. The release of such person shall be determined as provided in sections 9220 to 9226. [C. L. §7991a.]

Hist. '09, p. 82, H. B. 214, § 1; am. '11, c. 200, § 1, p. 664; compiled and reen. C. L. § 7991a.

Cross ref. Determination of punishment between certain limits: § 8080; punishment for felony where no other penalty prescribed: § 8085.

Comp. leg.—Kan. Similar: Gen. St. '15, § 8179.

Cited: S. v. Altwater (1916) 29 I. 107, 112, 157 P. 256.

Effect of erroneous sentence: Where a prisoner is not erroneously sentenced under this law, the sentence is not void ab initio. A prisoner can not be discharged on habeas corpus until he has performed so much of the sentence as was within the power of the court to impose. Re Chase (1910) 18 I. 561, 110 P. 1036.

Maximum sentence: Under this section any attempt by the trial court to fix a maximum sentence in a criminal case, where such sentence is fixed by law, is surplusage. Re Setters (1913) 23 I. 270, 128 P. 1111; S. v. Lottridge (1917) 29 I. 822, 162 P. 672.

Minimum sentence: It was held that under this section before its enactment, when the minimum sentence is fixed by law the court is not authorized to fix a different minimum. Re Setters, supra. But since amendment see S. v. Grant, below.

Under this section taken together with § 8399, fixing the penalty for the crime of arson in the first degree at a minimum sentence of two years and a maximum for life, the defendant was legally sentenced to serve a maximum term of 50 years, with a minimum of 25 years. S. v. Grant (1914) 26 I. 189, 140 P. 959.

§ 9036. [7992] **Inquiry into mitgating or aggravating circumstances.** After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct. [R. S. § 7992.]

Hist. R. S. § 7992, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1203; similar with additional provisions as amended; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10937.

§ 9037. [7993] **Same: Examination of witnesses.** The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out

of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section. [R. S. § 7993.]

Hist. R. S. § 7993, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1204; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 10938-9.

§ 9038. [7994] Imprisonment upon failure to pay fine. A judgment that the defendant pay a fine, or pay costs, or pay both fine and costs, may also direct that defendant be imprisoned until the fine, or costs, or both fine and costs, have been satisfied; specifying the extent of the imprisonment, which can not exceed one day for every $2 of the fine, costs, or fine and costs, as the case may be. ['99, p. 379, § 1.]

Hist. (See Cr. Prac. '64, § 447) R. S. § 7994; am. '99, p. 379, § 1, reen. R. C. § 7994, reen. C. L. ib.

Cross ref. Similar provision as to common law offenses: § 8604. Similar provision relating to probate and justices' courts: § 9248.

Comp. leg.—Cal. Similar as to fine, costs not mentioned: Pen. C. 1872, § 1205; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10941.

Cited: (In brief of counsel) Re Peterson (1911) 19 I. 434; Re Schuster (1914) 25 I. 465, 138 P. 135.

Sufficiency of judgment: A judgment that the defendant pay a fine of $1000 and be remanded to the custody of the sheriff to be confined in the county jail, and unless the fine be paid within 30 days, to the territorial prison, to be there confined until the fine is paid, not exceeding two years from the date of the sentence, and that on payment of the fine the defendant be released from custody and confinement, is not sufficiently definite, and when brought before the supreme court for review, will be vacated with directions to the trial court to pronounce such judgment as may seem proper. T. v. Guthrie (1888) 2 I. 432, 17 P. 39.

Alternative sentence: Under this section court may impose alternative sentence of imprisonment if defendant fails to pay fine or costs or both. This section has reference to the judgment upon the original trial of a criminal case, while § 9270 has reference to judgments in such cases on appeal. Re Lucas (1909) 17 I. 164, 104 P. 657; Re Walton (1909) 17 I. 171, 104 P. 659.

Imprisonment and fine: Under this section a judgment of absolute imprisonment in a criminal case, coupled with the payment of a fine and costs, may also contain a direction that the defendant be imprisoned until the fine and costs have been satisfied. S. v. Anderson, 31 I. 514, 174 P. 124.

§ 9039. [7995] Lien of judgment for fine. A judgment that the defendant pay a fine, pay costs, or pay fine and costs, constitutes a lien in like manner as a judgment for money in a civil action. ['99, p. 379, § 2.]

Hist. Cr. Pr. '64, § 448, R. S. § 7995, '99, p. 379, § 2, reen. R. C. § 7995, reen. C. L. ib.

Comp. leg.—Cal. Same except "pay costs, or pay fine and costs" omitted, and "rendered" inserted after "money": Pen. C. 1872, § 1206; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10941a.

Cited: S. v. Anderson, 31 I. 514, 174 P. 124.

§ 9040. Entry of judgment: Record. When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction was had and must without unnecessary delay annex together and file the following papers, which constitute a record of the action:

1. A copy of the minutes of a challenge interposed by the defendant to the panel of a grand jury, or to an individual grand juror, and the proceedings and the decisions thereon.
2. The indictment and a copy of the minutes of the plea or demurrer.
3. A copy of the minutes of a challenge interposed to the panel of the trial jury or to an individual juror, and the proceedings and decision thereon.
4. A copy of the minutes of the trial.
5. A copy of the minutes of the judgment.

6. Any bill or bills of exceptions.

7. The written charges asked of the court, and refused with the court's indorsement thereon.

8. A copy of all requested instruction showing those given and those refused with the court's indorsement thereon, together with a copy of all instructions given on the court's own motion. ['15, c. 149, p. 323.]

Hist. (See Cr. Prac. '64, § 449) R. S. § 7996, reen. R. C. ib.; am. '15, c. 149, p. 323, reen. C. L. § 7996.

Comp. leg.—Cal: Similar: Pen. C. 1872, § 1207; amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10942.

Cited: S. v. Lottridge (1916) 29 I. 53, 155 P. 487; S. v. Crawford, 32 I. —, 179 P. 511.

Appellate review: A matter not made a part of the record by statute must be made so by a bill of exceptions in order to be available on appeal. P. v. Ah Hop (1878) 1 I. 698.

On appeal from the judgment alone, no objection or exception may be considered that does not appear from the record or judgment roll, as defined by this section. S. v. Suttles (1907) 13 I. 88, 88 P. 238.

To authorize a review of instructions given by the court upon its own motion, they must be presented to the supreme court by a proper bill of exceptions, either incorporating the instructions given, or the exception, with a proper identification of such instructions, showing that the exception was taken at the time the instructions were given. S. v. Peck (1908) 14 I. 712, 718, 95 P. 515.

Contents of record: Instructions given by the court on its own motion constitute no part of the record and must be embodied in a bill of exceptions. P. v. Walter (1871) 1 I. 386; S. v. Suttles (1907) 13 I. 88, 88 P. 238.

Neither the arraignment nor a copy of the minutes thereof is a part of the record in a criminal action. P. v. Ah Hop, supra.

The record need not show that the officer in charge of the jury was sworn, nor that the jury was admonished at each adjournment; failure to comply with those requirements of the law must be shown by a bill of exceptions. P. v. Waters (1874) 1 I. 560. The record need not show that the defendant was instructed as to his right to challenge an individual juror, as required by § 7826, nor that the jury were admonished at each adjournment of the court, as required by § 7881. S. v. Suttles, supra.

Effect of amendment: The previous rulings of the supreme court—that instructions in writing requested by the state, and given, or requested by the defendant and refused, are deemed excepted to, and the question presented thereby need not be preserved in the bill of exceptions in order to be reviewed by the appellate court; also that objections to instructions given by the court on its own motion must be preserved by bill of exceptions in order to be reviewed—are not affected by the amendment of 1915. S. v. Lundhigh (1917) 30 I. 365, 371, 164 P. 690.

ARTICLE 2.

SUSPENSION OF JUDGMENT AND SENTENCE AND PAROLE OF OFFENDERS.

§ 9041. Parole. Whenever any person shall have been convicted of any crime against the laws of this state except those of treason, murder, robbery and all classes of rape except statutory rape, abortion, arson and embezzlement of public funds, and the defendant is previously of good character and has never before been convicted of a felony, the court may in its discretion, suspend the execution of judgment or withhold judgment on such terms and for such time as it may prescribe, and, in either event, may put the defendant on probation in the charge of one of the probation officers of the Juvenile court of the county in which the court is sitting or other probation officer, or of any other proper person selected and designated for that purpose. ['19, c. 134, § 1, p. 428.]

Hist. '15, c. 104, proviso in § 1, p. 244, reen. C. L. § 7997; am. '19, c. 134, § 1, p. 428.

§ 9042. Parole secured by misrepresentation. If at any time after suspension of sentence it shall appear to the district judge that the order suspending sentence was obtained by fraud, perjury or by any sort of misrepresentation or suppression of facts, or that the accused has failed or neglected to have a fixed place of abode and a regular occupation, the district judge shall issue a warrant for his apprehension and shall remand him for sentence. ['15, c. 104, § 3, p. 245.]

Hist. '15, c. 104, § 3, p. 245; reen. C. L. 7998.

§ 9043. Duty of paroled offender to report. It shall be the duty of any person paroled under the provisions of this article to appear at one regular term of the court each year granting the parole or suspending the execution of the judgment, during the continuance of such probation, and furnish at his own expense, proof, to the satisfaction of the court, that he has, since he was placed on probation or since the last date at which proof has been furnished, complied with the terms and conditions upon which he was placed on probation by the court. ['15, c. 104, § 2, p. 245.]

Hist. '15, c. 104, § 2, p. 245, reen. C. L. § 7999.

§ 9044. Violation of parole: Arrest. If it is proved to the satisfaction of the court that the terms and conditions upon which the defendant was placed on probation by the court or any of them have been violated or for any other cause satisfactory to the court, the court may, at any time within the longest period for which the defendant might have been originally sentenced by judgment of the court, issue a bench warrant for the rearrest of the defendant. ['15, c. 104, part of § 1, p. 245.]

Hist. '15, c. 104, part of § 1, p. 245, reen. C. L. § 8000.

§ 9045. Same: Pronouncement and execution of judgment. When the defendant is brought before the court in such case, it may, if judgment has been withheld, pronounce any judgment which it could originally have pronounced, or, if judgment was originally pronounced but suspended, the original judgment shall be in full force and effect and may be executed according to law, and the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence, but the time of the defendant's sentence shall count from the date of service of such bench warrant. ['15, c. 104, part of § 1, p. 245.]

Hist. '15, c. 104, part of § 1, p. 245, reen. C. L. § 8001.

§ 9046. Discharge of defendant. After the expiration of a period of time equivalent to the minimum sentence imposed by the court, if sentence has been imposed but suspended, or equivalent to the minimum sentence prescribed by statute for the offense in question, if sentence has been withheld, upon application of the defendant and upon satisfactory showing that the defendant has at all times complied with the terms and conditions upon which he was placed on probation, the court may, if convinced by the showing made that there is no longer cause for continuing the period of probation, finally dismiss the case and discharge the defendant; and this shall apply to the cases in which defendants have been convicted and paroled by the court before this law goes into effect, as well as to cases which arise thereafter. In any event at the end of the longest period for which the defendant might have been originally sentenced by the court, if the defendant has abided by the terms and conditions of his probation, and the judgment of the court has not been executed, an order shall be entered for the defendant's discharge. The final dismissal of the case as herein provided shall have the effect of restoring the defendant to his civil rights. ['19, c. 134, §2, p. 429.]

Hist. '15, c. 104, part of § 1, p. 245, reen. C. L. § 8002; am. '19, c. 134, § 2, p. 429.

§ 9047. Powers of judge at chambers. The powers hereby conferred upon the district court may be exercised by the judge thereof at chambers. ['15, c. 104, part of § 1, p. 245.]

Hist. '15, c. 104, part of § 1, p. 245, reen. C. L. § 8003.

ARTICLE 3.

THE EXECUTION.

§ 9048. [8005] **Authority for execution of judgment.** When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution. [R. S. § 8005.]

Hist. (See Cr. Prac. '64, § 450) R. S. § 8005, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1213; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10961.

§ 9049. [8006] **Execution on judgment for fine.** If the judgment is for the payment of a fine, or costs, or fine and costs, only, execution may be issued thereon as on a judgment in a civil action. ['99, p. 379, § 3.]

Hist. Cr. Prac. '64, § 451, R. S. § 8006; am. '99, p. 379, § 3, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Similar as to fine, costs not mentioned: Pen. C. 1872, § 1214; as amended: Kerr's C. ib.

N. D. Similar; C. Cr. P. § 10962.

Cited: Re Schuster (1914) 25 I. 465, 138 P. 135; S. v. Anderson, 31 I. 514, 174 P. 124.

§ 9050. [8007] **Execution of judgment of imprisonment.** If the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with. [R. S. § 8007.]

Hist. Cr. Prac. '64, § 452, R. S. § 8007, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1215; additional provision as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10963.

Cited: S. v. Anderson, 31 I. 514, 174 P. 124.

§ 9051. [8008] **Delivery of defendant to penitentiary guard.** If judgment is for imprisonment in the state prison, or for the infliction of the death penalty, the sheriff of the county must, upon receipt of the certified copy of judgment, hold the prisoner in his custody until demand for such prisoner is made upon him by the duly authorized guard of said prison, who may be sent to convey such prisoner to the state prison. When such demand is made upon the sheriff by said guard, the sheriff shall deliver the prisoner and said copy of the judgment to said guard, and take a receipt from said guard for the prisoner and said copy of the judgment. ['99, p. 340, § 2.]

Hist. R. S. § 8008; am. '99, p. 340, § 2, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 10965.

§ 9052. [8009] **Death warrant and confinement thereunder.** Whenever a person is convicted of a crime the penalty for which is death, and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall designate in the warrant of conviction a day in which the judgment is to be executed, which must not be less than 30 nor more than 60 days from the date of said judgment. Said warrant shall be directed to the warden of the state penitentiary of this state, commanding said warden to do execution of the sentence imposed as aforesaid, within the time designated in said warrant, and

shall be delivered to the sheriff of the county wherein said conviction is had, who shall deliver the same to the warden of the state penitentiary or his authorized guard at the time of the delivery of the person, and copy of the judgment as herein provided for. The said warden of the state penitentiary shall keep said convicted person in solitary confinement until the infliction of the death penalty; and no person shall be allowed access to the said convict, except his attendants, counsel, physician, spiritual adviser of his own selection, and members of his own family, and then only in accordance with the prison rules. ['99, p. 340, § 3.]

Hist. R. S. § 8009; am. '99, p. 340, § 3, reen. R. C. § 8009, reen. C. L. ib.

Comp leg.—Cal. See Pen. C. 1872, § 1217; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10968.

§ 9053. [8010] **Conviction of murder: Transmission of statement to governor.** The judge of the court at which a conviction for murder is had, must, immediately after the conviction, transmit to the governor, by mail, or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial. [R. S. § 8010.]

Hist. Cr. Prac. '64, § 454, R. S. § 8010, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1218; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10969.

§ 9054. [8011] **Governor may require opinion on statement.** The governor may thereupon require the opinion of the justices of the supreme court and of the attorney general, or any of them, upon the statement so furnished. [R. S. § 8011.]

Hist. Cr. Prac. '64, § 455, R. S. § 8011, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1219; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10970.

§ 9055. [8012] **Suspension of judgment of death.** No judge, court or officer, other than the governor, can suspend the execution of a judgment of death, except the sheriff, as provided in the six succeeding sections, unless an appeal is taken. [R. S. § 8012.]

Hist. (See Cr. Prac. '64, § 456) R. S. § 8012, reen. R. C. ib, reen. C. L. ib.

Cross ref. Governor may grant respites or reprieves in all cases of convictions for offenses against the state except treason or conviction on impeachment, but such respite or reprieve shall not extend beyond the next session of the board of pardons. Const. IV, 7.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1220; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10971.

§ 9056. [8013] **Inquiry as to defendant's sanity.** If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected by the commissioners for the year a jury of 12 persons to inquire into the supposed insanity, and must give immediate notice thereof to the prosecuting attorney of the county. [R. S. § 8013.]

Hist. Cr. Prac. '64, § 457, R. S. § 8013, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same except "supervisors" for "commissioners": Pen. C. 1872, § 1221; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10983.

§ 9057. [8014] **Production of witnesses.** The prosecuting attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. [R. S. § 8014.]

Hist. Cr. Prac. '64, § 458, R. S. § 8014, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1222; similar as amended: Kerr's C. ib.

Cross ref. Processes of witnesses before the grand jury: § 8794.

N. D. Analogous: C. Cr. P. § 10984.

§ 9058. [8015] **Certificate of inquisition.** A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction was had. [R. S. § 8015.]

Hist. Cr. Prac. '64, § 459, R. S. § 8015, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1223; different as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10984.

§ 9059. [8016] **Proceedings upon finding.** If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor or from the judge of the court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. [R. S. § 8016.]

Hist. Cr. Prac. '64, § 460, R. S. § 8016, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1224; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10985.

§ 9060. [8017] **Proceedings when female supposed to be pregnant.** If there is good reason to suppose that a female against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the prosecuting attorney of the county, and the provisions of sections 9057 and 9058 apply to the proceedings upon the inquisition. [R. S. § 8017.]

Hist. Cr. Prac. '64, § 462, R. S. § 8017, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 1225; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. §10986.

§ 9061. [8018] **Finding of jury in case of pregnancy.** If it is found by the inquisition that the female is not pregnant, the sheriff must execute the judgment; if it is found that she is pregnant, the sheriff must suspend the execution of the judgment, and transmit the inquisition to the governor. When the governor is satisfied that the female is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment. [R. S. § 8018.]

Hist. Cr. Prac. '64, §§ 463-4, R. S. § 8018, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1226; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10987.

§ 9062. [8019] **Order for execution of judgment of death.** If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the prosecuting attorney, must order the defendant to be brought before it, or if he is at large a warrant for his apprehension may be issued. Upon the defendant being brought before the court, the court must inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the warden execute the judgment at a specified time. The warden must execute the judgment accordingly. ['99, p. 340, § 4.]

Hist. (See Cr. Prac. '64, §§ 465, 466) R. S. § 8019; am. '99, p. 340, § 4, reen. R. C. § 8019, reen. C. L. ib.

§ 9063. [8020] **Infliction of death penalty.** The punishment of death must be inflicted by hanging the defendant by the neck until he is dead. [R. S. § 8020.]

Hist. Cr. Prac. '64, § 467, R. S. § 8020, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1228; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10972.

§ 9064. [8021] **Same: Duties of the state prison board.** The state prison board of the state, at the expense of the state of Idaho, shall provide a suitable room or place, closed from public view within the walls of the state penitentiary, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this state, in each and every case, be inflicted by the warden, in the state penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead. ['99, p. 340, § 5.]

Hist. R. S. § 8021; am. '99, p. 340, § 5, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 10873.

Cited: Davis v. Burke (1900) 179 U. S. 399, 45 L. ed. 249, 21 S. C. R. 210.

Not retroactive: This section as amended applies only to future offenses, and one convicted of an offense committed prior to its passage and sentenced to be hung, should be executed in accordance with the original section prior to the amendment, which provided for the execution of the sentence by the sheriff of the county. Re Davis (1899) 6 I. 766, 59 P. 544.

§ 9065. [8022] **Return of death warrant.** After the execution, the warden must make a return upon the death warrant, showing the time, mode and manner in which it was executed. ['99, p. 340, § 6.]

Hist. R. S. § 8022; am. '99, p. 340, § 6, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same except "sheriff" for "warden": Pen. C. 1872, § 1230; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10980.

CHAPTER 323.

APPEALS TO THE SUPREME COURT.

ARTICLE 1.

TAKING OF APPEAL.

§ 9066. [8040] **Who may appeal.** Either party in a criminal action in the district court may appeal to the supreme court, on questions of law alone, as prescribed in this article. [R. S. § 8040.]

Hist. (See Cr. Prac. '64, §§ 468, 469) R. S. § 8040, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1235; Kerr's C. ib.

N. D. Analogous: C. Cr. P. 10989.

Cited: S. v. Reed (1893) 3 I. 554, 32 P. 202.

Scope of review: The supreme court can not upon appeal in a criminal case review the facts to determine whether the verdict is contrary to the evidence, but is confined to the consideration of errors of law. P. v. Ah Hop (1878) 1 I. 698. The evidence may be reviewed only by an appeal from an order denying a new trial. P. v. Pierson (1884) 2 I. 76, 3 P. 688. Errors of law in the admission of evidence may be reviewed but conflicting evidence can not be weighed. U. S. v. Camp (1886) 2 I. 231, 10 P. 226.

§ 9067. [8041] **Designation of parties.** The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action is not changed in consequence of the appeal. [R. S. § 8041.]

Hist. (See Cr. Prac. '64, § 470) R. S. § 8041, reen. R. C. ib, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1236; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 10991.

§ 9068. Appeal by defendant. An appeal may be taken by the defendant:

1. From a final judgment of conviction.
2. From an order denying a motion for a new trial.
3. From any order made after judgment, affecting the substantial rights of the party.

Upon an appeal from a final judgment of conviction, if a reporter's transcript of the evidence appears in the record, the ground that the verdict is contrary to the evidence may be considered and determined to the same extent as on an appeal from an order denying a new trial, *Providing,* A specification of the particulars in which the evidence is insufficient to sustain the verdict is made in appellant's brief filed with the supreme court. ['15, c. 150, § 1, p. 324.]

Hist. (See Cr. Prac. '64, § 471) R. S. § 8042, reen. R. C. ib; am. '15, c. 150, § 1, p. 324, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1237; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10992.

Cited: Re Neil (1906) 12 I. 749, 87 P. 881; S. v. Lundhigh (1917) 30 I. 365, 371, 164 P. 690.

What constitutes a judgment: A court minute reciting that a copy of the justice's docket is ordered stricken from the files, and the motion of the county attorney to dismiss the action is sustained, does not constitute a judgment from which an appeal may be taken. S. v. Barnard (1907) 13 I. 439, 90 P. 1.

The action of the court with reference to bail can not be reviewed upon appeal from the judgment. S. v. Peck (1908) 14 I. 712, 95 P. 515.

Review of evidence: Prior to this and concurrent amendments, the only method of procuring a review of the evidence was upon appeal from an order granting or denying a motion for a new trial. S. v. Lottridge (1916) 29 I. 53, 155 P. 487.

Review of orders: Orders refusing to set aside an indictment and disallowing a demurrer are not appealable, and can be reviewed by the court only on appeal from a final judgment. S. v. Maguire (1917) 31 I. 24, 169 P. 175.

Specification of particulars required: Since this section as amended requires specifications of particulars in which evidence is insufficient to be made in appellant's brief, such questions may not be reviewed by court unless specifications are made. Ib.

§ 9069. [8043] **Appeal by state.** An appeal may be taken by the state:

1. From a judgment for the defendant on a demurrer to the indictment or information.
2. From an order granting a new trial.
3. From an order arresting judgment.
4. From an order made after judgment affecting the substantial rights of the prosecution.
5. From any ruling of the trial judge during the course of the trial on the receipt or rejection of testimony, and from any ruling of the trial judge on the giving or refusal to give instructions to the jury. ['07, p. 508, § 1.]

Hist. (See Cr. Prac. '64, § 471) R. S. § 8043; am. '07, p. 508, § 1, reen. R. C. § 8043, reen. C. L. ib.

Comp. Leg.—Cal. Similar: Pen. C. 1872, § 1238; as am. Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10993.

Cited: S. v. Sheridan (1908) 14 I. 222, 228, 93 P. 656, 15 L. R. A. (N. S.) 497; S. v. Zarlenga (1908) 14 I. 305, 308, 94 P. 55; S. v. Maguire (1917) 31 I. 24, 169 P. 175.

Right of appeal: The right of the state to appeal from any decision in favor of the defendant in a criminal action is statutory, and does not exist in any class of cases unless expressly given by statute. This section does not give the state the right to appeal from a judgment of the district court in a criminal action which has been appealed from a probate or justice's court, and which is prosecuted by complaint. S. v. Ridenbaugh (1897) 5 I. 710, 51 P. 750; modified by S. v. Stafford (1914) 26 I. 381, 143 P. 528.

The state has no right of appeal from an order sustaining defendant's plea of once in jeopardy, and other orders specified. S. v. Grady, 31 I. 272, 170 P. 85.

An appeal may be taken by the state under the amendment of '07 from a judgment for defendant on demurrer to the complaint originally filed in the probate court in a case appealed to the district court, the word "information" being held to apply to the first pleading in the inferior court. S. v. Stafford (1914) 26 I. 381, 143 P. 528.

Advising jury to acquit defendant under § 8963 is not subject to review. S. v. Murphy (1916) 29 I. 42, 156 P. 908.

§ 9070. Time for appeal. An appeal from a judgment must be taken within six months after its rendition, and from an order, within 60 days after it is made. [C. L. § 8044.]

Hist. (See Cr. Prac. '64. § 472) am. '75. p. 363, § 468, R. S. § 8044, reen. R. C. ib; am. '15, c. 150, § 2, p. 325; compiled and reen. C. L. § 8044.

Comp. leg.—Cal. Analogous: Pen. C. 1872, § 1239; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10994

Time for appeal: An appeal from an order made after judgment must be taken within 60 days after the entry of such order, nor can the time be extended by moving in the district court to set aside the order. and appealing from the action of the court denying such motion. S. v. Griffin (1895) 4 I. 459, 40 P. 60.

Cited: S. v. Lottridge (1916) 53 I. 53, 57, 155 P. 487; S. v. Lundhigh (1917) 30 I. 365, 371, 164 P. 690.

§ 9071. [8045] **Notice of appeal.** An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party. [R. S. § 8045.]

Hist. (See Cr. Prac. '64. §§ 473, 474, 475) R. S. § 8045, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1240; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10995.

Taking of appeals: An appeal whether taken by the defendant or by the people, must be taken by the service of a notice on the clerk. P. v. Lynch (1871) 1 I. 358.

Adverse party: When the appeal is perfected under this section, the attorney general becomes the attorney for the state, the adverse party. S. v. Squires (1908) 15 I. 327. 97 P. 411.

§ 9072. [8046] **Service of notice.** If personal service of the notice can not be made, the judge of the court in which the action was tried, upon proof thereof, may make an order for the publication of the notice in some newspaper for a period not exceeding 30 days; such publication is equivalent to personal service. [R. S. § 8046.]

Hist. (See Cr. Prac. '64, §§ 475, 476) R. S. § 8046, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1241; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 10996.

§ 9073. [8047] **Effect of appeal by state.** An appeal taken by the state in no case stays or affects the operation of a judgment in favor of the defendant, until the judgment is reversed: *Provided,* That when an appeal is taken by the state on any grounds stated in the fifth subdivision of section 9069, the decision on appeal shall be for the future guidance of courts only and shall in no way affect a judgment in favor of the defendant. ['07, p. 508, § 2.]

Hist. (See Cr. Prac. '64. § 477) R. S. § 8047, am. '07, p. 508, § 2. reen. R. C. § 8047, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1242; Kerr's C. ib.

N. D. Similar, in part: C. Cr. P. § 10998.

§ 9074. [8048] **Stay of execution.** An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise. [R. S. § 8048.]

Hist. (See Cr. Prac. '64, § 478) R. S. § 8048, reen. R. C. ib., reen. C. L. ib.

Comp. Leg.—Cal. Same: Pen. C. 1872. § 1243; Kerr's C. ib.

N. D. Similar. C. Cr. P. § 10999.

Probable cause—definition: The phrase "probable cause for the appeal." as used in this section. does not mean that there is a probable reason to suppose the judgment will be reversed. but that the appellant has assigned grounds of error that are open to doubt or honest difference of opinion, and over which rational, reasonable and honest discussion may arise; that the appeal must present some debatable question that is not merely frivolous and vexatious. Re Neil (1906) 12 I. 749, 87 P. 881.

Admission to bail: Admission to bail after conviction is a matter entirely separate and distinct from a certificate of

probable cause; while the defendant may not be admitted to bail prior to the issuance of such certificate, yet, on the other hand, a certificate may, and should, properly issue in many cases where the defendant should not be admitted to bail. Ib.

Certificate—When denied: A justice of the supreme court will not grant a certificate of probable cause to stay proceedings pending an appeal from an order denying a new trial, where the motion for a new trial was not made within the time allowed by statute therefor. S. v. Davis (1901) 7 I. 776. 65 P. 429.

§ 9075. [8049] **Same: Custody of defendant.** If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal. [R. S. § 8049.]

Hist. (See Cr. Prac. '64, § 478) R. S. § 8049, reen. R. C. ib., reen. C. L. ib.

Cross ref. Admittance to bail pending appeal: §§ 9096, 9110.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1244; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11000.

§ 9076. [8050] **Same: Remand of defendant.** If, before granting of the certificate, the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody. [R. S. § 8050.]

Hist. R. S. § 8050, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1245; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11001.

§ 9077. Record on appeal: Duty of clerk: Service. Upon the appeal being taken, the clerk with whom the notice of appeal is filed, must within 40 days thereafter, unless further time is given by the district court from which the appeal is taken, or a judge thereof, or by a member of the supreme court, prepare the record to be used in the supreme court. Such record shall be prepared in accordance with the rules of the supreme court and shall consist of one original and four carbon copies to be certified by the clerk as true and correct. The original copy and two carbon copies so prepared and certified by the clerk shall be at once transmitted by him to the clerk of the supreme court. Two carbon copies of such record or transcript on appeal shall, as soon as prepared and certified by the clerk, be transmitted to the attorney for the appellant, or if there be more than one attorney for the apellant whose name appears upon the notice of appeal, then the said copies shall be transmitted to one of such attorneys and the clerk shall notify by mail the other attorneys for appellant of such fact.

The attorneys for the appellant shall within 10 days after receiving such copies of the transcript on appeal serve one copy thereof upon the attorney for the respondent. In case the state is respondent, such copy shall be served upon the attorney general. Service may be made by mail or personally and proof of service shall be filed with the clerk of the supreme court. The record for appeal from a final judgment of conviction shall consist of copies of the following papers: the notice of appeal; the record, as the same is or shall be provided by section 9040; the reporter's transcript, in case there be one; any bill or bills of exceptions, if any there be, preserving the evidence and proceedings at the trial.

If the appeal be from an order denying a motion for a new trial, or from any other order made after judgment affecting the substantial rights of the party, the record on appeal shall consist of copies of the bill or bills of exceptions preserving the same. On an appeal taken by the state as provided in section 9069 the record shall consist of copies

of any bill or bills of exceptions preserving a record of the same. [C. L. § 8051.]

Hist. (See Cr. Prac. '64, § 479) R. S. § 8051, reen. R. C. ib., am. '15, c. 146, p. 319; compiled and reen. C. L. § 8051.

Comp. leg.—Cal. Analogous: Pen. C. 1872, § 1246; amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11002.

Cited: S. v. Suttles (1907) 13 I. 88, 88 P. 238; S. v. Peck (1908) 14 I. 712, 718, 95 P. 515; S. v. Lottridge (1916) 29 I. 53, 57, 155 P. 487; S. v. Lundhigh (1917) 30 I. 365, 164 P. 690; S. v. Maguire (1917) 31 I. 24, 169 P. 175; S. v. Crawford, 32 I. —. 179 P. 511.

Stipulation as to correctness of record: The provisions of R. S. § 8051, requiring the clerk to transmit the records to the appellate court and to certify to their correctness may be waived by a stipulation entered into by the respective counsel as to the correctness and completeness of the record. S. v. Squires (1908) 15 I. 327, 97 P. 411.

When appeal is perfected in a criminal case the attorney general becomes attorney for the state and is the only counsel with authority to stipulate what the record contains. Ib.

State's attorney: The attorney general is the attorney for the adverse party, the state. on a criminal appeal, and must be served with brief and transcript or the appeal will be dismissed. S. v. Burgy (2 cases) (1912) 22 I. 586, 588, 126 P. 779, 780.

ARTICLE 2.

DISMISSING APPEALS.

§ **9078.** [8056] **Dismissal for irregularity.** If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day in term, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed. [R. S. § 8056.]

Hist. (See Cr. Prac. '64, § 480, R. S. § 8056, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1248; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11007.

Informalities: The absence of a formal motion for a new trial, where notice of intention was duly served, and was treated by the court and counsel as an application, is not a substantial irregularity such as to authorize a dismissal of the appeal. S. v. Wright (1906) 12 I. 212. 85 P. 493.

Substantial irregularities: Where a transcript on appeal in a criminal case is not certified as required by law and such certificate is not waived the same will be stricken from the files for want of proper certification. S. v. Squires (1908) 15 I. 327, 96 P. 411.

Where a transcript on appeal has been stricken from the files, and no new transcript is substituted or filed in lieu thereof. there is no case before the appellate court for review and upon motion the appeal will be dismissed. Ib.

§ **9079.** [8057] **Dismissal for want of return.** The court may also, upon like motion, dismiss the appeal, if the return is not made as provided in the last article, unless, for good cause, they enlarge the time for that purpose. [R. S. § 8057.]

Hist. Cr. Prac. '64, § 481, R. S. § 8057. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1249; Kerr's C. ib.

ARTICLE 3.

ARGUMENT OF THE APPEAL.

§ **9080.** [8062] **To be heard at first term.** All appeals in criminal cases must be heard and determined at the first term of the appellate court after the record is filed, unless continued on motion of or with the consent of the defendant. [R. S. § 8062.]

Hist. (See Cr. Prac. '64, § 482) R. S. § 8062, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1252; different as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11009.

§ **9081.** [8063] **Affirmance for failure to appear.** The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument though the respondent fail to appear. [R. S. § 8063.]

Hist. Cr. Prac. '64, § 483, R. S. § 8063, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1253; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11010.

§ 9082. [8064] **Restriction of argument.** Upon the argument of the appeal, if the offense is punishable with death, two counsel must be heard on each side, if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side. [R. S. § 8064.]

Hist. Cr. Prac. '64, § 484, R. S. § 8064, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1254; Kerr's C ib.

N. D. Analogous: C. Cr. P. § 11011.

§ 9083. [8065] **Presence of defendant.** The defendant need not personally appear in the appellate court. [R. S. § 8065.]

Hist. Cr. Prac. '64, § 485, R. S. § 8065, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, §1255; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11012.

ARTICLE 4.

JUDGMENT UPON APPEAL.

§ 9084. [8070] **Technical errors disregarded.** After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. [R. S. § 8070.]

Hist. Cr. Prac. '64, § 486, R. S. § 8070, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1258; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11013.

Cited: S. v. Clark (1894) 4 I. 7, 35 P. 710; (Dis. op.) S. v. Squires (1908) 15 I. 327, 97 P. 411; (Con. op.) S. v. Lundhigh (1917) 30 I. 365, 174 P. 690.

Application: This section is applicable, not only against the defendant, but also against the state, when it urges a mere technical variance by the defendant from statutory requirements of practice, which appears neither to have misled nor prejudiced the rights of the state. S. v. Wright (1906) 12 I. 212, 85 P. 493.

Harmless errors: The following defects or informalities have been held not to affect substantial rights within the meaning of this section: A technical defect in an instruction otherwise unobjectionable. P. v. Barnard (1886) 2 I. 193, 10 P. 30. Charging an accessory as such instead of charging him as principal. T. v. Guthrie (1888) 2 I. 432, 17 P. 39. Improperly sustaining a challenge for implied bias. S. v. Gordon (1897) 5 I. 297, 48 P. 1061. The failure of the record to show the defendant's presence at the rendition of the verdict. S. v. Watkins (1900) 7 I. 35, 59 P. 1106. Improper statements, made by the prosecuting attorney to the jury, which are not actually prejudicial to the defendant. S. v. Rice (1901) 7 I. 762, 66 P. 87. Rejection and admission of evidence not prejudicial. S. v. Gruber (1911) 19 I. 692, 115 P. 1; S. v. Fondren (1913) 24 I. 663, 135 P. 265. Absence of trial judge on view of premises by jury, no objection being made at the time, no actual prejudice arising therefrom. S. v. Moon (1911) 20 I. 202, 117 P. 757, Ann. Cas. 1913A 724.

A new trial should never be granted, notwithstanding some mistake or even misdirection by the judge, provided the revisioning court is satisfied that justice has been done and that upon the evidence no other verdict could properly have been found. S. v. Marren (1910) 17 I. 766, 107 P. 993.

Additional references: For other cases of harmless error, see cases cited under § 9191.

For technical defects in indictments which are held not prejudicial, see cases cited under §§ 8825, 8834 and 8835.

§ 9085. [8071] **Review of intermediate rulings.** Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment. [R. S. § 8071.]

Hist. (See Cr. Prac. '64, § 471) R. S. § 8071, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1259; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11014.

§ 9086. [8072] **Disposition of appeal.** The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. [R. S. § 8072.]

Hist. (See Cr. Prac. '64, § 487) R. S. § 8072, reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1260; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11015.

Modification of judgment: Where an indictment fails to sufficiently charge murder in the first degree, but charges murder in the second degree, and there has been a verdict of guilty, and judgment convicting the defendant of murder in the first degree, the supreme court will modify the judgment by reducing the same to murder in the second degree. P. v. O'Callaghan (1886) 2 I. 156, 9 P. 414.

While this section empowers the supreme court to affirm, modify or reverse a case on appeal, yet that court will hesitate to modify a sentence in a criminal case by reducing the term. S. v. Harness (1905) 11 I. 122, 80 P. 1129. But in a later case the supreme court reduced the sentence without passing on the question of its power so to do. S. v. Neil (1907) 13 I. 539, 90 P. 860.

§ 9087. [8073] **Remand for new trial.** When a new trial is ordered, the cause shall be remanded to the district court of the county from which the appeal was taken. [R. S. § 8073.]

Hist. (See Cr. Prac. '64, § 488) R. S. § 8073, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1261; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11016.

Dismissal after appeal: When a judgment in a criminal case is reversed on the ground that the evidence is insufficient to justify the verdict, the trial court, on motion of the county attorney should dismiss the case when it is shown that the state has no other or further evidence than that adduced on the first trial. S. v. Seymour (1901) 7 I. 548, 63 P. 1036.

§ 9088. [8074] **Discharge of defendant.** If a judgment against a defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant. A certified copy of the judgment shall immediately be served upon the officer having the defendant in cutody, which shall be his warrant for discharging him from custody or imprisonment. ['97, p. 73, § 1.]

Hist. (See Cr. Prac. '64, § 489) R. S. § 8074; am. '97, p. 73, § 1, reen. '99, p. 305, § 1, reen. R. C. § 8074. reen. C. L. ib.

Comp leg.—Cal. Similar: Pen. C. 1872, § 1262; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11017.

Cited: S. v. Flower (1915) 27 I. 223, 147 P. 786.

§ 9089. [8075] **Execution of judgment on affirmance.** If a judgment against the defendant is affirmed, the original judgment must be enforced. [R. S. § 8075.]

Hist. (See Cr. Prac. '64, § 490) R. S. § 8075, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1263; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11018.

§ 9090. [8076] **Entry and remittitur of judgment.** When the judgment of the appellate court is given, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the clerk of the court from which the appeal was taken. [R. S. § 8076.]

Hist. Cr. Prac. '64, § 491, R. S. § 8076, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1264; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11019.

Termination of jurisdiction: Under this and the following sections the power of the supreme court over a case ceases after the remittitur goes down. P. v. Walters (1869) 1 I. 274; S. v. Neil (1907) 13 I. 539, 554, 91 P. 318.

§ 9091. [8077] **Termination of appellate jurisdiction.** After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted. [R. S. § 8077.]

Hist. Cr. Prac. '64, § 493. R. S. § 8077, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1265; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11020.

CHAPTER 324.

BAIL.

§ 9092. [8100] **Admission to bail defined.** Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail. [R. S. § 8100.]

Hist. Cr. Prac. '64, § 494, R. S. § 8100, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1268; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11111.

Cited: Re Schuster (1914) 25 I. 465, 138 P. 135.

§ 9093. [8101] **Taking of bail defined.** The taking of bail consists in the acceptance by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the state a specified sum. [R. S. § 8101.]

Hist. Cr. Prac. '64, § 495, R. S. § 8101, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1269; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11112.

Cited: Re Schuster (1914) 25 I. 465, 138 P. 135.

§ 9094. [8102] **Capital offenses not bailable.** A defendant charged with an offense punishable with death can not be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumption to be drawn therefrom. [R. S. § 8102.]

Hist. '75 p. 363, § 492, R. S. § 8102. reen. R. C. ib., reen. C. L. ib.

Cross ref. Constitutional provision: Const. I, 6.

Comp. leg.—Cal. Same: Pen C. 1872, § 1270; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11114.

§ 9095. [8103] **Admittance to bail before conviction.** If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right. [R. S. § 8103.]

Hist. '75, p. 363, § 493, R. S. § 8103, reen. R. C. ib., reen. C. L. ib.

Cross ref. Privilege of bail guaranteed. Const I, 6

Comp. leg.—Cal. Same: Pen C. 1872, § 1271; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11114.

§ 9096. [8104] **Same: After conviction.** After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only.
2. As a matter of discretion in all other cases. [R. S. § 8104.]

Hist. Cr. Prac. '64, § 499; R. S. § 8104, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1272; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11115.

Bail on certificate of probable cause: Admission to bail after conviction is a matter entirely separate and distinct from a certificate of probable cause; while the defendant may not be admitted to bail prior to the issuance of such certificate, yet, on the other hand, a certificate may and should properly issue in many cases where the defendant should not be admitted to bail. Re Neil (1906) 12 I. 749, 87 P. 881.

Discretion of court: Where a defendant who has been sentenced to imprisonment appeals and applies to the trial judge for admission to bail, such application is addressed to the sound legal discretion of such judge or court, and unless it clearly appears that such discretion has been abused, the action of the trial judge or court will not be disturbed or interfered with by the supreme court on application for a writ of habeas corpus. Re Schriber (1911) 19 I. 531, 114 P. 29, 37 L. R. A. (N. S.) 693.

§ 9097. [8105] **Nature of bail.** If the offense is bailable, the defendant may be admitted to bail before conviction:

1. For his appearance before the magistrate on the examination of the charge, before being held to answer.

2. To appear at the court to which the magistrate is required to return the depositions upon the defendant being held to answer after examination.

3. After indictment, either before the bench warrant is issued for his arrest or upon any order of the court committing him or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be transferred for trial.

After conviction, and upon an appeal:

1. If the appeal is from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment is affirmed, modified, or the appeal is dismissed.

2. If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed; or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof. [R. S. § 8105.]

Hist. (See Cr. Prac. '64, §§ 500, 501) R. S. § 8105, reen. R. C. ib.. reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1273; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11116.

Construed: The statute does not require the giving of security on appeal for the payment of a fine unless there is attached to the fine the alternative of imprisonment in case the fine is not paid. Re Schuster (1914) 25 I. 465. 138 P. 135.

Nonliability on bond: Where a bail bond has been duly executed prior to preliminary examination, to obtain the release of one charged with crime, and the district court upon motion to quash the information orders the case resubmitted to a committing magistrate, and the prosecuting attorney files a new complaint before such magistrate, the latter has no authority to call upon the sureties to produce the body of the defendant to answer the new charge. or to declare the bond forfeited by reason of their failure to do so. S. v. McLeod, 31 I. 536, 173 P. 496.

§ **9098.** [8106] **Notice of application.** When the admission to bail is a matter of discretion, the court or officer to whom the application is made must require reasonable notice thereof to be given to the prosecuting attorney of the county. [R. S. § 8106.]

Hist. Cr. Prac. '64, § 498, R. S. § 8106, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1274; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11120.

§ **9099.** [8107] **What magistrate may admit to bail.** When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus. [R. S. § 8107.]

Hist. Cr. Prac. '64, § 502, R. S. § 8107. reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1277; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11121.

§ **9100.** [8108] **Form of undertaking.** Bail is put in by a written undertaking executed by two sufficient sureties (with or without the defendant, in the discretion of the magistrate), and acknowledged before the court or magistrate, in substantially the following form:

An order having been made on the .....day of....., A. D. 19....., by A. B., a justice of the peace of.....county (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been admitted to bail in the sum of.....dollars; we, E. F. and G. H. (stating their place of residence), hereby undertake that the above named C. D. will appear and answer the charge above mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay to the people of the state of Idaho the sum of .....dollars (inserting the sum in which the defendant is admitted to bail).

[R. S. § 8108.]

Hist. Cr. Prac. '64, § 503, R. S. § 8108, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1278; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11122.

Defective bonds: A bond payable to "the people of the United States" instead of to "the people of the United States in the territory of Idaho" must be reformed before any judgment can be rendered upon it in favor of the people of the territory. U. S. v. Shoup (1889) 2 I. 493, 21 P. 656.

Justification before notary: This section does not prohibit the justification of the sureties before a notary public if the committing magistrate is willing to approve the bond after it is so acknowledged; the bond is valid and enforceable against the sureties, notwithstanding its acknowledgement before a notary. S. v. Baird (1907) 13 I. 126. 89 P. 298.

§ 9101. [8109] **Qualifications of bail.** The qualifications of bail are as follows:

1. Each of them must be a resident, householder or freeholder within the state; but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered.

2. They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail. [R. S. § 8109.]

Hist. Cr. Prac. '64. § 504, R. S. § 8109, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same. Pen. C. 1872, § 1279; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11117.

§ 9102. [8110] **Justification of bail.** The bail must in all cases justify by affidavit taken before the magistrate, that they each possess the qualifications provided in the preceding section. The magistrate may further examine the bail upon oath concerning their sufficiency, in such manner as he may deem proper. [R. S. § 8110.]

Hist. Cr. Prac. '64, §§ 505. 506, R. S. § 8110, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same. Pen. C. 1872, § 1280. Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11117.

§ 9103. [8111] **Discharge of defendant on giving bail.** Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged. [R. S. § 8111.]

Hist R. S. § 8111, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same. Pen. C. 1872, § 1281; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11118.

§ 9104. [8112] **Defendant to be taken before magistrate on arrest.** When the offense charged in the indictment is not punishable with death, the officer serving the bench warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail. [R. S. § 8112.]

Hist. '75. p. 363, § 503, R. S. § 8112, reen. R. C. ib., reen. C. L. ib,

Comp. leg.—Cal. Same: Pen. C. 1872, § 1284; similar as amended: Kerr's C. ib.

§ 9105. [8113] **Arrest of defendant for capital offense.** If the offense charged in the indictment is punishable with death, the officer arresting the defendant must deliver him into custody, according to the command of the bench warrant. [R. S. § 8113.]

Hist. Cr. Prac. '64, § 508, R. S. § 8113, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1285; similar as amended: Kerr's C. ib.

§ 9106. [8114] **Bail on habeas corpus.** When the defendant is so delivered into custody, he must be held by the sheriff, unless admitted to bail on examination upon a writ of habeas corpus. [R. S. § 8114.]

Hist. Cr. Prac. '64, § 509, R. S. § 8114, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1286; Kerr's C. ib.

§ 9107. [8115] **Form of undertaking after indictment.** The bail must be put in by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the court or magistrate), and acknowledged before the court or magistrate, in substantially the following form:

> An indictment having been found on.....day of....., A. D. 19....., in the district court of the county of....., charging A. B. with the crime of .....(designating it generally), and he having been admitted to bail in the sum of ..... dollars, we, C. D. and E. T., of .....(stating their place of residence), hereby undertake that the above named A. B. will appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and will at all times render himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof; or, if he fails to perform either of these conditions, that we will pay to the people of the state of Idaho the sum of.....dollars (inserting the sum in which the defendant is admitted to bail.)

[R. S. § 8115.]

Hist. Cr. Prac. '64, § 510, R. S. § 8115, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11122.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1287; Kerr's C. ib.

§ 9108. [8116] **Same: Sections applicable to bail.** The provisions contained in this chapter in relation to bail before indictment, apply to the qualifications of the bail, and to all the proceedings respecting the putting in and justifying of bail and incident thereto. [R. S. § 8116.]

Hist. Cr. Prac. '64, § 511, R. S. § 8116, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1288; as amended: Kerr's C. ib.

§ 9109. [8117] **Increase or reduction of bail.** After a defendant has been admitted to bail upon an indictment, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a re-

duction of the amount notice of the application must be served upon the prosecuting attorney. [R. S. § 8117.]

Hist. R. S. § 8117, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11126.

Comp. leg.—Cal. Same: Kerr's Pen. C. § 1289.

§ 9110. [8118] **Who may admit to bail on appeal.** In cases in which defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had. [R. S. § 8118.]

Hist. (See Cr. Prac. '64, § 512) R. S. § 8118, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. §§ 11121, 11123.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1291; same as amended: Kerr's C. ib.

§ 9111. [8119] **Same: Qualifications and how put in.** The bail must possess the qualifications, and must be put in in all respects as provided in this chapter, except that the undertaking must be conditioned as prescribed for undertakings of bail on appeal. [R. S. § 8119.]

Hist. Cr. Prac. '64, § 514, R. S. § 8119, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. §§ 11117, 11123.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1292; Kerr's C. ib.

§ 9112. [8120] **Deposit in lieu of bail.** The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the court in which he is held to answer the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate of the deposit, he must be discharged from custody. [R. S. § 8120.]

Hist. (See Cr. Prac. '64, § 515) R. S. § 8120, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11119.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1295; Kerr's C. ib.

§ 9113. [8121] **Deposit after bail.** If the defendant has given bail, he may at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the recognizance, and upon the deposit being made, the bail is exonerated. [R. S. § 8121.]

Hist. Cr. Prac. '64, § 516, R. S. § 8121, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11119.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1296; Kerr's C. ib.

§ 9114. [8122] **Deposit applied to payment of fine.** When the money has been deposited, if it remains on deposit at the time of the judgment for the payment of a fine, the clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant. [R. S. § 8122.]

Hist. (See Cr. Prac. '64, § 517) R. S. § 8122, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1297; Kerr's C. ib.

§ 9115. [8123] **Surrender of defendant by bail.** At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer in whose custody he was committed at the time of giving bail in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon as upon a commitment, and by a certificate in writing acknowledge the surrender.

2. Upon the undertaking and the certificate of the officer, the court in which the action or appeal is pending may, upon notice of five days to the prosecuting attorney of the county, with a copy of the undertaking and a certificate, order that the bail be exonerated, and on filing the order and the papers used on the application, they are exonerated accordingly. [R. S. § 8123.]

Hist. Cr. Prac. '64, §§ 518, 519, R. S. § 8123, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11124.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1300; Kerr's C. ib.

§ **9116.** [8124] **Arrest of defendant for surrender.** For the purpose of surrendering the defendant, the bail, at any time before they are finally discharged, and at any place within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so. [R. S. § 8124.]

Hist. Cr. Prac. '64, § 520, R. S. § 8124, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11124.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1301; Kerr's C. ib.

§ **9117.** [8125] **Return of deposit on surrender.** If money has been deposited instead of bail, and the defendant at any time before the forfeiture thereof surrenders himself to the officer to whom the commitment was directed in the manner provided in the last two sections, the court must order a return of the deposit to the defendant upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the prosecuting attorney, with a copy of the certificate. [R. S. § 8125.]

Hist. Cr. Prac. '64, § 521, R. S. § 8125, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11125.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1302; Kerr's C. ib.

§ **9118.** [8126] **Forfeiture of bail.** If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes and the undertaking of bail, or the money deposited instead of bail, as the case may be, is thereupon declared forfeited. But if at any time before the final adjournment of the court, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just. [R. S. § 8126.]

Hist. Cr. Prac. '64, §§ 522, 523, R. S. § 8126, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1305; similar as amended: Kerr's C. ib.

§ **9119.** [8127] **Enforcement of forfeiture.** If the forfeiture is not discharged, as provided in the last section, the prosecuting attorney may, at any time after the adjournment of the court, proceed by action only against the bail upon their undertaking. [R. S. § 8127.]

Hist. Cr. Prac. '64, § 524, R. S. § 8127, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11125.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1306; similar as amended: Kerr's C. ib.

§ **9120.** [8128] **Forfeiture of deposit.** If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom

it is deposited must, immediately after the final adjournment of the court, pay over the money deposited to the county treasurer. [R. S. § 8128.]

Hist. Cr. Prac. '64, § 525, R. S. § 8128, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11125.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1307; similar as amended: Kerr's C. ib.

§ 9121. [8129] **Recommitment of defendant after bail.** The court to which the committing magistrate returns the depositions, or in which an indictment or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged in the following cases:

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof.
2. When it satisfactorily appears to the court that his bail, or either of them, are dead or insufficient, or have removed from the state.
3. Upon an indictment being found in the cases provided in section 8856. [R. S. § 8129.]

Hist. Cr. Prac. '64, § 526, R. S. § 8129, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except reference: Pen. C. 1872, § 1310; as amended: Kerr's C. ib.

§ 9122. [8130] **Order for recommitment.** The order for the recommitment of the defendant must recite generally the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal, or policeman in this state, and committed to the officer in whose custody he was at the time he was admitted to bail, to be detained until legally discharged. [R. S. § 8130.]

Hist. Cr. Prac. '64, § 527, R. S. § 8130, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1311; Kerr's C. ib.

§ 9123. [8131] **Arrest for recommitment.** The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be indorsed by a magistrate of that county. [R. S. § 8131.]

Hist. Cr. Prac. '64, § 528, R. S. § 8131, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1312; Kerr's C. ib.

§ 9124. [8132] **Commitment to await judgment.** If the order recites, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order. [R. S. § 8132.]

Hist. Cr. Prac. '64, § 529, R. S. § 8132, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1313; Kerr's C. ib.

§ 9125. [8133] **Readmittance to bail.** If the order be made for any other cause, and the offense is bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order. [R. S. § 8133.]

Hist. Cr. Prac. '64, § 530, R. S. § 8133, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1314; Kerr's C. ib.

§ 9126. [8134] **Same: Who may take bail.** When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority in a similar case to admit to bail, upon the holding of

the defendant to answer before an indictment, or by any other magistrate designated by the court. [R. S. § 8134.]

Hist. Cr. Prac. '64, § 531, R. S. § 8134, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1315; Kerr's C. ib.

§ 9127. [8135] **Form of bail on recommitment.** When bail is taken upon the recommitment of the defendant, the undertaking must be in substantially the following form:

> An order having been made on the .....day of....., A. D. 19....., by the court (naming it), that A. B. be admitted to bail in the sum of.....dollars in an action pending in that court against him in behalf of the state of Idaho, upon an (information, presentment, indictment, or appeal, as the case may be), we, C. D. and E. F., of (stating their places of residence), hereby undertake that the above named A. B. will appear in that or any other court in which his appearance may be lawfully required upon that (information, presentment, indictment, or appeal, as the case may be), and will at all times render himself amenable to its orders and process and appear for judgment and surrender himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the state of Idaho the sum of .....dollars (insert the sum in which defendant is admitted to bail.)

[R. S. § 8135.]

Hist. Cr. Prac. '64, § 532, R. S. § 8135, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1316; Kerr's C. ib.

§ 9128. [8136] **Same: Qualifications and how put in.** The bail must possess the qualifications and must be put in, in all respects in the manner prescribed in this chapter. [R. S. § 8136.]

Hist. Cr. Prac. '64, § 533, R. S. § 8136, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1317; Kerr's C. ib.

CHAPTER 325.

WITNESSES IN CRIMINAL PROCEEDINGS.

ARTICLE 1.

WHO MAY BE WITNESSES IN CRIMINAL ACTIONS.

§ 9129. [8141] **Rules for determining competency.** The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code. [R. S. § 8141.]

Hist. R. S. § 8141, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1321; Kerr's C. ib.

Cross ref. Competency of witnesses in civil actions: §§ 7935-9.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945.

§ 9130. [8142] **Husband and wife as witnesses.** Neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties, except:

1. With the consent of both, or
2. In cases of criminal violence upon one by the other; or
3. In cases of desertion or nonsupport or wife or child by the husband. [C. L. § 8142.]

Hist. R. S. § 8142, reen. R. C. ib., am. by implication by '15, c. 83, p. 201, amending R. C. § 5782; compiled and reen. C. L. § 8142.

Cross ref. Similar provisions: § 7937.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1322; amended: Kerr's C. ib.

Utah. Similar: C. C. P. § 421, (C. L. '88, § 5197). Bassett v. U. S. 137 U. S. 496, 34 L. ed. 762, 11 S. C. R. 165.

§ 9131. [8143] **Defendant not obliged to testify.** A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding. [R. S. § 8143.]

Hist. (See Cr. Prac. '64, § 12) R. S. § 8143, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1323; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 10837.

Cited: S. v. Larkin (1897) 5 I. 200, 47 P. 945; S. v. Smith (1917) 30 I. 337, 164 P. 519.

Instructions: It is not error to instruct the jury in the language of the statute. S. v. Levy (1904) 9 I. 483, 75 P. 227.

Testimony after plea of guilty: Where one of a number of codefendants has pleaded guilty, the court may require him to testify either for or against his codefendants on their trial. S. v. Knudtson (1905) 11 I. 524, 83 P. 226.

ARTICLE 2.

COMPELLING THE ATTENDANCE OF WITNESSES.

§ 9132. [8148] **Subpoena: How issued.** The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by:

1. A magistrate before whom an information is laid, for witnesses in the state, either on behalf of the people or of the defendant.
2. The prosecuting attorney, for witnesses in the state in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.
3. The prosecuting attorney, for witnesses in the state in support of an indictment, to appear before the court in which it is to be tried.
4. The clerk of the court in which an indictment is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state, as the defendant may require. [R. S. § 8148.]

Hist. (See Cr. Prac. '64, §§ 534, 538) R. S. § 8148, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1326; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11023.

§ 9133. [8149] **Form of subpoena.** A subpoena authorized by the last section must be substantially in the following form:

> The state of Idaho to A. B.:
>
> You are commanded to appear before C. D., a justice of the peace of .....precinct, in .....county (or as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the state of Idaho against E. F.
>
> Given under my hand this.....day of....., A. D. 19.....
>
> G. H., Justice of the Peace, (or "J. K., Prosecuting Attorney," or "By order of the court, L. M., Clerk," or as the case may be).

If books, papers or documents are required, a direction to the following effect must be contained in the subpoena: "And you are required, also, to bring with you the following" (describing intelligibly the books, papers or documents required). [R. S. § 8149.]

Hist. Cr. Prac. '64, §§ 539, 540, R. S. § 8149, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1327; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 11028-9.

§ 9134. [8150] **Service of subpoena.** A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the

defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally and informing him of its contents. [R. S. § 8150.]

Hist. Cr. Prac. '64, §§ 541, 542, R. S. § 8150, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1328; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 11030-1.

§ 9135. [8151] **Fees and mileage of witnesses.** When a person shall attend before a grand jury, or the district court, as a witness, upon a subpoena, or pursuant to an undertaking, such person shall receive the sum of 25 cents a mile, one way for each mile actually traveled, but no person can receive more than one mileage under this section at one term of the district court; such person shall also receive $2 per day for each day's actual attendance as such witness. Such mileage and per diem must be paid out of the county treasury of the county where such district court is held, upon the certificate of the clerk of said court: *Provided, however,* That when a defendant in a criminal proceeding requires the attendance of more than five witnesses in his behalf, before such witnesses shall be subpoenaed at the county's expense, or their fees and mileage be a charge against the county, such defendant must make affidavit setting forth that they are witnesses whose evidence is material to his defense, and that he can not safely go to trial without them. In such case the court, or the judge thereof, at any time application is made therefor, shall order a subpoena to issue to such of said witnesses as the court, or the judge thereof, may deem material for the defendant, and the costs incurred by the process and the fees and mileage of such witnesses shall be paid in the same manner that the costs and fees of other witnesses are paid. ['99, p. 367, § 1.]

Hist. R. S. § 8151; am. '93, p. 20, § 1, reen. '99, p. 172, § 1; am. '99, p. 367, § 1, reen. R. C. § 8151, reen. C. L. ib.

Comp. leg.—Cal. Same except "bounty" for "probate": Pen. C. 1872, § 1330; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11034.

Order for attendance: The order for the attendance of witnesses prescribed by this section must be made by the court, and can not be made by the judge at chambers, and if so made the county can not be compelled to pay fees to such witnesses. Delano v. Bd. of Comrs. (1894) 4 I. 83, 35 P. 841.

Same: Showing: In order to entitle a defendant to the benefit of this section he must strictly comply therewith, and the necessity and materiality of the additional witnesses must be shown, before subpoenas will be issued, or any expense incurred chargeable to the county. S. v. Goddard (1896) 4 I. 750, 44 P. 643.

§ 9136. [8152] **Compulsory attendance of witnesses.** No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a probate judge, upon an affidavit of the prosecuting attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness. [R. S. § 8152.]

Hist. Cr. Prac. '64, § 545, R. S. § 8152, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1331; Kerr's C. ib.

N. D. Similar: C. Cr. P. §§ 11035-6.

§ 9137. [8153] **Disobedience to subpoena.** Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt. A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause

for his nonattendance, is liable to the defendant in the sum of $100, which may be recovered in a civil action. [R. S. § 8153.]

Hist. (See Cr. Prac. '64, §§ 546, 548) R. S. § 8153, reen. R. C. ib., reen. C. L. ib.

§ 9138. [8154] Forfeiture of undertaking of witness. When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail. [R. S. § 8154.]

Hist. Cr. Prac. '64, § 547, R. S. § 8154, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 11037.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1332; Kerr's C. ib.

§ 9139. [8155] Production of imprisoned witness: Procedure. When the testimony of a material witness for the people is required in a criminal action before a court of record of this state, and such witness is a prisoner in the state prison or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by a judge thereof; but in case the prison or jail is out of the county in which the application is made, such order can only be made upon the affidavit of the prosecuting attorney or other person on behalf of the people showing that the testimony is material and necessary; and even then the granting of the order is in the discretion of the court or judge. The order must be executed by the sheriff of the county in which it is made, whose duty it is to bring the prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken. The expense of executing such order must be paid by the county in which the order is made. [R. S. § 8155.]

Hist. R. S. § 8155, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11038.

Comp. leg.—Cal. Similar: Kerr's C. § 1333.

ARTICLE 3.

EXAMINATION OF WITNESSES CONDITIONALLY.

Cross ref. When witness is unable to secure sureties: § 8766.

§ 9140. [8160] Witnesses may be conditionally examined. When a defendant has been held to answer a charge for a public offense, he may, either before or after an indictment, have witnesses examined conditionally, on his behalf, as prescribed in this article, and not otherwise. [R. S. § 8160.]

Hist. Cr. Prac. '64, § 549, R. S. § 8160, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11039.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1335; amended: Kerr's C. ib.

§ 9141. [8161] Grounds for examination. When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally. [R. S. § 8161.]

Hist. (See Cr. Prac. '64, § 555) R. S. § 8161, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 11040.

Cited: T. v. Evans (1890) 2 I. 651, 23 P. 232.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1336; similar as amended: Kerr's C. ib.

§ 9142. [8162] Contents of application. The application must be made upon affidavit, stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action.
3. The name and residence of the witness, and that his testimony is material to the defense of the action.
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial. [R. S. § 8162.]

Hist. Cr. Prac. '64, § 553, R. S. § 8162, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1337; similar as amended: Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11041.

§ 9143. [8163] **To whom made.** The application may be made to the court during the term thereof, or to the judge in vacation, and must be upon three days' notice to the prosecuting attorney. [R. S. § 8163.]

Hist. Cr. Prac. '64, § 554, R. S. § 8163, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1338; as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11042.

§ 9144. [8164] **Order for examination.** If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the prosecuting attorney, within a specified time before that fixed for the examination. [R. S. § 8164.]

Hist. (See Cr. Prac. '64, § 555) R. S. § 8164, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1339; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11043.

§ 9145. [8165] **Proceedings in absence of county attorney.** The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the prosecuting attorney of a copy of the order, if no counsel appear on the part of the people, the examination must proceed. [R. S. § 8165.]

Hist. R. S. § 8165, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1340; different as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11044.

§ 9146. [8166] **Discontinuance of examination.** If the prosecuting attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick and infirm, or that the application was made to avoid the examination of the witness on the trial, the examination can not take place; otherwise it must proceed. [R. S. § 8166.]

Hist. R. S. § 8166, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "or" for "and" between 'sick" and "infirm": Pen. C. 1872, § 1341; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11045.

§ 9147. [8167] **Subpoena for witness.** The attendance of the witness may be enforced by a subpoena, issued by the magistrate before whom the examination is to be taken. [R. S. § 8167.]

Hist. R. S. § 8167, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1342; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11046.

§ 9148. [8168] **Taking and authentication of testimony.** The testimony given by the witness must be reduced to writing and authenticated

in the same manner as the testimony of a witness taken in support of an information. [R. S. § 8168.]

Hist. R. S. § 8168, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11047.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1343; Kerr's C. ib.

§ 9149. [8169] Transmission of depositions. The deposition taken must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending or may come for trial. [R. S. § 8169]

Hist. R. S. § 8169, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11047.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1344; Kerr's C. ib.

§ 9150. [8170] Use of deposition on trial. The deposition, or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state. Upon reading the depositions in evidence, the same objections may be taken to a question or answer contained therein, as if the witness had been examined orally in court. [R. S. § 8170.]

Hist. Cr. Prac. '64, § 569, R. S. § 8170, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 11048.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1345; Kerr's C. ib.

§ 9151. [8171] Deposition of imprisoned witness. When a material witness for a defendant, under a criminal charge, is a prisoner in the state prison, or in the county jail of a county other than that in which the defendant is to be tried, his deposition may be taken on behalf of the defendant, in the same manner provided in the case of a witness who is sick, and the provisions of this article, so far as applicable, govern in the application for, and in the taking and use of, such deposition. Such deposition may be taken before any magistrate or notary public of the county in which the jail or prison is situated. Every officer before whom testimony is taken by virtue hereof shall have authority to administer, and must administer, an oath to the witness that his testimony shall be the truth, the whole truth, and nothing but the truth. [R. S. § 8171.]

Hist. R. S. § 8171, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11049.

Comp. leg.—Cal. Similar as amended: Kerr's C. § 1346.

ARTICLE 4.

EXAMINATION OF WITNESSES ON COMMISSION.

§ 9152. [8176] Examination of nonresident witness. When an issue of fact is joined upon an indictment the defendant may have any material witness, residing out of the state, examined in his behalf, as prescribed in this article, and not otherwise. [R. S. § 8176.]

Hist. R. S. § 8176, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1349; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11050.

Preliminary depositions inadmissible: Depositions taken on preliminary examination are not admissible in evidence on the trial. (T. v. Evans (1890) 2 I. 651, 23 P. 232, overruled) S. v. Potter (1899) 6 I. 584, 57 P. 431.

§ 9153. [8177] Application for order. When a material witness for the defendant resides out of the state the defendant may apply for an order that the witness be examined on a commission. [R. S. § 8177.]

Hist. R. S. § 8177, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1350; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11051.

§ 9154. [8178] **Commission defined.** A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission. [R. S. § 8178.]

Hist. Cr. Prac. '64, § 551, R. S. § 8178, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1351; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11051.

§ 9155. [8179] **Affidavit to accompany application.** The application must be made upon affidavit, stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action, and that an issue of fact has been joined therein.
3. The name of the witness, and that his testimony is material to the defense of the action.
4. That the witness resides out of the state. [R. S. § 8179.]

Hist. (See Cr. Prac. '64, § 553) R. S. § 8179, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1352; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11052.

§ 9156. [8180] **To whom made and notice.** The application may be made to the court during the term, or to the judge in vacation, and must be upon three days' notice to the prosecuting attorney. [R. S. § 8180.]

Hist. Cr. Prac. '64, § 554; R. S. § 8180, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1353; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11053.

§ 9157. [8181] **Order for commission.** If the court or judge to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission. [R. S. § 8181.]

Hist. Cr. Prac. '64, §§ 555, 556, R. S. § 8181, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1354; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11054.

Discretion of court: Where an application is made to take testimony outside of this state under this section the granting or refusing of such application is within the discretion of the trial judge. S. v. Wetter (1905) 11 I. 433, 83 P. 341.

§ 9158. [8182] **Interrogatories: How settled and allowed.** When the commission is ordered, the defendant must serve upon the prosecuting attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge. The prosecuting attorney may, in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the court or judge, according to the notice given, the court or judge must modify the questions so as to conform them to the rules of evidence, and must indorse upon them his allowance and annex them to the commission. [R. S. § 8182.]

Hist. Cr. Prac. '64, §§ 557, 560, R. S. § 8182, reen. R. C. ib., reen. C. L. ib.
N. D. Similar: C. Cr. P. § 11055.
Comp. leg.—Cal. Same: Pen. C. 1872, § 1355; Kerr's C. ib.

§ 9159. [8183] **Direction as to return.** Unless the parties otherwise consent, by an indorsement upon the commission, the court or judge must indorse thereon a direction as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the action is pending, designating his name and the place where his office is kept. [R. S. § 8183.]

Hist. (See Cr. Prac. '64, § 561) R. S. § 8183, reen. R. C. ib., reen. C. L. ib.
N. D. Similar: C. Cr. P. § 11056.
Comp. leg.—Cal. Same: Pen. C. 1872, § 1356; Kerr's C. ib.

§ 9160. [8184] **Execution of commission.** The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness, that his answers given to the interrogatories shall be the truth, the whole truth and nothing but the truth.
2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.
3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth.
4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.
5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.
6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents, proved by the witness, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon.
7. If there is a direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post office. If any other direction is made by the written consent of the parties, or by the court or judge, on the commission, as to its return, he must comply with the direction. A copy of this section must be annexed to the commission. [R. S. § 8184.]

Hist. Cr. Prac. '64, §§ 562, 563, R. S. § 8184, reen. R. C. ib., reen. C. L. ib.
N. D. Similar: C. Cr. P. § 11057.
Comp. leg.—Cal. Similar: Pen. C. 1872, § 1357; as amended: Kerr's C. ib.

§ 9161. [8185] **Delivery of commission to agent.** If the commission and return is delivered by the commissioner to an agent he must deliver the same to the clerk to whom it is directed or to the judge of the court in which the indictment is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it. [R. S. § 8185.]

Hist. Cr. Prac. '64, § 564, R. S. § 8185, reen. R. C. ib., reen. C. L. ib.
N. D. Similar: C. Cr. P. § 11058.
Comp. leg.—Cal. Same: Pen. C. 1872, § 1358; similar as amended: Kerr's C. ib.

§ 9162. [8186] **Same: Death or disability of agent.** If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner. [R. S. § 8186.]

Hist. Cr. Prac. '64, § 565, R. S. § 8186, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1369; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11059.

§ 9163. [8187] **Filing of commission.** The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending.

If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the post office, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge. [R. S. § 8187.]

Hist. Cr. Prac. '64, §§ 566, 567, R. S. § 8187, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1360; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11060.

§ 9164. [8188] **Commission open for inspection.** The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or of any part thereof, on payment of his fees. [R. S. § 8188.]

Hist. Cr. Prac. '64, § 568, R. S. § 8188, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1361; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11061.

§ 9165. [8189] **Use and objections to depositions.** The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court. [R. S. § 8189.]

Hist. Cr. Prac. '64, § 569, R. S. § 8189, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1362; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11062.

Preliminary depositions inadmissible: Depositions taken on preliminary examination are not admissible in evidence on the trial. (T. v. Evans (1890) 2 I. 651, 23 P. 232, overruled) S. v. Potter (1899) 6 I. 584, 57 P. 431.

CHAPTER 326.

INQUIRY INTO SANITY OF DEFENDANT.

Cited: S. v. St. Clair (1899) 6 I. 109, 53 P. 1.

§ 9166. [8194] **Insane person can not be tried or punished.** A person can not be tried, adjudged to punishment, or punished for a public offense while he is insane. [R. S. § 8194.]

Hist. (See Cr. Prac. '64, § 570) R. S. § 8194, reen. R. C. ib., reen. C. L. ib.

Cross ref. Inquiry into sanity after acquittal for insanity: § 9005.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1367; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11063.

§ 9167. [8195] **Inquisition to determine sanity.** When an indictment is called for trial, if a doubt arises as to the sanity of the defendant, the court must order the question to be submitted to a jury; where such doubt arises on the defendant being brought up for judgment on conviction, the court must order a jury to be summoned from the list of jurors selected by the commissioners for the year, to inquire into the fact; and the trial of the indictment or the pronouncing of the judgment must be suspended until the question of insanity is determined by the verdict of the jury. [R. S. § 8195.]

Hist. Cr. Prac. '64, §§ 571, 572, R. S. § 8195, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11064.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1368; amended: Kerr's C. ib.

§ 9168. [8196] **Order of trial.** The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case and offer evidence in support of the allegation of insanity.
2. The counsel for the people may then open their case and offer evidence in support thereof.
3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permit them to offer evidence upon their original cause.
4. When the evidence is concluded, unless the case is submitted to the jury on either or both sides without argument, the counsel for the people must commence, and the defendant or his counsel may conclude, the argument to the jury.
5. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. In other cases the argument may be restricted to one counsel on each side.
6. The court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict. [R. S. § 8196.]

Hist. (See Cr. Prac. '64, §§ 573, 574) R. S. § 8196, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11065.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1369; Kerr's C. ib.

§ 9169. [8197] **Proceedings on verdict.** If the jury find the defendant sane the trial of the indictment must proceed, or judgment may be pronounced, as the case may be. If the jury find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court, if it deems his discharge dangerous to the public peace or safety, may order that he be in the meantime committed by the sheriff to the state insane asylum, and that upon his becoming sane he be redelivered to the sheriff. [R. S. § 8197.]

Hist. Cr. Prac. '64, §§ 575, 576, R. S. § 8197, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. §§ 11067-8.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1370; amended: Kerr's C. ib.

§ 9170. [8198] **Exoneration of bail on commitment.** The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person, authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail. [R. S. § 8198.]

Hist. Cr. Prac. '64, § 577, R. S. § 8198, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 11069.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1371; Kerr's C. ib.

§ **9171.** [8199] **Detention of defendant until sane.** If the defendant is received into the asylum he must be detained there until he becomes sane. When he becomes sane the superintendent must give notice of that fact to the sheriff and prosecuting attorney of the county. The sheriff must thereupon, without delay, take the defendant from the asylum and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged. [R. S. § 8199.]

Hist. Cr. Prac. '64, § 578, R. S. § 8199, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11070.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1372; similar as amended: Kerr's C. ib.

§ **9172.** [8200] **Expenses payable by county.** The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city or county bound to provide for and maintain him elsewhere. [R. S. § 8200.]

Hist. Cr. Prac. '64, § 579, R. S. § 8200, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11071.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1373; as amended: Kerr's C. ib.

CHAPTER 327.

MISCELLANEOUS PROCEEDINGS.

ARTICLE 1.

COMPROMISING OFFENSES.

§ **9173.** [8205] **Compromise of offenses after satisfaction.** When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it is committed:

1. By or upon an officer of justice, while in the execution of the duties of his office.
2. Riotously.
3. With an intent to commit a felony. [R. S. § 8205.]

Hist. Cr. Prac. '64, § 661, R. S. § 8205, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 11074.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1377, Kerr's C. ib.

§ **9174.** [8206] **Leave of court required.** If the party injured appears before the court to which the depositions are required to be returned, at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the same offense. [R. S. § 8206.]

Hist. Cr. Prac. '64, §§ 662, 663, R. S. § 8206, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11075.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1378; Kerr's C. ib.

§ **9175.** [8207] **Mode of compromise exclusive.** No public offense can be compromised, nor can any proceeding or prosecution for the

punishment thereof upon a compromise be stayed, except as provided in this article. [R. S. § 8207.]

Hist. Cr. Prac. '64, § 664, R. S. § 8207, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1379; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11077.

ARTICLE 2.

DISMISSAL OF THE ACTION.

§ 9176. [8212] **When action may be dismissed.** The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:

1. When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the court at which he is held to answer.

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the court in which the indictment is triable, after it is found. [R. S. § 8212.]

Hist. (See Cr. Prac. '64, §§ 580, 581) R. S. § 8212, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1382; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11166.

Cited: Re Moragne (1898) 6 I. 82, 53 P. 3.

Ground for retaining prosecution: Loss of criminal complaint, together with the the fact that knowledge of the loss was not communicated to the prosecuting attorney until about two weeks before the beginning of the next term of court, and press of business on the part of the prosecuting attorney, is not cause for retaining a criminal prosecution where the information is not filed at the next term as required by this section, and the accused is entitled to be discharged. Re Jay (1905) 10 I. 540, 79 P. 202.

§ 9177. [8213] **Continuance for cause.** If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued. [R. S. § 8213.]

Hist. Cr. Prac. '64, § 582, R. S. § 8213, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1383; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11167.

Arbitrary detention of accused: It is improper for the court to arbitrarily hold the accused to answer a charge of felony that has been fully and fairly investigated by a grand jury, and dismissed, in the absence of a showing that any further evidence can be produced, or that there was improper conduct by the grand jury which considered the case. Re Moragne (1898) 6 I. 82, 53 P. 3.

§ 9178. [8214] **Defendant to be discharged.** If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him. [R. S. § 8214.]

Hist. Cr. Prac. '64, § 583, R. S. § 8214, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1384; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11168.

§ 9179. [8215] **Dismissal on motion of court or prosecuting attorney.** The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. [R. S. § 8215.]

Hist. Cr. Prac. '64, § 584, R. S. § 8215, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1385; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11169.

Dismissal after appeal: When a judgment in a criminal case is reversed on the ground that the evidence is insufficient to justify the verdict, the trial court, on motion of the county attorney, should dismiss the case when it is shown that the state has no other or further evidence than that adduced on the first trial. S. v. Seymour (1901) 7 I. 548, 63 P. 1036.

§ 9180. [8216] **Nolle prosequi abolished.** The entry of a nolle prosequi is abolished, and neither the attorney general nor the prosecuting attorney can discontinue or abandon a prosecution for a public offense except as provided in the last section. [R. S. § 8216.]

Hist. (See Cr. Prac. '64, § 585) R. S. § 8216, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: C. Cr. P. § 11170.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1386; Kerr's C. ib.

§ 9181. [8217] **Effect of dismissal as bar.** An order for the dismissal of the action, as provided in this article, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony. [R. S. § 8217.]

Hist. Cr. Prac. '64, § 586, R. S. § 8217, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: C. Cr. P. § 11171.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1387; Kerr's C. ib.

ARTICLE 3.

PROCEEDINGS AGAINST CORPORATIONS.

§ 9182. [8222] **Issuance of summons.** Upon an information or presentment against a corporation, the magistrate must issue a summons signed by him, with his name of office, requiring the corporation to appear before him at a specified time and place, to answer the charge, the time to be not less than 10 days after the issuing of the summons. [R. S. § 8222.]

Hist. '75, p. 363, § 583, R. S. § 8222, reen. R. C. ib., reen. C. L. ib. **N. D.** Analogous: C. Cr. P. § 11078.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1390; Kerr's C. ib.

§ 9183. [8223] **Form of summons.** The summons must be substantially in the following form:

> County of (as the case may be):
>
> The state of Idaho to the (naming the corporation):
>
> You are hereby summoned to appear before me at (naming the place), on (specifying the day and hour), to answer a charge made against you upon the information of A. B. (or the presentment of the grand jury of the county, as the case may be), for (designating the offense generally).
>
> Dated at the city or precinct of....., this.....day of ....., 19.....
>
> G. H., Justice of the Peace.
>
> (Or as the case may be.)

[R. S. § 8223.]

Hist. Cr. Prac. '64, § 584, R. S. § 8223, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: C. Cr. P. § 11079.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1391; Kerr's C. ib.

§ 9184. [8224] **Service of summons.** The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president or other head of the corporation, or to the secretary, cashier or managing agent thereof. [R. S. § 8224.]

Hist. '75, p. 363, § 585, R. S. § 8224, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: C. Cr. P. § 11080.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1392; Kerr's C. ib.

§ 9185. [8225] **Examination of charge.** At the appointed time in the summons the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable. [R. S. § 8225.]

Hist. '75, p. 363, § 586, R. S. § 8225, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1393; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11081.

§ 9186. [8226] **Certificate of magistrate.** After hearing the proofs, the magistrate must certify upon the deposition, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the deposition and certificate to the clerk of the district court of the county. [R. S. § 8226.]

Hist. '75, p. 363, § 587, R. S. § 8226, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1394; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11082.

§ 9187. [8227] **Investigation by grand jury.** If the magistrate returns a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon as in case of a natural person held to answer. [R. S. § 8227.]

Hist. '75, p. 363, § 588, R. S. § 8227, reen. R. C. ib., reen. C. L. ib.

Cross ref. Indictment by grand jury: §§ 8817-22.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1395; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11083.

§ 9188. [8228] **Appearance and plea.** If an indictment is found, the corporation may appear by counsel to answer the same. If it does not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases. [R. S. § 8228.]

Hist. '75, p. 363, § 589, R. S. § 8228, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1396; similar as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11084.

§ 9189. [8229] **Collection of fine.** When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action. [R. S. § 8229.]

Hist. '75, p. 363, § 590, R. S. § 8229, reen. R. C. ib., reen. C. L. ib.

Cross ref. Execution in civil action: §§ 6910-40.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1397; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11086.

ARTICLE 4.

ERRORS AND MISTAKES.

§ 9190. [8234] **Defectively entitled affidavit valid.** It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or appeal in which it is made. [R. S. § 8234.]

Hist. Cr. Prac. '64, § 587, R. S. § 8234, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1401; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11087.

§ 9191. [8236] **Immaterial errors disregarded.** Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right. [R. S. § 8236.]

Hist. Cr. Prac. '64, § 588, R. S. § 8236, reen. R. C. ib., reen. C. L. ib.

Cross ref. Formal defects in indictments disregarded: § 8834. Technical errors disregarded on appeal: § 9084.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1404; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11088.

Cited: S. v. Reed (1894) 3 I. 754, 35 P. 706; Re Dowling (1896) 4 I. 715, 43 P. 781; Re Marshall (1899) 6 I. 516, 56 P. 470; (Con. op.) S. v. Lundhigh (1917) 30 I. 365, 378, 164 P. 690.

Harmless errors: The following errors have been held harmless and disregarded: Errors which are not shown to have damaged the accused. T. v. Neilson (1890) 2 I. 614, 23 P. 537. Failure of a committing magistrate to indorse the order of commitment on the depositions. S. v. Clark (1894) 4 I. 7, 35 P. 710. Technical defects in indictments. T. v. Anderson (1889) 2 I. 573, 21 P. 417; Bonney v. S. (1892) 3 I. 288, 29 P. 185; S. v. Ellington (1895) 4 I. 529, 43 P. 60; S. v. Alcorn (1901) 7 I. 599; 64 P. 101; S. v. Shuff (1903) 9 I. 115, 72 P. 664; S. v. Mickey (1915) 27 I. 626, 150 P. 39. Error in sustaining a challenge of the state to a juror where defendant had not exhausted his peremptory challenges. S. v. McGraw (1899) 6 I. 635, 59 P. 178; S. v. Corcoran (1900) 7 I. 220, 61 P. 1034. Failure of the clerk to read the indictment and state the plea to the jury. P. v. Ah Hop (1878) 1 I. 698. But see contra cases cited in note to § 8941. Permitting the use of depositions taken in the presence of accused. T. v. Evans (1890) 2 I. 651, 23 P. 232. But see S. v. Potter, 6 I. 584, 57 P. 431, overruling this case. Error in permitting questions, the answers to which were harmless. S. v. Larkin (1897) 5 I. 200, 47 P. 945; S. v. Levy (1904) 9 I. 483, 497, 75 P. 227; S. v. Gruber (1911) 19 I. 692, 705, 115 P. 1. A variance between an information for larceny in alleging property in B and proof showing property in the firm of B & J. S. v. Ireland (1904) 9 I. 686, 75 P. 257. An instruction to acquit if the jury has a reasonable and "abiding" doubt of defendant's guilt. S. v. Neil (1907) 13 I. 539, 90 P. 860. An informal verdict finding the defendant "guilty of being a vagrant." S. v. Preston (1894) 4 I. 215, 38 P. 694. The bringing in of separate verdicts against defendants jointly charged and tried. S. v. Cotterel (1906) 12 I. 572, 86 P. 527. The giving of a recognizance to the people of the territory instead of to the people of the United States in the territory. P. v. Meyers (1871) 1 I. 355. Absence of trial judge on view of premises by jury. S. v. Moon (1911) 20 I. 202, 117 P. 757, Ann. Cas. 1913A 724. Refusal of continuance where no showing is made that such refusal will result in actual prejudice. S. v. Allen (1911) 20 I. 263, 117 P. 849.

Erroneous instructions: If the instructions taken as a whole are substantially correct, and the jury could not have been misled to the prejudice of the defendant, the giving of erroneous instructions is not ground for reversal. S. v. Marren (1910) 17 I. 766, 107 P. 993; S. v. Silva (1912) 21 I. 247, 120 P. 835.

Mistake of judge: A new trial should never be granted, notwithstanding some mistake or even misdirection by the judge, provided the revisioning court is satisfied that justice has been done and that upon the evidence no other verdict could properly have been found. S. v. Marren, supra.

Additional reference: For other illustrations of harmless errors see cases cited in note to § 9084.

For additional cases construing defective indictments see cases cited in notes to §§ 8825, 8834, 8835.

ARTICLE 5.

DISPOSAL OF STOLEN PROPERTY.

§ 9192. [8238] **Disposal of stolen property.** When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof. [R. S. § 8238.]

Hist. Cr. Prac. '64, § 589, R. S. § 8238, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1407; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11089.

§ 9193. [8239] **Order for delivery.** On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property. [R. S. § 8239.]

Hist. Cr. Prac. '64, § 590, R. S. § 8239, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1408; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11090.

§ 9194. [8240] **Delivery to owner.** If property stolen or embezzled comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. [R. S. § 8240.]

Hist. Cr. Prac. '64, § 591, R. S. § 8240, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: C. Cr. P. § 11091.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1409; Kerr's C. ib.

§ 9195. [8241] **Court may order delivery.** If the property stolen or embezzled has not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner. [R. S. § 8241.]

Hist. Cr. Prac. '64, § 592, R. S. § 8241, reen. R. C. ib., reen. C. L. ib. **N. D.** Identical: C. Cr. P. § 11092.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1410; Kerr's C. ib.

§ 9196. [8242] **Delivery to county treasurer.** If the property stolen or embezzled is not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody must, on the payment of the necessary expenses incurred in its preservation, deliver it to the county treasurer, by whom it must be sold and the proceeds paid into the county treasury. [R. S. § 8242.]

Hist. Cr. Prac. '64, § 593, R. S. § 8242, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: C. Cr. P. § 11093.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1411; Kerr's C. ib.

§ 9197. [8243] **Receipt for property taken from defendant.** When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. [R. S. § 8243.]

Hist. Cr. Prac. '64, § 594, R. S. § 8243, reen. R. C. ib., reen. C. L. ib. **N. D.** Similar: C. Cr. P. § 11094.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1412; Kerr's C. ib.

CHAPTER 328.

PARDONS, COMMUTATIONS AND PAROLES.

Cross ref. Commutation of penitentiary to training school sentence: § 1150. Limitations on pardoning power: Const. IV, 7. Governor may grant respites and reprieves: ib. Suspension of sentence and parole of youthful offenders: §§ 9041-7.

ARTICLE 1.

PARDONS, COMMUTATIONS AND REMITTANCES.

§ 9198. [8248] **Sessions of board of pardons.** The board of pardons established by section 7 of article 4 of the constitution of the state of Idaho, shall meet at the capitol on the first Wednesdays of January, April, July and October of each year. ['90-91, p. 17, § 1.]

Hist. '90-91, p. 17, § 1, reen. '99, p. 10, § 1, reen. R. C. § 8248, reen. C. L. ib.

Cross ref. The legislature shall prescribe the sessions and regulate the proceedings of the board of pardons: Const. IV, 7.

The governor, secretary of state and attorney general also constitute the board of state prison commissioners: Const. IV, 18; § 9355 et seq. The same officers with the warden constitute the prison board: § 9216 et seq.

Character of board: The board of pardons is a branch of the executive department of the state government and its powers and prerogatives, as such, are those of granting clemency to convicted prisoners, and it has no power to increase or extend penalties or punishments, imposed by judgment of the courts. Re Prout (1906) 12 I. 494, 86 P. 275, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 119.

§ 9199. [8249] **Record of proceedings.** The governor shall preside at all meetings, and the secretary of state shall be secretary, and shall keep a full and detailed record of the proceedings of the board. ['90-91, p. 17, § 2.]

Hist. '90-91, p. 17, § 2, reen. '99, p. 10, § 2, reen. R. C. § 8249, reen. C. L. ib.

Cross ref. Board is constituted of the governor, secretary of state and attorney general: Const. IV, 7.

§ 9200. [8250] **Application for pardon or commutation.** Applications for pardons, commutations and remittances shall be made to the board by written or printed petition, giving a full history of the offense alleged to have been committed, and the legal proceedings had thereon, together with the reasons for clemency, and proof that due publication, as provided in section 7 of article IV of the constitution, has been made in some newspaper of general circulation in the county wherein the alleged offense was committed, and that a copy of said notice has been served on the district judge, prosecuting attorney, and chairman of the board of county commissioners of the county wherein the alleged offense was committed or conviction had. [R. C. § 8250.]

Hist. '90-91, p. 17, § 3, reen. '99, p. 10, § 3; modified by Const. IV, 7; am. R. C. § 8250, reen. C. L. ib.

Cross ref. Notice of hearing must be published for four weeks in some newspaper of general circulation: Const. IV, 7.

Comp. leg.—N. D. See C. Cr. P. § 11097.

§ 9201. [8251] **Action on application.** It shall be the duty of the board, when applications for pardons, commutations and remittances are duly presented to them, to carefully consider them, and for [to] this end they may make such examination outside the application and accompanying documents as they see fit, and shall, if action favorable to the applicant be decided upon, issue to the applicant a certificate of their action, signed by the chairman and countersigned by the secretary of the board, and shall also notify the custodian of the body of the applicant, if he be in custody, of their action. ['90-91, p. 17, § 4.]

Hist. '90-91, p. 17, § 4, reen. '99, p. 10, § 4, reen. R. C. § 8251, reen. C. L. ib.

Cross ref. No fine or forfeiture shall be remitted, and no commutation or pardon granted, except by a decision of a majority of the board after a full hearing in open session. The proceedings and decision shall be reduced to writing, with the dissent of any member, and filed with the papers in the office of the secretary of state. Const. IV, 7.

Comp. leg.—N. D. See C. Cr. P. §§ 11100, 11102,.

§ 9202. [8252] **False statement in application is perjury.** Every person having taken a lawful oath or affirmation in an application to the board, or on the hearing thereof, who shall swear or affirm wilfully, corruptly and falsely in any matter material to the issue or point in question, or shall suborn any other person to swear or affirm as aforesaid, shall be deemed guilty of perjury or subornation of perjury (as the case may be) and, upon conviction thereof, shall be punished as by law provided for such crime. ['90-91, p. 17, § 5.]

Hist. '90-91, p. 17, § 5, reen. '99, p. 10, § 5, reen. R. C. § 8252, reen. C. L. ib.

§ 9203. [8253] **Expenses to be borne by applicant.** All expenses attending the application for a pardon, commutation or remittance, and

the proceedings thereon, shall be borne by the applicant, unless for good cause shown the board shall otherwise direct. ['90-91, p. 17, § 6.]

Hist. '90-91, p. 17, § 6, reen. '99, p. 10, § 6, reen. R. C. § 8253, reen. C. L. ib.

§ 9204. [8254] **Discharge of person pardoned.** Upon the receipt of the certificate mentioned in section 9201, it shall be the duty of the said custodian forthwith to discharge from custody the person to whom the pardon has been granted. ['90-91, p. 17, § 7.]

Hist. '90-91, p. 17, § 7, reen. '99, p. 10, § 7, reen. R. C. § 8254, reen. C. L. ib.

§ 9205. [8255] **Remission of fine.** Upon the remission of a fine or penalty by the board it shall be the duty of the secretary of the board forthwith to certify the same to the clerk of the court where said fine or forfeiture was adjudged, who shall file the same in his office, and said proceedings shall constitute a satisfaction of the judgment. ['90-91, p. 17, § 8.]

Hist. '90-91, p. 17, § 8, reen. '99, p. 10, § 8, reen. R. C. § 8255, reen. C. L. ib.

§ 9206. [8256] **Authority to administer oaths.** Any member of the board shall have authority to administer an oath or affirmation to any person offering to testify upon the hearing of an application, and may issue subpoenas for witnesses. ['90-91, p. 17, § 9.]

Hist. '90-91, p. 17, § 9, reen. '99, p. 10, § 9, reen. R. C. § 8256, reen. C. L. ib.

§ 9207. [8257] **Application for restoration to citizenship.** The governor shall have power to restore to citizenship any person who has served a term of imprisonment in the state penitentiary, and the time of sentence has expired, on good cause shown, upon application duly made to him under the same rules, regulations and procedure as are provided for applications for pardons. ['90-91, p. 17, § 10.]

Hist. '90-91, p. 17, § 10, reen. '99, p. 10, § 10, reen. R. C. § 8257, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11109.

§ 9208. [8258] **Board may make rules.** The board shall have power to make all needful rules and regulations for the conduct of its business not inconsistent with this article or other provisions of law. ['90-91, p. 17, § 11.]

Hist. '90-91, p. 17, § 11, reen. '99, p. 10, § 11, reen. R. C. § 8258, reen. C. L. ib.

§ 9209. [8259] **Parole of convicts.** The board of pardons shall have authority, under such rules and regulations as the said board may prescribe, to issue a parole to any prisoner, except life convicts, who is now or hereafter may be imprisoned in the state penitentiary: *Provided,* That no convict shall be so paroled who is known to have received previous sentence in any prison for a felony: *Provided further,* That no convict who is serving a time sentence shall be paroled until he has served at least one-third of the full term for which he was sentenced, not reckoning any good time: *And, Provided further,* That no convict who is serving life sentence shall be paroled. [R. C. § 8259.]

Hist. '97, p. 59, § 1, reen. '99, p. 10, § 12; am. R. C. § 8259, reen. C. L. ib.

Cross ref. Parole by prison board under indeterminate sentence: § 9220.

Conditional pardons: The board of pardons may attach such conditions as they see fit to a pardon, commutation or parole, so long as they are not immoral, illegal or impossible of performance, provided they are to be kept and performed or complied with during the term for which the prisoner was sentenced, but they can not require a convict, who has broken his parole, to undergo imprisonment after the expiration of the time fixed by the judgment of conviction for the termination of such imprisonment, by requiring him

to serve an additional time equal to that during which he was out on parole. (Sullivan, J. dissents.) Re Prout (1906) 12 I. 494, 86 P. 275, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 119. But see § 9210 as amended in 1907.

§ 9210. [8260] **Custody of paroled convict.** Such convict while on parole shall remain in the legal custody, and under control, of the board of pardons, but only for the purpose of seeing that the said convict keeps to the terms of the parole agreement, and shall not be considered as serving his term in the penitentiary during the time that he shall be out on parole, in case the said parole agreement shall be broken by the said convict. The said convict shall be subject at any time to be taken back within the inclosure of the said penitentiary for any violation of his parole agreement, and full power to retake and reimprison any convict so upon parole is hereby conferred upon said board, whose written order, certified by the warden, shall be a sufficient warrant for all prisoners named in it, to authorize any sheriff, constable, policeman or other officer to arrest and return to actual imprisonment any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute such orders the same as ordinary criminal process. ['07, p. 544, § 1.]

Hist. '99, p. 10, § 13; am. '07, p. 544, § 1, reen. R. C. § 8260, reen. C. L. ib.

§ 9211. [8261] **Copy of parole to be sent to sheriff.** Whenever any person sentenced to serve a term in the Idaho state penitentiary shall have been granted a parole by the said board of pardons, it shall be the duty of the warden of said penitentiary to transmit to the sheriff of the county within which the said prisoner shall be paroled, a copy of the parole agreement, and information as to the place of residence of the said prisoner within the said county. ['07, p. 537, § 1.]

Hist. '07, p. 537, § 1, reen. R. C. § 8261, reen. C. L. ib.

§ 9212. [8262] **Report of paroled person to sheriff.** Thereupon it shall be the duty of the said sheriff to receive from all persons so paroled within his county a written report on the first day of each month during the continuance of the parole agreement, which report must contain an itemized account of the paroled person's earnings, what was expended of the same and how expended. It shall be the duty of the sheriff to ascertain the correctness of the said report, and to see that the said paroled person is honorably employed and conducting himself in an honorable manner. After ascertaining the correctness of the report, it shall be the duty of the said sheriff to forward the said report to the warden of the said penitentiary, and shall report to the said warden at the same time any information the said sheriff may have regarding the correctness of the report, or any information as to the conduct of the paroled person. It shall further be the duty of the sheriff, whenever he receives information that a parole agreement is being violated or has been violated by any person paroled within his county, immediately to report the fact to the warden of said penitentiary. ['07, p. 537, § 2.]

Hist. '07, p. 537, § 2, reen. R. C. § 8262, reen. C. L. ib.

§ 9213. [8263] **Consideration of applications for parole.** In considering applications for parole it shall be unlawful for the state board of pardons to entertain any petition, receive any written communication, or hear any argument from any attorney or other person not connected with said penitentiary, in favor of a conditional pardon of any prisoner, but the said board may, if they deem proper, institute inquiries by cor-

respondence or otherwise, as to the previous history or character of any prisoner: *Provided,* That no prisoner shall be paroled except upon the recommendation of the warden. ['97, p. 59, § 3.]

Hist. '97, p. 59, § 3, reen. '99, p. 10, § 14, reen. R. C. § 8263, reen. C. L. ib.

§ 9214. [8264] Grades of prisoners. The said board is hereby authorized and empowered to establish three grades of prisoners, together with a system of marks, and to prescribe rules to regulate such grades and marks; and no prisoner shall be released on parole unless he shall have been for six months preceding a member of the first grade. Prisoners in the second and third grades may be deprived of such privileges as the said board may direct. ['97, p. 59, § 4.]

Hist. '97, p. 59, § 4, reen. '99, p. 10, § 15, reen. R. C. § 8264, reen. C. L. ib.

Cited: Re Prout (1906) 12 I. 494, 86 P. 275, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 119.

ARTICLE 2.

PAROLE OF CONVICTS.

Hist. The prison board was constituted by '09, p. '81, H. B. 214, § 2, reen. C. L. § 8265.

'19, c. 104, p. 370, amended C. L. § 8265 by abolishing the prison board and imposing its duties upon the board of pardons.

Comp. leg.—Kan. See Gen. St. '15, §§ 8180-8.

§ 9215. Prison board abolished. The prison board is hereby abolished and the duties thereof imposed upon the board of pardons. ['19, c. 104, § 1, p. 370.]

§ 9216. Parole of prisoners. The board of pardons is authorized to parole prisoners confined in the state penitentiary in accordance with the provisions of this aritcle. Wherever the term "prison board" is used in this article it shall be construed to refer to the board of pardons. ['19, c. 104, § 2, p. 370.]

Hist. '09, p. 81, H. B. 214, § 2, reen. C. L. § 8265; am. '19, c. 104, § 2, p. 370.

Cross ref. The governor, secretary of state and attorney general constitute the board of state prison commissioners: Const. IV, 18; § 9352 et seq. The same officers constitute the board of pardons: Const. IV, 7; § 9198 et seq.

§ 9217. Personal record of convict: Duties of presiding judge and prosecuting attorney. It shall be the duty of the judge before whom the prisoner is tried and convicted, and of the prosecuting attorney, to furnish such prison board, together with the warrant of commitment, all information that they can give in regard to the career of the prisoner before the committal of the crime for which he was sentenced, stating to the best of their knowledge whether the prisoner was industrious or not, of good character or not, what his associates were, what his disposition was, and all the facts and circumstances which may tend to throw any light upon the question as to whether such prisoner is capable of again becoming a good citizen; and the said prison board shall also have the power to call upon any other official or person for similar information, and, where practicable, shall procure such information from people who have known the prisoner. [C. L. § 8266.]

Hist. '09, p. 81, H. B. 214, § 3; compiled and reen. C. L. § 8266.

§ 9218. Reformatory duties of board: Examination of prisoners. It shall be the duty of the said prison board to adopt such rules concerning all prisoners committed to their custody, as shall prevent them from returning to their criminal courses, best secure their self-support and accomplish their reformation.

When any prisoner shall be received into said penitentiary he shall

be given a thorough examination in the fundamental studies which are taught in the common schools of the state of Idaho, and unless he shall be able to pass a satisfactory examination he shall be instructed in such studies as may be deemed practicable and advisable; and each and every prisoner shall be given such courses from the university extension department as may be found practicable.

When any prisoner shall be received into said penitentiary, the warden shall cause to be entered into a register the date of such admission, the name, age, nativity and nationality of such prisoner, with such other facts as can be ascertained of parentage, education, occupation and early social influences as seem to indicate the inherited, constitutional and acquired defects and tendencies of the prisoner, and based upon these, an estimate of the present condition of the prisoner, and the best probable plan of treatment. And the physician of said penitentiary shall carefully examine each prisoner when received, and shall enter in a register (to be kept by him) the name, nationality or race, the weight, stature and family history of each prisoner; also a statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, the measurement of the chest and abdomen and any existing disease or deformity, or other disability, acquired or inherited.

Upon the warden's register shall be entered from time to time, minutes of the observed improvement or deterioration of character, and notes as to the standing or situation of such prisoner, and of his progress in learning, or any subsequent facts or personal history which may be brought officially to his knowledge, bearing upon the question of the parole or final release of the prisoner. ['17, c. 106, § 1, p. 384.]

Hist. '09, p. 81, H. B. 214, § 4; am. '17, c. 106, § 1, p. 384, reen. C. L. § 8267.

§ 9219. Educational courses: Duty of state board of education. The state board of education shall have prepared courses of studies for all grades and make provision for the giving of university extension courses to all prisoners held under the jurisdiction of the warden of the Idaho state penitentiary, and the state board of prison commissioners shall make necessary arrangements for putting into effect all provisions for the education of such persons as are prisoners of the state and held under the jurisdiction of said warden. ['17, c. 106, § 2, p. 385.]

Hist. '09, p. 81, H. B. 214, § 4a, enacted by '17, 106, § 2, p. 385, reen. C. L. § 8268.

§ 9220. Power to parole prisoners. The prison board shall have power to parole and release persons confined in the state penitentiary for felonies other than treason or murder in the first degree. [C. L. § 8269.]

Hist. Based upon '09, p. 81, H. B. 214, § 8; compiled and reen. C. L. § 8269.

Cross ref. Indeterminate sentence: § 9035. Parole by board of pardons: § 9209.

Cited: Re Chase (1910) 18 I. 561, 110 P. 1036; Re Setters (1913) 23 I. 270, 28 P. 1111.

§ 9221. Rules and regulations governing parole: Reimprisonment of parole violators. The said prison board shall have power to establish rules and regulations under which prisoners within the penitentiary may be allowed to go upon parole outside the penitentiary, building and enclosure, but to remain while on parole in the legal custody and under the control of the prison board, and subject at any time to be taken back within the enclosure of said penitentiary; and full power to enforce such rules and regulations and to retake and reimprison any inmate so upon

parole is hereby conferred upon the warden, whose order, certified by the clerk of the prison, shall be a sufficient warrant for the officer named in it to authorize such officer to apprehend and return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process. [C. L. § 8270.]

Hist. '09, p. 81, H. B. 214, part of § 5, reen. '11, c. 200, § 8, p. 665; compiled and reen. C. L. § 8270.

Cited: Re Setters (1913) 23 I. 270, 128 P. 1111.

§ 9222. Persons ineligible to parole. No person shall be eligible for parole until he has served the minimum term fixed by law for his offense. No person who has served a previous term in any penitentiary shall be eligible for parole. [C. L. § 8271.]

Hist. Based upon '09, p. 81, H. B. 214, proviso in § 5, reen. '11, c. 200, § 2, p. 665 and '09, p. 81, H. B. 214, § 8, reen. C. L. § 8271.

Cited: Re Setters (1913) 23 I. 270, 128 P. 1111.

§ 9223. Conditions precedent to parole: Employment. No prisoner shall be released on parole until the said prison board shall have made arrangements or shall have satisfactory evidence that arrangements have been made for his honorable and useful employment while upon parole in some suitable occupation, and at a proper or suitable place free from criminal influence. Except in the discretion of the prison board, prisoners mentally, morally or physically deficient, or whose best interests and that of the state would be best subserved by parole without employment, may be paroled within or without the state without complying with the provisions for employment and occupation hereinbefore immediately set out. In such case, however, the prison board shall have made arrangements or shall have satisfactory evidence that proper arrangements have been made for the keep of such prisoners. ['11, c. 200, provisos in § 2, p. 665.]

Hist. '09, p. 81, H. B. 214, proviso in § 5; am. '11, c. 200, § 2, p. 665, reen. C. L. § 8272.

§ 9224. Signing and attestation of parole. All paroles herein provided for shall be signed by the governor, as such chairman, and attested by the secretary, before the same shall be valid. ['09, p. 81, H. B. 214, part of § 8.]

Hist. '09, p. 81, H. B. 214, part of § 8, reen. C. L. § 8273.

§ 9225. Final discharge of parole. It shall be the duty of the warden to keep in communication, so far as possible, with all prisoners who are on parole, and also with their employers, and when, in his opinion, any prisoner who has served not less than six months of his parole acceptably has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the warden shall make certificate to that effect to the prison board, and the board shall at the next meeting thereafter consider the case of the prisoner so presented; and when said board shall decide that said prisoner is entitled to his final discharge, said board shall cause a record of the case of said prisoner to be made, showing the date of his commitment to the penitentiary, his record while detained therein, the date of his parole, his record while on parole, and their reasons for recommending his final discharge. Said record shall be signed by the board and attested by the secretary, and thereupon he shall receive a full discharge from

further liability under his sentence. But no petition or other form of application for either the parole or final release of any prisoner shall be entertained by the warden or prison board. Nothing in this article shall be construed as impairing the power of the governor or the board of pardons to grant a pardon or commutation in any cause. ['09, p. 81, H. B. 214, § 6.]

Hist. '09, p. 81, H. B. 214, § 6, reen. C. L. § 8274.

§ 9226. Violation of parole: Punishment. If any prisoner shall violate the conditions of his parole as fixed by the prison board, he shall be declared a delinquent, and shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency and the date of his arrest shall not be counted as any portion or part of time served. If any prisoner, while at large upon parole, shall commit the crime of treason or murder in the first degree, he shall be punished as provided by law, and conviction thereof shall terminate his former sentence. Any prisoner who, while at large upon parole, shall commit any other felony shall, upon conviction thereof, be sentenced to the penitentiary, as provided by law. Such sentence shall not be cumulative, but shall be added to his former sentence and commence to be served at the expiration of his former sentence. ['09, p. 81, H. B. 214, § 7.]

Hist. '09, p. 81, H. B. 214, § 7, reen. C. L. § 8275.

CHAPTER 329.

PROCEEDINGS IN PROBATE AND JUSTICES' COURTS.

Cross ref. Criminal jurisdiction of justices' courts: § 6474. Criminal jurisdiction of probate courts: § 6466. Same: Proceedings for the correction of delinquent children: § 1011. Same: Over prosecutions under the child labor law: § 1031.

ARTICLE 1.

PROCEEDINGS IN PROBATE AND JUSTICES' COURTS.

Cited: S. v. Raaf (1909) 16 I. 411, 415, 101 P. 747.

§ 9227. [8280] **Complaint.** All proceedings and actions before probate and justices' courts for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. [R. S. § 8280.]

Hist. Cr. Prac. '64, § 595, R. S. § 8280, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: Pen. C. 1872, § 1426; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9130. See also Jus. C. § 9132.

Cited: S. v. Raaf (1909) 16 I. 411, 415, 101 P. 747.

§ 9228. [8280a] **Correction of defective complaint.** Whenever it shall appear to the prosecuting attorney of any county of this state that any criminal complaint filed in any justice or probate court is defective or void, the said prosecuting attorney shall have the right to substitute a new complaint, and the defendant or defendants shall not be considered to have been placed in jeopardy by any proceedings previous to the filing of the said new complaint: *Provided,* That said prosecuting attorney shall file said complaint before the case for the prosecution has been closed. ['07, p. 110, § 1.]

Hist. '07, p. 110, § 1, reen. R. C. § 8280a, reen. C. L. ib.

§ 9229. [8281] **Issuance and form of warrant.** If the probate judge or justice of the peace is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the following form:

County of .....

The state of Idaho to any sheriff, constable, marshal or policeman, in this state:

Complaint, upon oath, having been this day made before me .....(justice of the peace or probate judge, as the case may be), by C. D., that the offense of.....(designating it generally), has been committed, and accusing E. F. thereof; you are therefore commanded forthwith to arrest the above named E. F. and bring him before me forthwith at..... (naming place).

Witness my hand at....., this.....day of....., A. D.....

(And if in probate court, seal of court.) A. B.

[R. S. § 8281.]

Hist. Cr. Prac. '64, § 597, R. S. § 8281, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1427; additional provision as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. §§ 9133-5.

§ 9230. [8282] **Docket and minutes.** A docket must be kept by the justice of the peace, or by the clerk of the probate court, in which must be entered each action and the proceedings of the court therein. [R. S. § 8282.]

Hist. Cr. Prac. '64, § 600; R. S. § 8282, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1428; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9131.

Cited: S. v. Drury (1914) 25 I. 787, 792, 139 P. 1129.

§ 9231. [8283] **Plea: Examination on plea of guilty.** The defendant may make the same plea as upon an indictment. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment which may be found against him by the grand jury. [R. S. § 8283.]

Hist. (See '75, p. 363, § 602) R. S. § 8283, reen R. C. ib., reen. C. L. ib.

Cross ref. Examination and commitment: § 8719, § 8743 et seq.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1429; similar as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. §§ 9146-7.

Cited: S. v. Raaf (1909) 14 I. 411, 416, 101 P. 747.

§ 9232. [8284] **Proceedings after plea.** Upon a plea other than a plea of guilty, if the parties waive a trial by jury, and an adjournment or change of venue is not granted, the court must proceed to try the case. [R. S. § 8284.]

Hist. R. S. § 8284, reen. R. C. ib., reen. C. L. ib.

Cross ref. Waiver of trial by jury: § 9237.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1430; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9148.

Cited: S. v. Raaf (1909) 14 I. 411, 416, 101 P. 747.

§ 9233. [8285] **Change of venue: Grounds and application.** If the action or proceeding is in a probate or justices' court, a change of the place of trial may be had:

1. When it appears from the affidavit of the defendant that he has reason to believe, and does believe that he can not have a fair and impartial trial before the probate judge or justice about to try the case, by reason of the prejudice or bias of such judge or justice, the cause must be transferred to any other justice of the county or the probate court thereof.

2. When in a justice's court it appears from affidavits that the defendants can not have a fair and impartial trial, by reason of the prejudice of the citizens of the precinct, the cause must be transferred to a justice of a precinct where the same prejudice does not exist, or to the probate court:

Provided, The defendant shall have served written notice upon the prosecuting attorney of his intention to apply for such change of venue, at least 24 hours before the time set for such trial; or if the defendant fail to give such notice, such change may only be granted upon the payment by the defendant of all accrued costs. ['07, p. 215, § 1.]

Hist. R. S. § 8285; am. '07, p. 215, § 1, reen. R. C. ib., reen. C. L. ib.

Cross. ref. Disqualification of judges: § 6499.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1431; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9141.

Cited: S. v. Raaf (1909) 16 I. 411, 415, 101 P. 747.

§ **9234.** [8286] **Same: Proceedings.** When a change of the place of trial is ordered, the judge or justice must transmit to the justice before whom the trial is to be had, all the original papers in the cause, with a certified copy of the minutes of his proceedings; and upon receipt thereof, the justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his court. [R. S. § 8286.]

Hist. R. S. § 8286, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1432; Kerr's C. ib.

N. D. Analogous: Jus. C. §§ 9142-3.

§ **9235.** [8287] **Postponement of trial.** Before the commencement of a trial in any of the courts mentioned in this article, either party may, upon good cause shown, have a reasonable postponement thereof. [R. S. § 8287.]

Hist. (See '75, p. 363, § 602) R. S. § 8287, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1433; Kerr's C. ib.

N. D. Analogous: Jus. C. 9139.

§ **9236.** [8288] **Presence of defendant.** The defendant must be personally present before the trial can proceed. [R. S. § 8288.]

Hist. Cr. Prac. '64, § 599, R. S. § 8288, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1434; Kerr's C. ib.

N. D. Similar: Jus. C. 9152.

§ **9237.** [8289] **Waiver of trial by jury.** A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket. The formation of the jury is provided for in chapter 246 of the Code of Civil Procedure. [R. S. § 8289.]

Hist. R. S. § 8289, reen. R. C. ib., reen. C. L. ib.

Cross ref. Formation of trial jury in probate and justices' courts: §§ 3963-5.

Comp. leg.—Cal. See Pen. C. 1872, § 1435; same as amended except reference: Kerr's C. ib.

§ **9238.** [8290] **Challenge to jurors.** The same challenges may be taken by either party to the panel of jurors, or to any individual juror,

for cause, as on the trial of an indictment for a misdemeanor; but the challenges must in all cases be tried by the court; the defendant is entitled to four peremptory challenges and the prosecution to three. [R. S. § 8290.]

Hist. (See '75, p. 363, §§ 605, 607) R. S. § 8290, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, 1436; Kerr's C. ib.

Cross ref. Challenges to jury: §§ 8911-40.

N. D. Analogous: Jus. C. § 9153.

§ 9239. [8291] **Oath of jurors.** The court must administer to the jury the following oath:

> "You do swear that you will well and truly try this issue between the state of Idaho and A. B., the defendant, and a true verdict render according to the evidence." [R. S. § 8291.]

Hist. Cr. Prac. '64, § 603; R. S. § 8291; reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1437; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9151.

§ 9240. [8292] **Conduct of jury.** After the jury are sworn they must sit together and hear the proofs and allegations of the parties, which must be delivered in public and in the presence of the defendant. [R. S. § 8292.]

Hist. Cr. Prac. '64, § 604; R. S. § 8292, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1438; Kerr's C. ib.

§ 9241. [8293] **Court to decide questions of law.** The court must decide all questions of law which may arise in the course of the trial, but can give no charge to the jury. [R. S. § 8293.]

Hist. (See Cr. Prac. '64, § 605) R. S. § 8293, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1439; Kerr's C. ib.

§ 9242. [8294] **Retirement of jury.** After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect:

> You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them, nor speak to them yourself unless by order of the court, or to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed or when ordered by the court. [R. S. § 8294.]

Hist. (See Cr. Prac. '64, § 606) R. S. § 8294, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1440; Kerr's C. ib.

§ 9243. [8295] **Verdict.** The verdict of the jury must in all cases be general. When the jury have agreed on their verdict they must deliver it publicly to the court, who must enter it or cause it to be entered, in the minutes. [R. S. § 8295.]

Hist. Cr. Prac. '64, §§ 607, 608; R. S. § 8295, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1441; Kerr's C. ib.

§ 9244. [8296] **Same: Against joint defendants.** When several defendants are tried together, if the jury can not agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury. [R. S. § 8296.]

Hist. Cr. Prac. '64, § 609, R. S. § 8296, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1442; Kerr's C. ib.

§ 9245. [8297] **Discharge of jury.** The jury can not be discharged after the cause is submitted to them until they have agreed upon and

rendered their verdict unless, for good cause the court sooner discharges them. [R. S. § 8297.]

Hist. Cr. Prac. '64, § 610, R. S. § 8297, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1443; Kerr's C. ib.

§ **9246.** [8298] **Same: Retrial of defendant.** If the jury is discharged as provided in the last section, the court may proceed again to the trial in the same manner as upon the first trial, and so on until a verdict is rendered. [R. S. § 8298.]

Hist. Cr. Prac. '64, § 611, R. S. § 8298, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: Pen. C. 1872, § 1444; Kerr's C. ib.

§ **9247.** [8299] **Proceedings on plea of guilty.** When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon of fine or imprisonment, or both, as the case may be. [R. S. § 8299.]

Hist. Cr. Prac. '64, § 612, R. S. § 8299, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "fine and imprisonment" for "fine or imprisonment": Pen. C. 1872, § 1445; same as amended: Kerr's C. ib.

§ **9248.** [8300] **Judgment of fine.** A judgment that the defendant pay a fine, or costs, or fine and costs, may also direct that the defendant be imprisoned until the fine, or costs, or both fine and costs, have been satisfied; specifying the extent of the imprisonment, which can not exceed one day for every $2 of the fine, costs, or fine and costs, as the case may be. ['99, p. 379, § 6.]

Hist. R. S. § 8300; am. '99, p. 379, § 6, reen. R. C. § 8300, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1205; amended: Kerr's C. ib.

Cross ref. Imprisonment on failure to pay fine: § 9038.

§ **9249.** [8301] **Acquittal: Costs of malicious prosecution.** When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same within 30 days after the trial. [R. S. § 8301.]

Hist. Cr. Prac. '64, § 614, R. S. § 8301, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: Pen. C. 1872, § 1447; Kerr's C. ib.

§ **9250.** [8302] **Same: Judgment against prosecutor.** If the prosecutor does not pay the costs, or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced in all respects, in the same manner as a judgment rendered in a civil action. [R. S. § 8302.]

Hist. Cr. Prac. '64, § 615, R. S. § 8302, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: Pen. C. 1872, § 1448; Kerr's C. ib.

§ **9251.** [8303] **Time for judgment.** After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, and must hold the defendant to bail to appear for judgment, and in default of bail he must be committed. [R. S. § 8303.]

Hist. Cr. Prac. '64, § 617, R. S. § 8303, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1449; similar as amended: Kerr's C. ib.

§ **9252.** [8304] **Motions prior to judgment.** At any time before judgment defendant may move for a new trial or in arrest of judgment. [R. S. § 8304.]

Hist. Cr. Prac. '64, § 618, R. S. § 8304, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1450; Kerr's C. ib.

§ 9253. [8305] **Grounds for new trial.** A new trial may be granted in the following cases:

1. When the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had.
2. When the jury has received any evidence out of court.
3. When the jury has separated without leave of the court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case.
4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors.
5. When there has been error in the decision of the court, given on any question of law arising during the course of the trial.
6. When the verdict is contrary to law or evidence.
7. When new evidence is discovered, material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground the defendant must produce at the hearing the affidavits of the witnesses by whom such newly discovered evidence is expected to be given. [R. S. § 8305.]

Hist. (See Cr. Prac. '64, § 619) R. S. § 8305, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1451; Kerr's C. ib.

§ 9254. [8306] **Grounds for arrest of judgment.** The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had. [R. S. § 8306.]

Hist. Cr. Prac. '64, § 620, R. S. § 8306, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1452; Kerr's C. ib.

§ 9255. [8307] **Pronouncement and entry of judgment.** If the judgment is not arrested, or a new trial granted judgment must be pronounced at the time appointed and entered in the minutes of the court. [R. S. § 8307.]

Hist. Cr. Prac. '64, § 621, R. S. § 8307, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1453; Kerr's C. ib.

§ 9256. [8308] **Discharge of defendant.** If judgment of acquittal is given, on judgment imposing a fine only, without imprisonment for nonpayment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given. [R. S. § 8308.]

Hist. Cr. Prac. '64, § 622, R. S. § 8308, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Jus. C. § 9156.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1454; Kerr's C. ib.

§ 9257. [8309] **Warrant for execution of judgment.** When a judgment of imprisonment is entered a certified copy thereof must be delivered to the sheriff, marshal or other officer, which is a sufficient warrant for its execution. [R. S. § 8309.]

Hist. Cr. Prac. '64, § 623, R. S. § 8309, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: Jus. C. § 9160.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1455; Kerr's C. ib.

§ 9258. [8310] **Imprisonment pending payment of fine.** When a judgment is entered imposing a fine, or costs, or both fine and costs, or ordering the defendant to be imprisoned until the fine, or costs, or fine and costs, be paid, he must be held in custody during the time spec-

ified in the judgment, unless the fine, or costs, or fine and costs, are sooner paid. ['99, p. 379, § 7.]

Hist. (See Cr. Prac. '64, § 624) R. S. § 8310; am. '99, p. 379, § 7, reen. R. C. § 8310, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1456; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9160.

§ 9259. [8311] **Same: Discharge upon payment of fine.** Upon payment of the fine, or costs, or fine and costs, the officer must discharge the defendant if he is not detained for any other legal cause. ['99, p. 379, § 8.]

Hist. (See Cr. Prac. '64, § 625) R. S. § 8311; am. '99, p. 379, § 8, reen. R. C. § 8311, reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1457; as amended: Kerr's C. ib.

§ 9260. [8312] **Admittance to bail.** The defendant, at any time after his arrest, and before conviction, may be admitted to bail. The provisions of this code relative to bail are applicable to bail in probate and justices' courts. [R. S. § 8312.]

Hist. R. S. § 8312, reen. R. C. ib., reen. C. L. ib.

Cross ref. Bail: §§ 9092-9128.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1458; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9140.

§ 9261. [8313] **Subpoenas for witnesses.** The justice or judge of either of the courts mentioned in this chapter may issue subpoenas for witnesses and punish disobedience thereof, as provided in sections 9132 to 9139 inclusive. [R. S. § 8313.]

Hist. R. S. § 8313, reen. R. C. ib., reen. C. L. ib.

Cross ref. Compelling attendance of witnesses: §§ 9132-39.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1459; Kerr's C. ib.

§ 9262. [8314] **Entitling affidavits.** The provisions in respect to entitling affidavits are applicable to proceedings in the courts mentioned in this article. [R. S. § 8314.]

Hist. R. S. § 8314, reen. R. C. ib., reen. C. L. ib.

Cross ref. Entitling affidavits: § 9190.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1460; Kerr's C. ib.

ARTICLE 2.

APPEALS TO THE DISTRICT COURT.

Application to police courts: Under § 3894 this article also governs appeals from police court. S. v. Hosford (1915) 27 I. 185, 147 P. 286.

§ 9263. [8320] **Defendant may appeal.** The defendant may appeal to the district court of the county from any judgment of conviction rendered in a criminal action by a probate or justice's court. [R. S. § 8320.]

Hist. R. S. § 8320, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Different: Pen. C. 1872, § 1466; as amended: Kerr's C. ib.

N. D. Analogous: Jus. C. § 9158.

Cited: S. v. Barnard (1907) 13 I. 439, 90 P. 1.

Effect of appeal: Where the case has been appealed to the district court the issuance of a writ of review by that court to the inferior court is a nullity. S. v. Hosford (1915) 27 I. 185, 147 P. 286.

§ 9264. [8321] **Notice of appeal.** A defendant intending to appeal must give notice of his intention to do so at the time of the trial or rendition of the judgment, and must within 10 days after the rendition and entry of the judgment, file with the judge or justice of the court wherein the conviction was had, and serve on the prosecuting attorney of the county, a notice of appeal, entitled in the action, setting forth the character of the judgment, and the intention of the defendant to appeal therefrom to the district court. [R. S. § 8321.]

Hist. R. S. § 8321, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9174.

Cited: S. v. Hosford (1915) 27 I. 185, 147 P. 286.

Necessity of notice: The failure to give notice of intention to appeal, as required by this section, and the failure of the record to show that such notice was given, is not ground for a dismissal of the appeal by the dsitrict court. S. v. Barnard (1907) 13 I. 439, 90 P. 1.

The giving of notice of appeal in the manner provided by this section is necessary to the jurisdiction of the appellate court. S. v. Leeper (1917) 30 I. 534, 165 P. 997.

Sufficiency of notice: A notice of appeal which gives the title of the court and cause, and the date on which the judgment was entered, and states that the judgment was in favor of the state and against the defendant, and that he appeals from the judgment and the whole thereof, sufficiently states the "character of the judgment" as required by this section. S. v. Barnard, supra.

A notice of appeal need not be signed; the lack of a signature thereto of the appellant or of his attorney is a formal. rather than a jurisdictional, defect, and may be waived; and such defect is waived by a written acceptance of service. S. v. Leeper, supra.

Filing and service: It is necessary both to file and serve the notice of appeal within the time prescribed and the transcript of proceedings on appeal must show affirmatively both the filing and service. S. v. Cowen (1916) 29 I. 783, 162 P. 674.

§ 9265. [8322] **Undertaking for appearance of witnesses.** When notice of intention to appeal is given by the defendant as provided in the last section, the judge or justice may take from each of the material witnesses examined before him on the part of the people, a written undertaking, with or without sureties, to the effect that he will appear and testify in the district court upon the appeal, or that he will forfeit the sum of $500, as provided in case of commitment upon preliminary examination, or if the witness is unable to procure sureties he may be conditionally examined as there provided. [R. S. § 8322.]

Hist. R. S. § 8322, reen. R. C. ib., reen. C. L. ib.

Cross ref. Security for appearance of witnesses: § 8763. Conditional examination: § 8766.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9177.

§ 9266. [8323] **Transmission of papers.** When an appeal is taken the judge or justice must immediately transmit to the clerk of the district court of the county, the complaint, notice of appeal, the depositions of any witnesses examined conditionally as provided in the last section, and any recognizance entered into by the defendant or any witness. [R. S. § 8323.]

Hist. R. S. § 8323, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9179.

Cited: S. v. Barnard (1907) 13 I. 439, 90 P. 1; S. v. Hosford (1915) 27 I. 185, 147 P. 286.

§ 9267. [8324] **Bail pending appeal.** The party appealing may, at any time thereafter, if he desires to be released from custody during the pendency of the appeal, or desires a stay of proceedings under the judgment until the appeal be disposed of, enter into a recognizance, with two sufficient sureties to be approved by the judge or justice, in an amount to be fixed by the judge or justice, but not exceeding $500 in any case, for the payment of any judgment, fine and costs that may be awarded against him on the appeal, and that he will faithfully prosecute the same and render himself in execution of any judgment or order rendered or entered against him in the district court. [R. S. § 8324.]

Hist. R. S. § 8324, reen. R. C. ib., reen. C. L. ib.

Cross ref. Qualifications of bail: § 9101.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9176.

Cited: S. v. Barnard (1907) 13 I. 439, 90 P. 1; S. v. Hosford (1915) 27 I. 185, 147 P. 286.

Nature of liability: Defendant's liability for fine and costs upon appeal from justice or probate court where a bond is given under this section is a civil liability. The district court has no power to enter an alternative judgment of imprisonment against the defendant in case of his failure to pay fine and costs. Re Lucas (1909) 17 I. 167, 104 P. 657; Re Walton (1909) 17 I. 171, 104 P. 659.

Failure to give bond: Failure to file the bond herein provided results only in failure to stay execution of judgment but does not defeat the jurisdiction of the district court nor render the appeal subject to dismissal. S. v. Leeper (1917) 30 I. 534, 165 P. 997.

§ 9268. [8325] **Trial on appeal.** The clerk of the district court must file the papers received, and enter the action on the calendar in its order with other criminal cases, and the same must be tried anew in the district court at the next term thereof, unless for good cause the same be continued. [R. S. § 8325.]

Hist. R. S. § 8325, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

N. D. Analogous: Jus. C. § 9180.

Cited: S. v. Drury (1914) 25 I. 787, 139 P. 1129; (In brief of counsel) S. v. Hosford (1915) 27 I. 185, 186.

Trial de novo on all issues: Under the provisions of this section the case must be tried anew, or de novo. The case is there for a new trial on every point and question that was raised or might have been raised in the justice's or probate court. The motions and demurrers decided by the justice or probate court must be heard by the district court, provided either the state or the defendant cares to present them, or the defendant may first demur to the complaint in the district court. S. v. Stafford (1914) 26 I. 381, 143 P. 528.

§ 9269. [8326] **Costs to abide event.** The costs in both courts shall abide the event of the trial in the district court. [R. S. § 8326.]

Hist. R. S. § 8326, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

§ 9270. [8327] **Judgment against sureties for costs.** If upon the trial in the district court the defendant is convicted, judgment must be rendered against the defendant and his sureties for the costs in both courts, and for any fine imposed by the district court; and if such fine and costs be not paid, execution must be issued thereon against the defendant and his sureties; but the sureties are not liable on any such judgment or execution beyond the amount of their undertaking. If the defendant fails to appear and prosecute his appeal, judgment must be entered by the district court against the defendant and his sureties in the amount of the undertaking. [R. S. § 8327.]

Hist. R. S. § 8327, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. See Pen. C. 1872, § 1467; Kerr's C. ib.

Cited: S. v. Barnard (1907) 13 I. 439, 90 P. 1.

Presence of sureties: The civil judgment authorized herein may be entered against a defendant and his sureties in district court, whether they be present in court or not. Re Lucas (1909) 17 I. 164, 104 P. 657; Re Walton (1909) 17 I. 171, 104 P. 659.

Form of judgment: Under a stay of proceedings as provided by § 9267, after a conviction in the lower court, and after conviction in the district court, under the provisions of this section, judgment for a fine or costs, or both fine and costs against defendant and his sureties, should be entered as in a civil action. The district court has no jurisdiction to impose an alternative judgment of imprisonment against defendant in case he fail to pay the fine or costs, or both fine and costs. Re Lucas, supra. Re Walton, supra.

The district court may enter an independent sentence of imprisonment against defendant convicted on appeal, in addition to fine and costs, where same is allowed as a part of the penalty for the specific offense. Ib.

ARTICLE 3.

FEES OF JURORS AND WITNESSES.

§ 9271. [8338] **Fees and mileage: Application for subpoenas.** Witnesses before examining magistrates and in criminal cases in the probate and justice court, and jurors and witnesses in a coroner's inquest, are entitled to $2 per day for each day actually engaged in the trial of a case, and 25 cents per mile, one way, which must be paid out of the county treasury: *Provided, however,* That when the state or defendant requires the attendance of more than three witnesses in its or his behalf, before such witnesses shall be subpoenaed at the county expense, or their fees and mileage be a charge against the county, the county attor-

ney or defendant must make affidavit setting forth that they are witnesses whose evidence is material for the state or the defense, and the facts showing such materiality, and that it or he can not safely go to trial without them. In such cases the court or judge thereof, at the time the application is made therefor, shall order a subjoena to issue to such of said witnesses as the court or judge thereof may deem material for the state or defendant, and the costs incurred by the process, and the fees and mileage of such witnesses, shall be paid in the same manner that the costs and fees of other witnesses are paid. ['05, p. 173, § 1.]

Hist. '05, p. 173, § 1, reen. R. C. § 8338, reen. C. L. ib.

§ 9272. [8339] **Affidavit as to miles traveled.** Each juror and witness must state on oath to the judge, justice or coroner, the number of miles traveled for which he is entitled to pay; but no juror or witness shall receive mileage other than for the distance actually traveled, notwithstanding he may serve or testify in more than one case. ['05, p. 173, § 2.]

Hist. '05, p. 173, § 2, reen. R. C. § 8339, reen. C. L. ib.

TITLE LXI. SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

CHAPTER 330.

THE WRIT OF HABEAS CORPUS.

Cross ref. No fees can be charged by officers in habeas corpus proceedings: § 3713.

§ 9273. [8340] **Who may prosecute writ.** Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint. [R. S. § 8340.]

Hist. '64, p. 606, § 1, R. S. § 8340, reen. R. C. ib., reen. C. L. ib.

Cross ref. Privilege of writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety requires it: Const. I, 5.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1473; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11359.

Nature of remedy: Habeas corpus can not be resorted to as an appellate remedy, or for the purpose of reviewing or correcting errors. Re Davis (1913) 23 I. 473, 130 P. 786.

Habeas corpus is a collateral remedy, and in an assault upon the judgment of a court, nothing to the contrary appearing in the record, it will be presumed that all proceedings were according to law. Ex parte Allen (1918) 31 I. 295, 170 P. 921.

Suspension of habeas corpus: On an application for habeas corpus the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a county to be in a state of insurrection and rebellion, will not be reviewed. Re Boyle (1899) 6 I. 609, 57 P. 706, 96 A. S. R. 286, 45 L. R. A. 832.

Grounds for writ: Improper conduct on the part of the justice of the peace or of the county attorney at a preliminary examination is not ground for habeas corpus unless it results in illegal restraint of the accused. Re Green (1900) 7 I. 94, 60 P. 82.

One held under process duly and regularly issued by a court of competent jurisdiction after extradition from a foreign state will be remanded to custody notwithstanding alleged irregularity in the extradition proceedings. Re Moyer (1906) 12 I. 250, 85 P. 897, 118 A. S. R. 214, 12 L. R. A. (N. S.) 227.

The right to the guardianship of an infant can not be tried on habeas corpus. Andrino v. Yates (1906) 12 I. 618, 87 P. 787.

Custody of infant: Proceedings by habeas corpus to obtain the custody of a minor child are of an equitable nature in which the courts are vested with a large measure of discretion, and may consider

the best interests of the child and its wishes in the matter. Ib.

The right of the parent to the custody of an infant may be presented and determined upon a habeas corpus proceeding. Allen v. Williams (1918) 31 I. 309, 171 P. 493.

Additional reference: For additional cases on the subject of grounds for the writ, see notes to §§ 9276, 9286, 9287.

§ 9274. [8341] **Application for writ.** Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties if they are known, or describing them if they are not known.

2. If the imprisonment is alleged to be illegal the petition must also state in what the alleged illegality consists.

3. The petition must be verified by the oath or affirmation of the party making the application. [R. S. § 8341.]

Hist. '64,, p. 606, § 2, R. S. § 8341, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1474; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11361.

§ 9275. [8342] **By whom granted.** The writ of habeas corpus may be granted:

1. By the supreme court, upon petition on behalf of any person restrained of his liberty in this state. When so issued, it may be made returnable before the court, or before any district court, or any judge thereof.

2. By the district courts, or a judge thereof, upon petition on behalf of any person restrained of his liberty in their respective districts. [R. S. § 8342.]

Hist. (See '64, p. 606, § 3) R. S. § 8342, reen. R. C. ib., reen. C. L. ib.

Cross ref. Jurisdiction of supreme court: Const. V, 9; codes, § 6444. Of district court: § 6457. Applications for habeas corpus may be heard and final judgments entered at chambers: § 6493.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1275; as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11362.

Nature of jurisdiction: Jurisdiction of supreme court on habeas corpus is original and not appellate. Re Knudtson (1905) 10 I. 676, 79 P. 641.

Where returnable: The supreme court has authority to make writ returnable before any court. Jain v. Priest (1917) 30 I. 273, 164 P. 364.

§ 9276. [8343] **When granted.** Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must, if it appear that the writ ought to issue, grant the same without delay. [R. S. § 8343.]

Hist. '64, p. 606, § 4, R. S. § 8343, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1476; additional provision as amended: Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11363.

Grounds for writ: Writ of habeas corpus can not be substituted for writ of error and will not lie to discharge a prisoner on the ground that the information filed against him is technically defective. Re Marshall (1899) 6 I. 516, 56 P. 470.

One convicted of crime is not entitled to a discharge on habeas corpus because the county attorney was given leave, after a demurrer to the information was sustained, to file a new information, instead of being specifically directed to do so. Re Pierce (1901) 8 I. 183, 67 P. 316.

Same: When not issued: Writ will not issue on behalf of one accused of felony pending a preliminary examination, where petition fails to state facts showing committing magistrate is without jurisdiction. Re Green (1900) 7 I. 94, 60 P. 82.

An application for a writ of habeas corpus should be denied where it is not shown that the committing magistrate has abused the discretion which the law vests in him. Re Levy (1901) 8 I. 53, 66 P. 806; Re Squires (1907) 13 I. 624, 92 P. 754.

§ 9277. [8344] **Contents of writ.** The writ must be directed to the person having custody of, or restraining the person on whose behalf the application is made, and must command him to have the body of such

person before the court or judge, before whom the writ is returnable, at a time and place therein specified. [R. S. § 8344.]

Hist. (See '64, p. 606, § 5 R. S. § 8344, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11364.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1477; Kerr's C. ib.

§ 9278. [8345] **Service of writ.** If the writ is directed to the sheriff or other ministerial officer of the court, out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service. If it is directed to any other person, it must be delivered to the sheriff, and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed can not be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside, either of his dwelling house or of the place where the party is confined or under restraint. [R. S. § 8345.]

Hist. (See '64, p. 606, §§ 6, 8) R. S. § 8345, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11365.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1478; Kerr's C. ib.

§ 9279. [8346] **Disobedience to writ: Attachment.** If the person to whom the writ is directed, refuses, after service, to obey the same, the court or judge, upon affidavit, must issue an attachment against such person, directed to the sheriff or coroner, or an elisor, commanding him forthwith to apprehend such person and bring him immediately before such court or judge; and upon being so brought, he must be committed to the jail of the county until he makes due return to such writ, or is otherwise legally discharged. [R. S. § 8346.]

Hist. '64, p. 606, § 9, R. S. § 8346, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11366.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1479; Kerr's C. ib.

§ 9280. [8347] **Return to writ.** The person upon whom the writ is served must state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody, or under his power or restraint.

2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint.

3. If the party is detained by virtue of any writ, warrant or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return.

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority, such transfer took place.

5. The return must be signed by the person making the same, and except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath. [R. S. § 8347.]

Hist. '64, p. 606, § 10, R. S. § 8347, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1480; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11367.

Return and answer: In habeas corpus proceedings the return takes the place of the complaint and the answer may traverse the allegations of the return and contain affirmative matter. Allen v. Williams (1918) 31 I. 309, 171 P. 493.

§ 9281. [8348] **Body must be produced.** The person to whom the writ is directed, if it is served, must bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next section. [R. S. § 8348.]

Hist. '64, p. 606, § 11, R. S. § 8348, reen. R. C. ib., reen. C. L. ib.

Comp leg.—Cal. Same: Pen. C. 1872, § 1481; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11368.

§ 9282. [8349] **When hearing may proceed without body.** When from sickness or infirmity of the person directed to be produced, he can not, without danger, be brought before the court or judge, the person in whose custody or power he is, may state that fact in his return to the writ, verifying the same by affidavit. If the court or judge is satisfied of the truth of such return, and the return to the writ is otherwise sufficient, the court or judge may proceed to decide on such return, and to dispose of the matter as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced. [R. S. § 8349.]

Hist. '64, p. 606, § 12, 13, R. S. § 8349, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1482; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11369.

§ 9283. [8350] **Hearing on return.** The court or judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return, and such other matters as may be properly submitted to their hearing and consideration. [R. S. § 8350.]

Hist. '64, p. 606, § 14, R. S. § 8350, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1483; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11370.

§ 9284. [8351] **Answer to return: Trial of issues.** The party brought before the court or judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The court or judge must thereupon proceed, in a summary way, to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and has full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachement, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case. [R. S. § 8351.]

Hist. '64, p. 606, §§ 15, 16, 17, R. S. § 8351, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1484; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11371.

Return and answer: In habeas corpus proceedings the return takes the place of the complaint and the answer may traverse the allegations of the return and contain affirmative matter. Allen v. Williams (1918) 31 I. 309, 171 P. 493.

§ 9285. [8352] **Discharge of petitioner from custody.** If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such court or judge must discharge such party from the custody or restraint under which he is held. [R. S. § 8352.]

Hist. '64, p. 606, § 18, R. S. § 8352, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1485; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11372.

§ 9286. [8353] **Remand of petitioner.** The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody:

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree. [R. S. § 8353.]

Hist. See '64, p. 606, § 19) R. S. § 8353, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1486; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11360.

N. Y. Similar: Code: § 2032. Re Davis (1913) 23 I. 473, 130 P. 786.

Scope of examination: Alleged irregularities in drawing, summoning and impanelling grand jury not proper matters for consideration on habeas corpus. Re Corcoran (1899) 6 I. 657, 59 P. 20.

A defect in the form of an indictment which should have been raised by demurrer can not be made the ground for issuing a writ of habeas corpus after conviction and sentence. Re Alcorn (1900) 7 I. 101, 60 P. 561.

After a judgment of conviction the court can not examine, on an application for habeas corpus, the evidence taken upon the preliminary examination of the accused to ascertain whether it discloses the commission of an offense by the accused. Re Knudtson (1905) 10 I. 676, 79 P. 641.

In habeas corpus proceedings where a petitioner is detained by virtue of a commitment the court has no authority to go back of the commitment or process on which the prisoner is held and examine the sufficiency of a complaint upon which the prisoner was tried, or the validity and regularity of a warrant that was issued thereon. Such errors can only be reviewed on appeal. Re Davis (1913) 23 I. 473, 130 P. 786.

§ 9287. [8354] **Grounds for discharge.** If it appears on the return of the writ that the prisoner is in custody by virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section:

1. When the jurisdiction of such court or officer has been exceeded.

2. When the imprisonment was at first lawful, yet by some act, omission or event which has taken place afterward, the party has become entitled to a discharge.

3. When the process is defective in some matter of substance required by law, rendering such process void.

4. When the process, though in proper form, has been issued in a case not allowed by law.

5. When the person having the custody of the prisoner is not the person allowed by law to detain him.

6. Where the process is not authorized by any order, judgment or decree of any court, nor by any provision of law.

7. Where a party has been committed on a criminal charge without reasonable or probable cause. [R. S. § 8354.]

Hist. '64, p. 606, § 20, R. S. § 8354, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1487, Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11373.

Excessive imprisonment: A prisoner sentenced to five years' imprisonment under a statute authorizing a maximum penalty of two years is entitled to release on habeas corpus. Ex parte Cox (1893) 3 I. 530, 32 P. 197, 95 A. S. R. 29.

Though a defendant is sentenced under the wrong section of the statute, he can not be discharged on habeas corpus until he has performed so much of the sentence as was within the power of the court to impose. Re Chase (1910) 18 I. 561, 110 P. 1036.

Insufficiency of preliminary examination: The prisoner will not be discharged on habeas corpus where the depositions establish that a crime has been committed, and the probability of the prisoner's being guilty thereof sufficiently appears in the depositions to warrant the magistrate to hold the prisoner. Re Levy (1901) 8 I. 53, 66 P. 806.

After a judgment of conviction, the court can not examine, on an application for habeas corpus, the evidence taken upon the preliminary examination of the accused to ascertain whether it discloses the commis-

sion of an offense by the accused. Re Knudtson (1905) 10 I. 676, 79 P. 641.

The supreme court can not on habeas corpus weigh the evidence taken at the preliminary, but if it wholly fails to disclose a public offense for which a prisoner may be held, then the petitioner is entitled to his discharge. Re Knudtson, supra; Re Heigho (1910) 18 I. 566, 110 P. 1029,, Ann. Cas. 1912A 138, 32 L. R. A. (N. S.) 877.

Same: Reasonable or probable cause defined: It is not necessary for the committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty thereof. S. v. Layman (1912) 22 I. 387, 125 P. 1042. In a preliminary examination, the state is not required to establish the guilt of the petitioner beyond a reasonable doubt, and the phrase "reasonable or probable cause" is not equivalent to the phrase "beyond a reasonable doubt." By "reasonable or probable cause" is meant such evidence as would lead a reasonable person to believe that the accused party has probably or likely committed the offense charged. Re Squires (1907) 13 I. 624, 92 P. 754.

Writ granted conditionally: Where a defendant was charged with murder, and found guilty of an assault with a deadly weapon under an information which did not charge an assault the writ was conditionally granted, provided the prosecuting attorney failed to file a complaint against the defendant within five days. Re McLeod (1913) 23 I. 257, 128 P. 1106.

§ 9288. [8355] **Not to be discharged for defect in warrant.** If any person is committed to prison or is in custody of any officer on any criminal charge by virtue of any warrant of commitment of a probate judge or justice of the peace, such person must not be discharged on the ground of any mere defect of form in the warrant of commitment. [R. S. § 8355.]

Hist. '64, p. 606, § 21, R. S. § 8355, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1488; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11374.

§ 9289. [8356] **Examination of defectively stated charge.** If it appears to the court or judge by affidavit or otherwise, or upon the inspection of the process or warrant of commitment, and such other papers in the proceedings as may be shown to the court or judge, that the party is guilty of a criminal offense, or ought not to be discharged, such court or judge, although the charge is defective or unsubstantially set forth in such process or warrant of commitment, must cause the complainant or other necessary witnesses to be subpoenaed to attend at such time as ordered, to testify before the court or judge; and upon the examination he may discharge such prisoner, let him to bail if the offense be bailable, or recommit him to custody, as may be just and legal. [R. S. § 8356.]

Hist. '64, p. 606, § 22, R. S. § 8356, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1489; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11375.

§ 9290. [8357] **Writ for purpose of bail.** When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined. [R. S. § 8357.]

Hist. '64, p. 606, § 23, R. S. § 8357, reen. R. C. ib., reen. C. L. ib.

Cross ref. Bail on habeas corpus: § 9106.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1490; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11376.

Cited: (In brief of counsel) Re Schuster (1914) 25 I. 465.

When bail is discretionary: Where a defendant who has been convicted and sentenced to serve a term of imprisonment appeals from such judgment and applies to the trial judge for admission to bail, such application is addressed to the sound legal discretion of such judge or court, and, unless it clearly appears that such discretion has been abused, the action of the trial judge or court will not be disturbed or interfered with by the supreme court on application for a writ of habeas corpus. Re Schriber (1911) 19 I. 531, 114 P. 29, 37 L. R. A. (N. S.) 692.

§ 9291. [8358] **Judge may take bail.** Any judge before whom a person who has been committed on a criminal charge may be brought

on a writ of habeas corpus, if the same is bailable, may take an undertaking of bail from such person as in other cases, and file the same in the proper court. [R. S. § 8358.]

Hist. '64, p. 606, § 24, R. S. § 8358, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1491; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11376.

§ 9292. [8359] **Court to remand petitioner.** If a party brought before the court or judge on the return of the writ is not entitled to his discharge, and is not bailed, where such bail is allowable, the court or judge must remand him to custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, is legally entitled thereto. [R. S. § 8359.]

Hist. '64, p. 606, § 25, R. S. § 8359, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1492; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11377.

§ 9293. [8360] **Remand to other custody.** In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto. [R. S. § 8360.]

Hist. '64, p. 606, § 26, R. S. § 8360, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1493; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11378.

Cited: Re Davis (1899) 6 I. 766, 59 P. 544.

§ 9294. [8361] **Custody of petitioner pending proceedings.** Until judgment is given on the return, the court or judge before whom any party may be brought on such writ may commit him to the custody of the sheriff of the county, or place him in such care or under such custody as his age or circumstances may require. [R. S. § 8361.]

Hist. '64, p. 606, § 27, R. S. § 8361, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1494; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11379.

Temporary custody: In habeas corpus proceedings for the custody of a child, the court may issue an order nisi requiring the child to be committed to the custody of the applicant until the hearing, where the facts show that the health of the child is endangered in its present environment, and that it is also dangerous in view of the inclemency of the season or other conditions, to bring the child before the court for immediate hearing. Re Miller (1896) 4 I. 711, 43 P. 870; Re Dowling (1896) 4 I. 715, 43 P. 871.

Same: Order: An order for the temporary care pending the hearing of the person whose custody is the subject of the writ, need not be issued and signed by the clerk under the seal of the court. Ib.

§ 9295. [8362] **Defects of form disregarded.** No writ of habeas corpus can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought. [R. S. § 8362.]

Hist. '64, p. 606, § 28, R. S. § 8362, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1495; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11382.

§ 9296. [8363] **Imprisonment after discharge.** No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned, restrained or kept in custody for the same cause, except in the following cases:

1. If he has been discharged from custody on a criminal charge and is afterwards committed for the same offense by legal order or process.

2. If, after a discharge for defect of proof, or for any defect of the process, warrant or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense. [R. S. § 8363.]

Hist. '64, p. 606, § 29, R. S. § 8363, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11383.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1496; Kerr's C. ib.

§ 9297. [8364] **Issuing warrant instead of writ.** When it appears to any court or judge authorized by law to issue the writ of habeas corpus, that any one is illegally held in custody, confinement or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts and directed to the sheriff, coroner or constable of the county, commanding such officer to take such person thus held in custody, confinement or restraint, and forthwith bring him before such court or judge to be dealt with according to law. [R. S. § 8364.]

Hist. '64, p. 606, § 30, R. S. § 8364, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11385.

Cited: Re Miller (1896) 4 I. 711, 43 P. 870.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1497; Kerr's C. ib.

§ 9298. [8365] **Same: Arrest of custodian.** The court or judge may also insert in such warrant a command for the apprehension of the person charged with such illegal detention and restraint. [R. S. § 8365.]

Hist. '64, p. 606, § 31, R. S. § 8365, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11385.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1498; Kerr's C. ib.

§ 9299. [8366] **Execution of warrant.** The officer to whom such warrant is delivered must execute it by bringing the person therein named before the court or judge who directed the issuing of such warrant. [R. S. § 8366.]

Hist. '64, p. 606, § 32, R. S. § 8366, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11386.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1499; Kerr's C. ib.

§ 9300. [8367] **Return and hearing.** The person alleged to have such party under illegal confinement or restraint may make such return to such warrant as in case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs, and trial may thereupon be had as upon a return to a writ of habeas corpus. [R. S. § 8367.]

Hist. '64, p. 606, § 33, R. S. § 8367, reen. R. C. ib., reen. C. L. ib.

N. D. Identical: C. Cr. P. § 11387.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1500; Kerr's C. ib.

§ 9301. [8368] **Party may be discharged or remanded.** If such party is held under illegal restraint or custody, he must be discharged; and if not, he must be restored to the care or custody of the person entitled thereto. [R. S. § 8368.]

Hist. (See '64, p. 606, § 34) R. S. § 8368, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11388.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1501; Kerr's C. ib.

§ 9302. [8369] **Writ or process issued and served at any time.** Any writ or process authorized by this chapter may be issued and served on any day or at any time. [R. S. § 8369.]

Hist. (See '64, p. 606, § 35) R. S. § 8369, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1502; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11389.

§ 9303. [8370] **By whom issued: Seal of court.** All writs, warrants, process and subpoenas authorized by the provisions of this chapter must be issued by the clerk of the court, and except subpoenas, must be sealed with the seal of such court, and served and returned forthwith, unless the court or judge shall specify a particular time for any such return. [R. S. § 8370.]

Hist. '64, p. 606, § 36, R. S. § 8370, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1503; Kerr's C. ib.

Cited: Re Miller (1896) 4 I. 711, 43 P. 870.

Seal unnecessary: The seal of the court need not be affixed to an order of court providing for temporary care, pending the hearing of the person whose custody is the subject of the writ. Re Dowling (1896) 4 I. 715, 43 P. 871.

§ 9304. [8371] **Where returnable.** All such writs and process when made returnable before a judge, must be returned before him at the county seat, and there heard and determined. [R. S. § 8371.]

Hist. R. S. § 8371, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Similar: Pen. C. 1872, § 1504; as amended: Kerr's C. ib.

§ 9305. [8372] **Damages for refusal or disregard of writ.** If any judge, after a proper application is made, refuses to grant an order for a writ of habeas corpus, or if the officer or person to whom such writ may be directed, refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding $5000, to be recovered by action in any court of competent jurisdiction. [R. S. § 8372.]

Hist. '64, p. 606, § 37, R. S. § 8372, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1505; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11393.

§ 9306. [6876] **Refusal to obey writ of habeas corpus.** Every officer or person to whom a writ of habeas corpus may be directed, who, after service thereof, neglects or refuses to obey the command thereof, is guilty of a misdemeanor. [R. S. § 6876.]

Hist. R. S. § 6876, reen. R. C. ib., reen. C. L. § 8373.

Comp. leg.—Cal. Same: Pen. C. 1872, § 362; Kerr's C. ib.

§ 9307. [6877] **Commitment of person after discharge on habeas corpus.** Every person who either solely or as a member of a court knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor. [R. S. § 6877.]

Hist. R. S. § 6877, reen. R. C. ib., reen. C. L. § 8374.

Cross ref. False imprisonment: § 8245.

Comp. leg.—Cal. Same: Pen. C. 1872, § 363; Kerr's C. ib.

§ 9308. [6878] **Concealment of person entitled to habeas corpus.** Every person having in his custody or under his restraint or power, any person for whose relief a writ of habeas corpus has been issued, who, with the intent to elude the service of such writ or to avoid the effect thereof, transfers such person to the custody of another, or places him under the power or control of another, or conceals or changes the place of his confinement or restraint, or removes him without the jurisdiction

of the court or judge issuing the writ, is guilty of a misdemeanor. [R. S. § 6878.]

Hist. '75, p. 467, § 38, R. S. § 6878, reen. R. C. ib., reen. C. L. § 8375.

Comp. leg.—Cal. Same: Pen. C. 1872, § 364; Kerr's C. ib.

CHAPTER 331.

CORONERS' INQUESTS.

§ 9309. [8377] **Coroner to hold inquest.** When a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is, cause it to be exhumed, if it has been interred, and summon not less than nine nor more than 15 persons, qualified by law to serve as jurors, to appear before him forthwith, at the place where the body of the deceased is, to inquire into the cause of the death. [R. S. § 8377.]

Hist. '64, p. 475, § 134, R. S. § 8377, reen. R. C. ib., reen. C. L. ib.

Cross ref. Summoning juries of inquest: § 6543.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1510; additional clauses as amended: Kerr's C. ib.

Cited: Fairchild v. Ada Co. (1898) 6 I. 340, 55 P. 654.

Failure to hold inquest: Failure of the coroner to hold an inquest is not ground for the release of a person charged with the murder of the deceased. Re Sly (1904) 9 I. 779, 76 P. 766.

§ 9310. [8378] **Jurors to be sworn.** When six or more of the jurors attend, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death, and to render a true verdict thereon, acording to the evidence offered them, or arising from the inspection of the body. [R. S. § 8378.]

Hist. '64, p. 475, § 136, R. S. § 8378, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1511; Kerr's C. ib.

Cited: Fairchild v. Ada Co. (1898) 6 I. 340, 55 P. 654; Re Sly (1904) 9 I. 779, 76 P. 766.

§ 9311. [8379] **Examination of witnesses.** Coroners may issue subpoenas for witnesses, returnable forthwith, or at such time and place as they may appoint, which may be served by any competent person. They must summon and examine as witnesses every person who, in their opinion, or that of any of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body and give a professional opinion as to the cause of the death. [R. S. § 8379.]

Hist. '64, p. 475, § 137, R. S. § 8379, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1512; similar as amended: Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766.

Compensation of physician: Where a physician is subpoenaed at an inquest and is ordered by the coroner to inspect the body of a deceased person and to give a professional opinion as to the cause of death, the reasonable value of his services in making the inspection is a charge against the county. Fairchild v. Ada Co. (1898) 6 I. 340, 55 P. 654.

§ 9312. [8380] **Compelling attendance of witnesses.** A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, in like manner as upon a subpoena issued by a justice of the peace. [R. S. § 8380.]

Hist. '64, p. 475, § 138, R. S. § 8380, reen. R. C. ib., reen. C. L. ib.

Cross ref. Contempts in justices' courts: §§ 7127-31.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1513; similar as amended: Kerr's C. ib.

Cited: Fairchild v. Ada Co. (1898) 6 I. 340, 55 P. 654.

§ 9313. [8381] **Verdict of jury.** After inspecting the body and hearing the testimony, the jury must render their verdict and certify the

same by an inquisition in writing, signed by them, and setting forth who the person killed is, and when, where, and by what means he came to his death; and if he was killed, or his death occasioned by the act of another, by criminal means, who is guilty thereof. [R. S. § 8381.]

Hist. '64, p. 475, § 139, R. S. § 8381, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1514; Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766.

§ 9314. [8382] **Reduction of testimony to writing.** The testimony of the witnesses examined before the coroners' jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him with the inquisition, in the office of the clerk of the district court of the county. [R. S. § 8382.]

Hist. '64, p. 475, § 140, R. S. § 8382, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county court" for "district court," Pen. C. 1872, § 1515; similar as amended: Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766.

Depositions not admissable in trial: As a general rule, depositions taken at a coroner's inquest, are not admissable upon the trial of a person accused of having caused the death of the person over whose body the inquest was held. S. v. Squires (1908) 15 I. 545, 98 P. 413.

§ 9315. [8383] **Transmission of testimony to magistrate.** If, however, the person charged with the commission of the offense is arrested before the inquisition can be filed, the coroner must deliver the same, with the testimony taken, to the magistrate before whom such person may be brought, who must return the same, with the depositions and statement taken before him, to the office of the clerk of the district court of the county. [R. S. § 8383.]

Hist. '64 § 141, R. S. § 8383, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county court" for "district court," Pen. C. 1872, § 1516; similar as amended: Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766; S. v. Squires (1908) 15 I. 545, 98 P. 413.

§ 9316. [8384] **Warrant for arrest of accused.** If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act is ascertained by the inquisition, and is not in custody, the coroner must issue a warrant, signed by him, with his name of office, into one or more counties, as may be necessary, for the arrest of the person charged. [R. S. § 8384.]

Hist. '64, p. 475, § 142, R. S. § 8384, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1517; Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766.

§ 9317. [8385] **Same: Form of warrant.** The coroner's warrant must be in substantially the following form:

County of.....

The state of Idaho, to any sheriff, constable, marshal, or policeman in this state:

An inquisition having been this day found by a coroner's jury before me, stating that A. B. has come to his death by the act of C. D., by criminal means (or as the case may be, as found by the inquisition), you are therefore commanded forthwith to arrest the above named C. D., and take him before the nearest or most accessible magistrate in this county.

Given under my hand this.....day of....., A. D. 19.....

E. F.,

Coroner of the County of.....

[R. S. § 8385.]

Hist. '64, p. 475, § 143, R. S. § 8385, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1518; Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766.

§ 9318. [8386] **Service of warrant.** The coroner's warrant may be served in any county, and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information before a magistrate; when served in another county it need not be indorsed by a magistrate of that county. [R. S. § 8386.]

Hist. '64, p. 475, § 144, R. S. § 8386, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1519; Kerr's C. ib.

Cited: Re Sly (1904) 9 I. 779, 76 P. 766.

CHAPTER 332.

SEARCH WARRANTS.

§ 9319. [8390] **Search warrant defined.** A search warrant is an order in writing, in the name of the state of Idaho, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate. [R. S. § 8390.]

Hist. Cr. Prac. '64, § 629, R. S. § 8390, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1523; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11129.

§ 9320. [8391] **Grounds for issuance.** It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled; in which case it may be taken, on the warrant, from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from the place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, or from any place occupied by him or under his control, or from the possesion of the person to whom he may have so delivered it. [R. S. § 8391.]

Hist. (See Cr. Prac. '64, § 630) R. S. § 8391, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1524; additional subd. as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11130.

§ 9321. [8392] **Affidavit of probable cause.** A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched. [R. S. § 8392.]

Hist. Cr. Prac. '64, § 631, R. S. § 8392, reen. R. C. ib., reen. C. L. ib.

Cross ref. Similar constitutional provision: I, 17. Procurement of search warrant without probable cause a misdemeanor: § 8201. Search without warrant under prohibition law: § 2644; under fish and game law: § 2806.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1525; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11131.

§ 9322. [8393] **Examination of complainant and witnesses.** The magistrate must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. [R. S. § 8393.]

Hist. Cr. Prac. '64, § 632, R. S. § 8393, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11132.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1526; Kerr's C. ib.

§ 9323. [8394] **Depositions to state facts.** The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist. [R. S. § 8394.]

Hist. Cr. Prac. '64, § 633, R. S. § 8394, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11132.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1527; Kerr's C. ib.

§ 9324. [8395] **Issuance of warrant.** If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate. [R. S. § 8395.]

Hist. Cr. Prac. '64, § 632, R. S. § 8395, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11133.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1528; Kerr's C. ib.

§ 9325. [8396] **Form of warrant.** The warrant must be in substantially the following form:

County of .....

The state of Idaho to any sheriff, constable, marshal, or policeman in the county of.....: Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, or, if the affidavit be not positive, that there is probable cause for believing that—stating the ground of the application in the same manner), you are therefore commanded, in the day time (or at any time of the day or night, as the case may be) to make immediate search of the person of C. D. (or in the house situated....., describing it or any other place to be searched, with reasonable particularity, as the case may be) for the.....following property: (describing it with reasonable particularity); and if you find the same or any part thereof, to bring it forthwith before me at..... (stating the place.)

Given under my hand, and dated this .....day of.....A. D. 19.....

E. T., Justice of the Peace.

(Or as the case may be.) [R. S. § 8396.]

Hist. Cr. Prac. '64, § 635, R. S. § 8396, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11134.

Comp. leg.—Cal. Same: Pen C. 1872, § 1529; Kerr's C. ib.

§ 9326. [8397] **Service of warrant.** A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. [R. S. § 8397.]

Hist. Cr. Prac. '64, § 636, R. S. § 8397, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1530; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11135.

§ 9327. [8398] **Same: Breaking open doors.** The officer may break open any outer or inner door or window of a house, or any part of a house, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. [R. S. § 8398.]

Hist. Cr. Prac. '64, § 637, R. S. § 8398, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1531; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11136.

§ 9328. [8399] **Same.** He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. [R. S. § 8399.]

Hist. Cr. Prac. '64, § 638, R. S. § 8399, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1532; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11137.

§ 9329. [8400] **Service of warrant at night.** The magistrate must insert a direction in the warrant that it be served in the day time unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night. [R. S. § 8400.]

Hist. Cr. Prac. '64, § 639, R. S. § 8400, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1533; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11138.

§ 9330. [8401] **Time for executing warrant.** A search warrant must be executed and returned to the magistrate who issued it, within 10 days after its date; after the expiration of this time the warrant, unless executed, is void. [R. S. § 8401.]

Hist. Cr. Prac. '64, § 640, R. S. § 8401, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1534; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11139.

§ 9331. [8402] **Receipt for property taken.** When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property. [R. S. § 8402.]

Hist. Cr. Prac. '64, § 641, R. S. § 8402, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1535; Kerr's C. ib.

§ 9332. [8403] **Disposition of property.** When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections 9192 to 9197 inclusive. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section 9320, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property taken is triable. [R. S. § 8403.]

Hist. (See Cr. Prac. '64, § 642) R. S. § 8403, reen. R. C. ib., reen. C. L. ib.

Cross ref. Disposition of stolen property: §§ 9192-97.

Comp. leg.—Cal. Same except references: Pen. C. 1872, § 1536; similar as amended: Kerr's C. ib..

N. D. Similar: C. Cr. P. § 11140.

§ 9333. [8404] **Return of warrant.** The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: "I, R. S., the officer by whom this warrant was executed do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant." [R. S. § 8404.]

Hist. Cr. Prac. '64, § 643, R. S. § 8404, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1537; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11141.

§ 9334. [8405] **Copy of inventory.** The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant. [R. S. § 8405.]

Hist. Cr. Prac. '64, § 644, R. S. § 8405, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen C. 1872, § 1538; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11142.

§ 9335. [8406] **Contest of warrant.** If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by the magistrate. [R. S. § 8406.]

Hist. Cr. Prac. '64, §§ 645, 646, R. S. § 8406, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1539; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11143-4.

§ 9336. [8407] **Restoration of property.** If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken. [R. S. § 8407.]

Hist. Cr. Prac. '64, § 647, R. S. § 8407, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1540; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11145.

§ 9337. [8408] **Return of papers to court.** The magistrate must annex together the depositions, the search warrant and return, and the inventory, and return them to the next term of the court having power to inquire into the offenses in respect to which the search warrant was issued, at or before its opening on the first day. [R. S. § 8408.]

Hist. Cr. Prac. '64, § 648, R. S. § 8408, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" inserted before "court", Pen. C. 1872, § 1541; similar as amended: Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11146.

§ 9338. [8409] **Search of accused person.** When a person charged with a felony is supposed by the magistrate before whom he is brought to have on his person a dangerous weapon, or any thing which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or to the order of the court in which the defendant may be tried. [R. S. § 8409.]

Hist. Cr. Prac. '64, § 651, R. S. § 8409, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1542; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11149

CHAPTER 333.

PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

Cross ref. Governor may offer rewards: § 128. Record of rewards offered: § 130.

§ 9339. [8416] Surrender of fugitives from other states. A person charged in any state or territory of the United States with treason, felony or other crime, who flees from justice and is found in this state, must, on demand of the executive authority of the state or territory from which he fled, be delivered up by the governor of this state, to be removed to the state or territory having jurisdiction of the crime. [R. S. § 8416.]

Hist. Cr. Prac. '64, § 652, R. S. § 8416, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1548; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11151.

Cited: Union Pac. R. Co. v. Belek (Neb. 1913) 211 F. 699, 706.

Jurisdiction of demanding and surrendering state: The motives which actuate the governor of a state to issue his warrant for the rendition of a prisoner on extradition are not proper subjects of judicial inquiry, since jurisdiction to take the action complained of is the test and the jurisdictional facts are subject to review by the federal courts of the surrendering state where application is made to such courts before the demanding state acquires jurisdiction of the person of the accused. In interstate extradition the prisoner is held under the extradition process only until such time as he reaches the jurisdiction of the demanding state, and he is thenceforth held under the process issued out of the courts of that state; hence, there is no federal question involved in his detention. Re Moyer (1906) 12 I. 250, 85 P. 897, 118 A. S. R. 214, 12 L. R. A. (N. S.) 227, aff. 203, U. S. 221, 27 S. C. R. 121, 51 L. ed. 160.

§ 9340. [8417] Issuing warrant. A magistrate may issue a warrant for the apprehension of any person so charged, who flees from justice and is found in this state. [R. S. § 8417.]

Hist. Cr. Prac. '64, § 653, R. S. § 8417, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1549; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11152.

Cited: Union Pac. R. Co. v. Belek (Neb., 1913) 211 F. 699, 706.

§ 9341. [8418] Arrest and commitment of fugitive. The proceedings for the arrest and commitment of a person charged, are in all respects similar to those provided in this code for the arrest and commitment of a person charged with a public offense committed in this state, except that an exemplified copy of an indictment found, or other judicial proceedings had against him in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate. [R. S. § 8418.]

Hist. Cr. Prac. '64, § 654, R. S. § 8418, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1550; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11153.

Cited Union Pac. R. Co. v. Belek (Neb., 1913) 211 F. 699, 706.

§ 9342. [8419] Examination and commitment of fugitives. If from the examination, it appear that the accused has committed the crime alleged, the magistrate by warrant reciting the accusation, must commit him to the proper custody in his county, for such time, to be specified in the warrant, as the magistrate may deem reasonable to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he gives bail as provided in the next section, or until he is legally discharged. [R. S. § 8419.]

Hist. Cr. Prac. '64, § 655, R. S. § 8419, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1551; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11154.

§ 9343. [8420] **Admission to bail.** The magistrate may admit the person arrested to bail by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to arrest upon the warrant of the governor of this state. [R. S. § 8420.]

Hist. Cr. Prac. '64, § 656, R. S. § 8420, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1552; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11155.

§ 9344. [8421] **Notice to prosecuting attorney.** Immediately upon the arrest of the person charged, the magistrate must give notice thereof to the prosecuting attorney of the county. [R. S. § 8421.]

Hist. (See Cr. Prac. '64, § 657) R. S. § 8421, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1553; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11156.

§ 9345. [8422] **Duty of prosecuting attorney.** The prosecuting attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge of the court of the city or county within the state or territory having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged. [R. S. § 8422.]

Hist. Cr. Prac. '64, § 658, R. S. § 8422, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1554; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11157.

§ 9346. [8423] **Discharge of fugitive.** The person arrested must be discharged from custody or bail, unless, before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the governor of this state. [R. S. § 8423.]

Hist. Cr. Prac. '64, § 659, R. S. § 8423, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1555; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11158.

§ 9347. [8424] **Return of proceedings to district court.** The magistrate must return his proceedings to the next district court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he is in custody, or the time for his arrest has not elapsed, it may discharge him from detention, or may order his undertaking of bail to be cancelled, or may continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within a time to be specified in the undertaking. [R. S. § 8424.]

Hist. Cr. Prac. '64, § 660, R. S. § 8424, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1556; Kerr's C. ib.

N. D. Identical: C. Cr. P. § 11159. See also: C. Cr. P. § 11160.

§ 9348. [8425] **Claims for services of executive agents.** When the governor of this state, in the exercise of the authority conferred by section 2 of article IV of the constitution of the United States, or by the laws of this state, demands from the executive authority of any state or territory of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state, territory, or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners and paid out of the state treasury. [R. C. § 8425.]

Hist. R. S. § 8425, modified by Const. IV, 18; am. R. C. § 8425, reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1557; Kerr's C. ib.

N. D. Analogous: C. Cr. P. § 11162.

Appointment of executive agent: The governor has a right to the appointment of an agent to receive and return a fugitive from justice under requisition papers, but not to fix any terms as to his fees.

Such officer is entitled to the fees and emoluments fixed by law for his services. Settle v. Sterling (1869) 1 I. 259.

Expense of executive agent: The expense incurred by an executive agent in going to another state to bring back a fugitive from justice, is a charge against the state under this section. Kroutinger v. Bd. of Examiners (1902) 8 I. 463, 69 P. 279.

If a deputy sheriff has been designated as the agent of the state to receive a fugitive from justice, his claim for services is a charge against the state, not against the county in which he is deputy sheriff. Roberts v. Comrs. of Custer Co. (1909) 17 I. 379, 105 P. 797.

§ 9349. [8426] **Rewards for services prohibited.** No compensation, fee, or reward of any kind can be paid to, or received by, a public officer of this state, or other person, for a service rendered in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided for in such section. [R. S. § 8426.]

Hist. R. S. § 8426, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1558; Kerr's C. ib.

N. D. Similar: C. Cr. P. § 11164.

CHAPTER 334.

PROCEEDINGS FOR THE PRODUCTION OF PRISONERS.

§ 9350. [8435] **Order for production of prisoner.** When it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made. [R. S. § 8435.]

Hist. Cr. Prac. '64, § 669, R. S. § 8435, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1567; Kerr's C. ib.

CHAPTER 335.

DISPOSITION OF FINES, FORFEITURES AND COSTS.

§ 9351. [8440] **Fines and forfeitures set apart for school fund.** All moneys collected from fines and forfeitures shall be paid into the county treasury of the respective counties where so collected, and shall be set apart by the county treasurer of such county as a part of the general school funds of said county, and distributed by the county superintendent of said county in accordance with the general school laws of the state providing for the distribution of school funds. ['03, p. 433, § 1.]

Hist. '03, p. 433, § 1, reen. R. C. § 8440, reen. C. L. ib.

Cross ref. Special dispositions of fines and penalties are as follows:

County school fund: Fines and forfeitures generally: § 906. Fines for keeping toll road, bridge or ferry without license: § 1473. One-half of fines for permitting stallions to run at large: § 1978. Forfeitures for usury: § 2554. Penalties for recorders failing properly to record instruments: § 3647. Fines and penalties accruing under marriage license act: § 4619. One-half of forfeitures for railroad's failure to keep for inspection hides and ears of animals killed: § 4819. Fines under Sunday rest law; § 8296. Fines for refusing to deliver or interfering with the delivery of water by ditch owners: § 8538. When firearms unlawfully carried are taken from Indians one-half the money received from their sale or redemption: § 8597.

State school fund: Fines for failure of of officers to make reports: § 413. Fines for violation of law governing sale of pamphlet laws: § 483. Penalties for failure of mine owners to make repairs as required by the inspector: § 5476.

School districts included within municipalities: One-half fines and penalties paid into municipal courts: § 3882.

For the use of the state: Penalty of peace officers for failure to execute process in military court: § 778. Forfeitures on the official bonds of revenue officers under the general tax law: §§ 3165, 3181, 3330, 3335. Penalties recovered against railroads for failure to sound bell or whistle: § 4820.

State general fund: Fines for violation of dairy, food, sanitary and health law: § 1674. Fines for adulteration and misbranding: § 1698. Fines for violation of pure oil law: § 1795. Fines, forfeitures and penalties for violation of horticultural law: § 2067. Fines and penalties for violation of public utilities law: § 2528. Penalties for false advertising: § 5022.

State fish and game fund: Fines collected under fish and game law when arrest is made by warden: § 2816.

State highway fund: Twenty-five per cent of fines and penalties for violation of state highway law: §§ 1581, 1582, 1621.

State military fund: Fines assessed by courts-martial: § 778.

For the use of the county: Forfeitures on the official bonds of revenue officers under the general tax law: §§ 3151, 3182, 3226, 3232, 3236, 3281, 3328.

County general fund: One-half fines for violation of fire prevention law: § 2951. Fines collected under fish and game law when arrest is made by local officer: § 3276.

County current expense fund: Forfeitures for failure of probate judges and justices to deliver dockets to successors: § 7140.

Road fund: Penalties and forfeitures for injuries to highways: § 1384. Forfeitures of ferry and toll bridge keepers: § 1456.

Municipal general fund: One-half fines and penalties paid into municipal courts: § 3882.

For the use of taxing districts: Forfeitures on county auditors' bonds for neglect or refusal to transmit statements to taxing districts: § 3329.

Informers' shares: Forfeitures for disobedience of subpoena: § 81. One-half of fines for permitting stallions to run at large: § 1978. One-half of penalties for unauthorized marking of logs: § 2349. One-half fines for violation of fire prevention law: § 2951. One-half forfeitures for railroad's failure to keep for inspection hide and ears of animals killed: § 4819. When firearms unlawfully carried are taken from Indians, one-half the money from their sale or redemption goes to the officer disarming the Indian: § 8597.

§ 9352. Disposition of other funds. Whenever any money shall be or shall come into the possession of any clerk of court, or other public officer authorized to receive the same, and no fund is specified by law into which such money shall be paid, or purpose to which the same shall be applied, the officer in possession of, or who may come into the possession of any money in such cases, shall pay the same to the state treasurer, who shall add the same to the permanent school fund, and such money shall thereafter be and remain a part of said fund. ['13, c. 70, § 1, p. 307.]

Hist. '13, c. 70, § 1, p. 307, reen. C. L. § 8440a.

§ 9353. [8441] **Judgment for costs.** At the close of every trial for any offense against the laws of this state the costs thereof shall be paid as by law provided, but by way of indemnity to the county the whole amount of such costs, including the costs of examination if such shall have been had, in cases wherein the accused is convicted, shall be taxed against the convicted person, and judgment shall be rendered accordingly by the court before which such person shall have been convicted, and such judgment may be enforced in the same manner as judgments in civil cases. [R. C. § 8441.]

Hist. R. S. § 8441; modified by '99, p. 379, § 4; am. R. C. § 8441, reen. C. L. ib.

Comp. leg.—N. D. Analogous: Pen. C. § 10381.

§ 9354. [8442] **Apportionment of funds realized from judgment.** All moneys arising from the satisfaction of any judgment for costs in a criminal action, or from an execution on any such judgment, shall be apportioned to the general expense fund of the year and of the county in which such judgment was entered. ['99, p. 379, § 4.]

Hist. '99, p. 379, § 4, reen. R. C. § 8442, reen. C. L. ib.

TITLE LXII. STATE PRISON AND COUNTY JAILS.

CHAPTER 336.

THE STATE PRISON.

ARTICLE 1.

BOARD OF STATE PRISON COMMISSIONERS.

Cross ref. Duties of dept. public welfare with reference to penitentiary: § 1623. Duties of board of pardons: § 9198 et seq. Duties of prison board: § 9216.

§ 9355. [8460] **Location and use of penitentiary.** There shall be continually maintained for the care and custody of convicts in Idaho, a penitentiary at Boise City, in Ada county, on the lands connected therewith and set apart and reserved therefor and granted and donated to the state of Idaho by the general government upon its admission into the Union, wherein must be confined for reformation and punishment, and employed at hard labor, all offenders convicted and sentenced according to law to imprisonment in the state prison; and all persons convicted of crimes against the laws of this state, and sentenced to confinement in the state prison, must be sentenced to hard labor during the term of their confinement, and must perform such labor under such rules and regulations as may be prescribed by the board of state prison commissioners. [R. C. § 8460.]

Hist. Part of R. S. § 8500 and '90-91, p. 21, § 1, reen. '99, p. 13, § 1; compiled R. C. § 8460, reen. C. L. ib.

The portion of R. S. § 8500 which was retained in R. C. was held to be in force notwithstanding the act of 1899. Re Corcoran (1899) 6 I. 657, 59 P. 18. The omitted portions of § 8500 are repugnant to the first part of this section and to the following section.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11181.

§ 9356. Constitution of board: Provision for care and employment of prisoners. The governor, the secretary of state and attorney general are hereby constituted a board of state prison commissioners, of which the governor shall be chairman. Said board shall have the control, direction and management of the penitentiary of the state, and it shall be duty of said board, either by direct expenditure or by contract with a responsible person or persons, to provide for the care, maintenance and employment of all inmates confined, or that may hereafter be confined, in the state penitentiary. If such board shall provide by contract for the care and maintenance of the inmates of said penitentiary, authority on behalf of the state is hereby vested with a majority of the members of said board to make and sign said contract, in such manner as shall in their judgment appear to be for the best interest of the state, and to arrange all the necessary details thereof, including the cost per diem to the state, the terms and time of payment, and the appointment and compensation of the warden and employees. Said board shall have the power to make contract with the lowest responsible bidder, and shall have the privilege of rejecting any and all bids, and any such contract entered into shall provide that the discipline of the convicts shall be under the control of said board and the warden. And no contract shall be made which shall in any wise abridge or deprive the convicts of any privileges granted by law. ['11, c. 216, § 1, p. 695.]

Hist. '90-91, p. 21, § 2; am. '93, p. 155, § 1, reen. '99, p. 13, § 2, reen. R. C. § 8461, am. '11, c. 216, § 1, p. 695, reen. C. L. § 8461.

Cross ref. Constitution of board: Const. IV, 18; X, 5. Labor of convicts to be done within the prison grounds, or on public works, under the control of the state: Const. XIII, 3. Labor of convicts: § 9392; on state highways: §§ 1572, 1573. Board to provide place for execution of death penalty: § 9064.

Education of convicts under supervision of state prison board: §§ 9217-18.

§ 9357. Disposition of receipts from convict labor. All moneys obtained from the employment of convict labor under the direction of the state board of prison commissioners shall be credited to the penitentiary fund. ['15, c. 85, p. 203.]

Hist. '15, c. 85, p. 203, reen. C. L. § 8461a.

§ 9358. [8462] **Meetings of board.** The board of prison commissioners shall meet quarterly, and shall inquire into and examine all matters connected with the government, discipline and police of the penitentiary, and the punishment and employment of the prisoners confined therein, and they may, from time to time, require reports from the warden as to any and all of said matters. ['90-91, p. 21, § 6.]

Hist. '90-91, p. 21, § 6, reen. '99, p. 13, § 6, reen. R. C. § 8462, reen. C. L. ib.

Additional meetings of board: The legislature in requiring quarterly meetings to be held by the board of prison commissioners did not limit the power of the board to those meetings only. Ackley v. Perrin (1905) 10 I. 531, 79 P. 192.

§ 9359. [8463] **Inquiry into misconduct of officers.** They shall inquire into any improper conduct alleged to have been committed by the warden or any other officer of the penitentiary, and for that purpose the chairman of the board has power to issue subpoenas to compel the attendance of witnesses and the production of papers and writings before them, in the same manner and with like effect as in case of arbitration. ['90-91, p. 21, § 8.]

Hist. '90-91, p. 21, § 8, reen. '99, p. 13, § 8, reen. R. C. § 8463, reen. C. L. ib.

Comp. leg.—N. D. See C. Cr. P. § 11199.

§ 9360. [8464] **Same: Examination of witnesses.** The board may examine any witnesses who appear before them, on oath, to be administered by the chairman of the board, or in his absence, by any other member of the board. ['90-91, p. 21, § 9.]

Hist. '90-91, p. 21, § 9, reen. '99, p. 13, § 9, reen. R. C. § 8464, reen. C. L. ib.

§ 9361. [8465] **Inspection of penitentiary and books.** The warden and other officers of the penitentiary at all times shall admit the board, or either of them, into every part of said penitentiary; exhibit to them, or either of them, on demand, all the books, papers, accounts and writings pertaining to the penitentiary or to the business, government, discipline or management thereof, and to render them every other facility in their power to enable them to discharge their duties under this title. ['90-91, p. 21, § 10.]

Hist. '90-91, p. 21, § 10, reen. '99, p. 13, § 10, reen. R. C. § 8465, reen. C. L. ib.

§ 9362. [8466] **Rules for admission of visitors.** It shall be the duty of the board of state prison commissioners to establish rules for the admission of visitors to the penitentiary, and they may prescribe a certain sum, not to exceed 25 cents, to be charged each individual admitted for each admission. The warden shall provide suitable tickets of admission, and keep, or cause to be kept, a record in the daily journal of the number of visitors admitted; and there shall be appropriated, quarterly, out of the fees received from visitors, or from other funds of the library, a sum not less than $25, to be expended in the purchase of

books, papers and periodicals for the use of the prison library. ['90-91, p. 21, § 14.]

Hist. '90-91, p. 21, § 14, reen. '99, p. 13, § 14, reen. R. C. § 8466, reen. C. L. ib.

§ **9363.** [8467] **Audit and report of finances.** The board on the first Monday of December, annually, shall audit, correct and settle the accounts of the warden with the penitentiary and the state for the year ending on the last day of November preceding, and make report of the same to the governor, which report must embrace and exhibit all particulars necessary to give the governor a full understanding of the fiscal year, and all other matters pertaining to the management of the prison; and they shall, at the same time, furnish an estimate of the probable income and expenses of the penitentiary for the ensuing year. ['90-91, p. 21, § 13.]

Hist. '90-91, p. 21, § 13, reen. '99, p. 13, § 13, reen. R. C. § 8467, reen. C. L. ib.

Cited: Ackley v. Perrin (1905) 10 I. 531, 79 P. 192.

§ **9364.** [8468] **Maximum per capita expense.** The general support of the penitentiary, including food, clothing, bedding and all supplies for the use of the prison, including salaries of officers and employees, and all other expenses connected therewith, shall not exceed 85 cents per day for each convict: *Provided,* That all expenses for permanent repairs and improvements or the expenses of sheriffs and other officers in bringing prisoners to the penitentiary, and all extraordinary expenses made with the consent and advice of the board of commissioners, shall not be included in this limit of expense per capita. All such expenses shall be kept in detail, under a separate head, in the prison books, and shall so appear in all financial reports of the commissioners and warden: *Provided,* That no labor of convicts shall be charged to this account. ['90-91, p. 21, § 23.]

Hist. '90-91, p. 21, § 23, reen. '99, p. 13, § 22, reen. R. C. § 8468, reen. C. L. ib.

§ **9365. Disposition of minor convict.** The board of state prison commissioners is empowered to place any minor under the age of 15 years, sentenced to the state penitentiary, in a school of correction, either within or without this state, for such part of his sentence as it may deem advisable, and to provide for the transportation, tuition and other charges necessarily connected therewith, but the said expense, other than transportation, are subject to the maximum limit fixed by section 9364. ['15, c. 74, p. 186.]

Hist. R. C. § 8468a, enacted by '15, c. 74, p. 186, reen. C. L. § 8468a.

§ **9366.** [8469] **Warrants for expenses.** The state auditor is authorized and required to draw his warrant on the state treasury for such sums as the board of state prison commissioners may from time to time direct, for defraying the proper and necessary expenses of the prison. ['90-91, p. 21, § 40.]

Hist. '90-91, p. 21, § 40, reen. '99, p. 13, § 37, reen. R. C. § 8469, reen. C. L. ib.

ARTICLE 2.

FEDERAL AID: PENITENTIARY FUND.

§ **9367.** [8469a] **Penitentiary fund.** A fund which shall be known as the penitentiary fund is hereby created and established. All moneys now in, or credited to, that certain fund designated on the books in the offices of the state auditor and the state treasurer as the penitentiary

fund and all moneys which may accrue from the investment of the proceeds of the sale of any of the 50,000 acres of land granted to the state of Idaho under the provisions of the act of congress of July 3, 1890, entitled "An act to provide for the admission of the state of Idaho into the Union" for the support and maintenance of the penitentiary located at Boise City or from the investment of the proceeds of the sale of timber growing upon any of the lands, and also any and all moneys which may be received on account of rentals charged for the use of any such lands and all moneys which may be received by the state treasurer on account of interest charged upon deferred payments on such of the said lands as may have been sold by the state shall be credited to, placed in, and constitute the penitentiary fund.

No moneys shall ever be appropriated out of the said penitentiary fund for any purpose other than the support and maintenance of the penitentiary located at Boise City, nor shall any moneys properly belonging to the said fund ever be diverted therefrom or used for any other purpose whatsoever. ['05, p. 406, S. B. 118, §§ 1, 2.]

Hist. '05, p. 406, S. B. 118, §§ 1, 2, continued in force R. C. § 17, subd. 69, reen. C. L. § 8469a.

Note: This fund is commonly denominated the penitentiary interest fund.

§ 9368. Same: Appropriation. All moneys which may accrue to the penitentiary fund are perpetually appropriated and set apart for the support and maintenance of the penitentiary, the same to be available for such purpose immediately upon their being credited to the said fund. [C. L. § 8469b.]

Hist. '05, p. 406, S. B. 118, § 4, continued in force R. C. § 17, subd. 69; compiled and reen. C. L. § 8469b.

Cross ref. See annotations to § 1109.

ARTICLE 3.

OFFICERS OF THE PENITENTIARY.

§ 9369. [8470] **Officers of the penitentiary enumerated.** The officers of the penitentiary shall consist of one warden, who shall be the principal keeper of the penitentiary; one deputy warden, who shall be the chief turnkey and clerk and bookkeeper of the penitentiary, both of whom shall reside at the penitentiary; one physician, and such number of assistant keepers and guards as the warden and board of state prison commissioners shall deem requisite. ['90-91, p. 13, § 3.]

Hist. '90-91, p. 13, § 3, reen. '99, p. 13, § 3, reen. R. C. § 8470, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11204.

§ 9370. [8471] **Appointment of warden.** The warden shall be appointed by the board of state prison commissioners. He must execute an official bond in the sum of $10,000, with at least two good and sufficient sureties, to the full penalty of said bond, to be approved by the governor, and shall hold his office during the pleasure of the board. ['90-91, p. 21, § 4.]

Hist. '90-91, p. 21, § 4, reen. '99, p. 13, § 4, reen. R. C. § 8471, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11205.

§ 9371. [8472] **Appointment of other officers.** The physician shall be appointed by the board of state prison commissioners, and shall hold his office during the pleasure of said board. The deputy warden, the assistant keepers and the guards shall be appointed by the warden, with the assent of the board, and shall hold offices during the pleasure of the warden. ['90-91, p. 21, § 5.]

Hist. '90-91, p. 21, § 5, reen. '99, p. 13, § 5, reen. R. C. § 8472, reen. C. L. ib.

Cross ref. Warden may appoint subordinates subject to the approval of the board of prison commissioners: Const. X, 5.

§ 9372. [8473] **Residence and expenses of warden.** The warden, at the expense of the state, shall be entitled to the use of the building or quarters set apart and designated by the board of state prison commissioners as the warden's quarters, and shall be entitled to necessary fuel, lights and food for himself, wife and children, and shall render an itemized account of the expenses chargeable to the warden's quarters, and submit such account to the board of prison commissioners at the regular meetings of the board, together with his other accounts and reports: *Provided,* That if the warden does not occupy said building with his family, the same may be occupied by the deputy warden and his family. ['90-91, p. 21, § 45.]

Hist. '90-91, p. 21, § 45, reen. '99, p. 13, § 42, reen. R. C. § 8473, reen. C. L. ib.

§ 9373. [8474] **Salaries of officers.** There shall be paid to the officers and employees of the penitentiary the following yearly salaries and compensation, to wit: To the warden, the sum of $1800; to the deputy warden, the sum of $1200, and board and quarters as provided in the preceding section; to the physician and assistant keepers and guards, such sums as the board of prison commissioners may deem proper and just: *Provided,* That the board of prison commissioners shall not pay the guards and keepers more than $75 per month and board. All bills for supplies and services rendered to the penitentiary shall be paid monthly out of the state treasury on warrants of the state auditor. ['07, p. 125, § 1.]

Hist. '90-91, p. 21, § 15; am. '93, p. 155, § 2, reen. '99, p. 13, § 15; am. '07, p. 125, § 1, reen. R. C. § 8474, reen. C. L. ib.

§ 9374. [8475] **Duties of warden.** The warden shall attend constantly at the penitentiary. He shall exercise general supervision over and give necessary directions to the keepers and guards; examine whether they have been vigilant in the discharge of their respective duties; examine daily into the health of the prisoners, and take charge of the real and personal estate belonging to or connected with the penitentiary. ['90-91, p. 21, § 16.]

Hist. '90-91, p. 21, § 16, reen. '99, p. 13, § 16, reen. R. C. § 8475, reen. C. L. ib.

Cross ref. Warden to execute death penalty: § 9064. Warden is member of prison board: § 9216.

§ 9375. [8476] **Suits by and against warden.** All the transactions and dealings of the prison shall be conducted in the name of the warden, who shall be capable in law of suing and being sued in all courts and places in all matters concerning the said prison by his name of office, and by that name he is hereby authorized to sue for and recover all sums of money or any property due from any person to any former warden of said prison, or to the people of the state, on account of said penitentiary. ['90-91, p. 21, § 17.]

Hist. '90-91, p. 21, § 17, reen. '99, p. 13, § 17, reen. R. C. § 8476, reen. C. L. ib.

§ 9376. [8477] **Entry and certification of bills.** The warden must take bills of the quantity and prices of supplies furnished for the prison at the time they are delivered, and shall at once submit the same to the deputy warden, who shall compare the bills with the articles delivered and check off the same. If the bills are correct, the warden must certify by signing each bill, and the deputy warden must enter them, with date, in a book kept for that purpose. In like manner, bills shall be taken, certified and entered for all services rendered for the prison, including those of officers, guards and keepers. If any bills are found

incorrect, the deputy warden shall omit to enter them, and shall immediately give notice to the warden, that the error may be corrected. ['90-91, p. 21, § 20.]

Hist. '90-91, p. 21, § 20, reen. '99, p. 13, § 19, reen. R. C. § 8477, reen. C. L. ib.

§ 9377. [8478] **Daily journal of proceedings.** The warden or deputy warden shall keep a daily journal of all proceedings of the penitentiary, in which he shall note all infractions of the rules and regulations of the penitentiary by any officer or guard thereof, and also any infraction of the rules and regulations of the penitentiary by any prisoner, naming him and specifying the offense, and also what punishment (if any) was inflicted, which journal shall be laid before the board at every stated meeting, and at every special meeting when demanded. ['90-91, p. 21, § 12.]

Hist. '90-91, p. 21, § 12, reen. '99, p. 13, § 12, reen. R. C. § 8478, reen. C. L. ib.

§ 9378. [8479] **Monthly report of warden.** The warden shall, on the first Wednesday of each month, make a complete detailed report to the board of state prison commissioners, showing the whole number of prisoners confined in said prison on the first day of the preceding month, the number received during the month, the number whose terms expired during the month, the number pardoned during the month, the number escaped and still at large, the number escaped and recaptured, the number died (if any) during the month, and the number in prison on the last day of the month. He shall, also, at the same time, make a detailed statement of all receipts, showing the source from which the same were derived, and all expenditures, with the proper vouchers for each item, the same to be kept on file by the board and embraced in their annual report to the governor. All certificates certified to by the warden on account of the expenditures for care and custody of prisoners shall be certified by at least two members of said board before the auditor shall issue his warrant upon the treasury for the payment of the same. ['90-91, p. 21, § 46.]

Hist. '90-91, p. 21, § 46, reen. '99, p. 13, § 43, reen. R. C. § 8479, reen. C. L. ib.

§ 9379. [8480] **Annual account of warden.** The warden shall, annually, on the last day of November of each year, close his accounts, and on or before the 3d of December next thereafter render to the state auditor a full and true account of all moneys received by him and of all moneys expended by him on account of the prison, with sufficient vouchers therefor, which account shall be duly verified by the warden. ['90-91, p. 21, § 21.]

Hist. '90-91, p. 21, § 21, reen. '99, p. 13, § 20, reen. R. C. § 8480, reen. C. L. ib.

§ 9380. [8481] **Annual report of warden.** He shall, annually, on or before the 3d day of December in each year, make and deliver to the board of state prison commissioners a report exhibiting a complete and detailed statement of the transactions of the penitentiary during the year preceding, and stating the number of convicts confined therein, and all other matters relating to the same and to the management thereof. ['90-91, p. 21, § 22.]

Hist. '90-91, p. 21, § 22, reen. '99, p. 13, § 21, reen. R. C. § 8481, reen. C. L. ib.

§ 9381. [8482] **Performance of duties by deputy warden.** Whenever there is a vacancy in the office of warden, or the warden is temporar-

ily absent, all the duties of the warden shall devolve upon and be performed by the deputy warden until the vacancy is filled or the warden returns, but in no case shall the warden and deputy warden be absent at the same time. ['90-91, p. 21, § 42.]

Hist. '90-91, p. 21, 42, reen. '99, p. 13, § 39, reen. R. C. § 8482, reen. C. L. ib.

§ 9382. [8483] **. Duties of physician.** It shall be the duty of the physician to attend at all times to the wants of sick convicts, and to prescribe medicine and diet for them. When any convict shall claim to be unable to labor by reason of sickness, the warden shall refer the case at once to the physician, and shall be guided by his opinion. He shall examine the cells of the convicts and all the sanitary arrangements of the prison, and the food and clothing of the convicts once a week, and shall make a general report of the same at each quarterly meeting of the board of commissioners. He shall enter in the daily journal of the prison the names or numbers of all convicts placed under his care, stating the disease with which each is afflicted. He shall also record the death of any convict in said journal, stating name, age, time and cause thereof, and he shall embody a statement relative to these matters in his quarterly report to the board of commissioners. ['90-91, p. 21, § 25.]

Hist. '90-91, p. 21, § 25, reen. '99, p. 13, § 24, reen. R. C. § 8483, reen. C. L. ib.

Cross ref. Examination of convicts upon entrance: § 9217.

§ 9383. [8484] **Officers must not be interested in contracts.** No officer or employee of the penitentiary shall be interested directly or indirectly in contracts for furnishing such penitentiary with provisions, clothing or other articles to be used in any manner by the inmates, or for the use of the institution. Nor shall any or either of such officers be concerned, or interested in any manner, in contracts for buildings of any kind connected with the penitentiary, or for materials to be used in any such buildings, or in any contract for the labor of any convict. Nor shall any officer or employee be permitted to receive in any way perquisites for themselves or families, or any compensation or reward from any contractor or employee or other person. Should any officer or employee violate, or wilfully or negligently fail to observe, the provisions and prohibitions of this section he shall be at once dismissed from office by the board of commissioners; and further, upon conviction of such violation by a court of competent jurisdiction, he shall be fined a sum not exceeding $1000 and not less than one month's pay, and shall forfeit his interest in any and all contracts or rewards which he may have received, or agreed to receive, in violation of the provisions of this section. ['90-91, p. 21, § 18.]

Hist. '90-91, p. 21, § 18, reen. '99, p. 13, § 18, reen. R. C. § 8484, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11199.

§ 9384. [8485] **Officers exempt from military and jury duty.** The warden, the deputy warden, the physician, the assistant keepers and guards shall be exempt from military and jury duties while actually employed by the state as such officers. ['90-91, p. 21, § 41.]

Hist. '90-91, p. 21, § 41, reen. '99, p. 13, § 38, reen. R. C. § 8485, reen. C. L. ib.

§ 9385. [8486] **Records are public property.** All books, accounts, documents, registers and reports shall be deemed public property, and the warden shall preserve at least one copy of each. ['90-91, p. 21, § 43]

Hist. '90-91, p. 21, § 43, reen. '99, p. 13, § 40, reen. R. C. § 8486, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr P. § 11198.

ARTICLE 4.

RECEPTION, TREATMENT AND DISCHARGE OF CONVICTS.

Cross ref. Civil and property rights of convicts: §§ 8602-15.

§ 9386. [8487] **County jail may be deemed state prison.** Where a sentence of imprisonment in the state prison does not exceed one year the jail of the county where the prisoner is tried, or of an adjoining county, may be deemed the state prison, and such prisoner may be sentenced to imprisonment therein: *Provided,* The sheriff of the county in which such jail is situated, files with the clerk of the court before which such prisoner is tried, an offer to keep such prisoner at the same rates paid by the state at the general state prison; and in such case such sheriff is the lawful keeper of such prisoners, and for a breach of such duty is liable in all respects as for the safe keeping of prisoners sentenced to imprisonment in the county jail, and his accounts for keeping such prisoners must be audited and paid in the same manner, and at the same rates as the accounts for keeping prisoners at the prison mentioned in the first section of this chapter. [R. S. § 8503.]

Hist. '77, p. 18, §§ 1, 2, R. S. § 8503, reen. R. C. § 8487, reen. C. L. ib.

§ 9387. [8488] **Conveyance of convict to penitentiary.** When any person is convicted in any court of this state, and sentenced to imprisonment in the state prison, or to suffer the death penalty, the sheriff of the county in which such conviction shall have been had shall immediately, upon passing of sentence, notify the warden of the state prison that persons are in his custody waiting transportation to the state prison. Such notice shall be sent by telegram or telephone if possible, directly from the place of conviction, but if there be no telegraphic communication between the place of conviction and Boise City, then such notice shall be sent by letter to the nearest telegraph or telephone station having communication with said city, and transmitted from such station by telegraph or telephone to said warden. Immediately upon receipt of such notice the warden of the state prison shall forthwith dispatch one or more guards, as may be necessary, from said prison to the place where such convicted person is detained, to secure and convey said convicted person to the state prison. Such guards shall have authority to demand and receive the convicted person, and the certified copy of judgment from the sheriff, and immediately upon the delivery of such convicted person to him, the said guard shall convey such convicted person to the state prison and deliver him into the custody of the warden thereof: *Provided,* That the judge of the court in which any person is convicted may, by order duly made, direct the sheriff of the county in which a term of court is being held, to withhold the notice herein provided, until the last day of the then current term of said court, if such judge has reason to believe that more than one person will be convicted at said term: *Provided, further,* That nothing in this section contained shall be so construed as to apply to persons ordered into confinement in a county jail, as provided in the preceding section. ['99, p. 340, § 1.]

Hist. R. S. § 8488; am. '99, p. 340, § 1, reen. R. C. § 8488, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11213.

§ 9388. [8489] **Certified copy of sentence.** When any convict is delivered to the warden the officer having such prisoner in charge shall deliver to the warden a certified copy of the sentence received by such officer from the clerk of the court where such convict was tried, and shall take from the warden a certificate of the delivery of such convict, and

such certified copy of the sentence shall be evidence of the fact therein contained. ['90-91, p. 21, § 34.]

Hist. '90-91, p. 21, § 34, reen. '99, p. 13, § 33, reen. R. C. § 8489, reen. C. L. ib.

§ 9389. [8490] **Care of federal prisoners.** The warden shall receive, safely keep, and subject to the discipline of the penitentiary, any criminal convicted of any crime against the United States, and sentenced to confinement therein by any court of the United States sitting within this state, until such sentence is executed, or until such convict is discharged by due course of law; the United States supporting such convict and paying the expenses of executing such sentence. ['90-91, p. 21, § 27.]

Hist. '90-91, p. 21, § 27, reen. '99, p. 13, § 26, reen. R. C. § 8490, reen. C. L. ib.

Cited: Re Mallon (1909) 16 I. 737, 102 P. 374, 22 L. R. A. (N. S.) 1123.

§ 9390. [8491] **Care of convicts' property.** He shall take charge of any property that convicts may have at the time of entering the penitentiary, and if the same is of the value of $5 or more, may sell the same, with the consent of the convict, and place the proceeds at interest for the benefit of such convict or his representatives when he may leave the penitentiary, keeping a correct account of such property and the proceeds thereof. ['90-91, p. 21, § 28.]

Hist. '90-91, p. 21, § 28, reen. '99, p. 13, § 27, reen. R. C. § 8491, reen. C. L. ib.

§ 9391. [8492] **Rules of government and discipline.** It shall be the duty of the state prison commissioners, in connection with the warden, to make and adopt such general rules and regulations for the government and discipline of the prison as they may consider expedient, and from time to time to change and amend the same as circumstances may require. In making such rules and regulations they shall, as far as practicable and consistent with the discipline of the prison, adopt such as shall in their judgment best conduce to the reformation of convicts. A printed copy of the rules and regulations shall be furnished to every officer and guard at the time he is appointed, and so much thereof as relates to the duties and obligations of the convicts shall be hung up in a conspicuous place in each cell and shop. ['90-91, p. 21, § 11.]

Hist. '90-91, p. 21, § 11, reen. '99, p. 13, § 11, reen. R. C. § 8492, reen. C. L. ib.

Cross ref. Board of pardons may establish grades of prisoners and system of marks: § 9214. Prison board may establish rules and regulations for education of prisoners: § 9217.

§ 9392. Labor of convicts. The board shall have authority to use the labor of convicts in the erection of a wall around the penitentiary buildings and grounds, and in the construction of irrigating and water ditches for the purpose of bringing water upon said penitentiary grounds as in the opinion of said board may be necessary for the proper cultivation of said grounds, and in making such other improvements and repairs to said buildings and grounds as they may deem proper and necessary, and in the performance of any labor in and about or in connection with the said penitentiary grounds, or lands or works necessary for the improvement thereof, and on all public works done under the direct control of the state. ['11, c. 216, § 2, p. 695.]

Hist. '90-91, p. 21, § 7, reen. '99, p. 13, § 7; am. '99, p. 433, § 1, reen. R. C. § 8493; am. '11, c. 216, § 2, p. 695, reen. C. L. § 8493.

Cross ref. Labor of convicts to be done within the penitentiary grounds or on public works under the control of the state: Const. XIII, 3. Contracts for employment of convicts: § 9356; on state highways: §§ 1572, 1573.

Comp. leg.—N. D. See Cr. P. § 11270.

§ 9393. [8494] **Separate cells for convicts.** When there are cells sufficient, each prisoner shall be confined in a separate cell. ['90-91, p. 21, § 30.]

Hist. '90-91, p. 21, § 30, reen. '99, p. 13, § 29, reen. R. C. § 8494, reen. C. L. ib.

§ 9394. [8495] **Clothing and bedding.** The clothing and bedding of the convicts shall be of coarse material, and they shall be supplied with a sufficient quantity of substantial, wholesome food. ['90-91, p. 21, § 31]

Hist. '90-91, p. 21, § 31, reen. '99, p. 13, § 30, reen. R. C. § 8495, reen. C. L. ib.

§ 9395. [8496] **Written communications with convicts prohibited.** No person shall, without the consent of the warden, bring into or carry out any writing or any information to or from any convict. ['90-91, p. 21, § 32.]

Hist. '90-91, p. 21, § 32, reen. '99, p. 13, § 31, reen. R. C. § 8496, reen. C. L. ib.

§ 9396. [8498] **Certain visitors permitted.** The following persons shall be allowed to visit the penitentiary during the regular hours prescribed by the warden for the admission of visitors: State officers, members of the legislature, and regularly ordained ministers of the gospel for the purpose of holding religious services and ministering to the spiritual wants of the prisoners, but no other person shall go within the walls of the penitentiary without the special permission of the warden or board. ['90-91, p. 21, § 33.]

Hist. '90-91, p. 21, § 33, reen. '99, p. 13, § 32, reen. R. C. § 8498, reen. C. L. ib.

§ 9397. [8499] **Pestilence among convicts.** In case any pestilence or contagious disease breaks out among the convicts in the penitentiary, the board and warden may cause such convicts to be removed to some secure and suitable place where such sick shall receive all necessary care and medical attendance. ['90-91, p. 21, § 26.]

Hist. '90-91, p. 21, § 26, reen. '99, p. 13, § 25, reen. R. C. § 8499, reen. C. L. ib.

§ 9398. [8500] **Escape of convicts: Reward.** When any convict escapes from the penitentiary the warden shall use all proper means for the apprehension of such convict. For this purpose the board of state prison commissioners may offer a reward not to exceed $500. ['90-91, p. 21, § 35.]

Hist. '90-91, p. 21, § 35, reen. '99, p. 13, § 34, reen. R. C. § 8500, reen. C. L. ib.

§ 9399. [8501] **Same: Approval of claims.** All rewards and other sums of money to be paid for advertising any convict shall be approved by the board of examiners, and upon such approval the auditor shall draw his warrant on the state treasurer. ['90-91, p. 21, § 36.]

Hist. '90-91, p. 21, § 36, reen. '99, p. 13, § 35, reen. R. C. § 8501, reen. C. L. ib.

§ 9400. [8502] **Resistance of officer: Punishment.** If any convict resist the authority of any officer, keeper or guard of the penitentiary, or refuse to obey any lawful command, then such convict shall be at once taken to his cell, and his case reported without delay to the warden, who may authorize such punishment under the prison rules as will in his opinion fit the case. If any convict threaten personal injury to any officer, keeper or guard, or make such demonstration as may reasonably lead the officer, keeper or guard to believe his life or the life of any convict in danger, or if any prisoner acts in a manner which may lead the

officer, keeper or guard to believe he is attempting to escape, then such officer, keeper or guard may proceed forthwith to use any weapon he may have to enforce obedience, and if in so doing any convict shall be necessarily wounded or killed, the officer or assistants are justified and shall be held guiltless: *Provided,* That no punishment shall ever be inflicted except solitary confinement on bread and water, or by wearing ball and chain attached to one leg. ['90-91, p. 21, § 24.]

Hist. '90-91, p. 21, § 24, reen. '99, p. 13, § 23, reen. R. C. § 8502, reen. C. L. ib.

§ **9401.** [8503] **Record of infractions of rules.** The warden shall cause to be kept a record of each and all infractions of the rules by convicts and discipline therefor, with the name of the convict offending and the date and character of each offense, which record shall be placed before the board of state prison commissioners at each regular meeting of the board. ['90-91, p. 21, § 44.]

Hist. '90-91, p. 21, 44, reen. '99, p. 13, § 41, reen. R. C. § 8503, reen. C. L. ib.

§ **9402.** [8504] **Commutation of sentence.** Every convict imprisoned in the state prison who has no infraction of the rules and regulations of the penitentiary recorded against him, and who performs the duties assigned to him in an orderly and peaceful manner, must be allowed, as a commutation of his sentence, a deduction of one month for the first year, two months for the second year, three months for the third year, four months for the fourth year, five months for the fifth year, and six months in each of the remaining years of said term. But if any convict escapes, or attempts to escape, from any prison, or commits an assault upon his keeper or any foreman, officer or convict, or otherwise endangers life, he forfeits any and all deductions from the time of his sentence to which he may have been entitled before the commission of such offense. ['90-91, p. 21, § 47.]

Hist. '90-91, p. 21, § 47, reen. '99, p. 13, § 44, reen. R. C. § 8504, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11215.

Cross ref. Parole of convicts: § 9209 et seq.

§ **9403.** [8505] **Same: Commutation of separate sentences.** For the purpose of commutation, whenever any convict has been committed under several convictions with separate sentences, they must be construed as one continuous sentence. [R. S. § 8507.]

Hist. '85, p. 151, § 3, R. S. § 8507, reen. R. C. § 8505, reen. C. L. ib.

§ **9404.** [8506] **Loss of time earned for misconduct.** Whenever a charge of misconduct shall be sustained by the warden and the board of prison commissioners at their first meeting after said charge or charges shall have been recorded by the warden or his deputy against a prisoner, he shall lose the deduction of time specified in section 9402, but he may regain, by continuous good conduct thereafter, a deduction of time not exceeding 75 per centum of said time specified in section 9402, and as much less as the warden and the board may certify to, as a suitable reward for good conduct. ['90-91, p. 21, § 48.]

Hist. '90-91, p. 21, § 48, reen. '99, p. 13, § 45, reen. R. C. § 8506, reen. C. L. ib.

§ **9405.** [8507] **Warrant for discharge: Effect as pardon.** The governor shall, upon the expiration of the sentence of any convict as commuted in sections 9402 and 9404, immediately issue his warrant for the discharge of said convict. Said warrant shall in all cases restore the

prisoner to civil rights, the same as though a pardon had been issued. ['90-91, p. 21, § 49.]

Hist. '90-91, p. 21, § 49, reen. '99, p. 13, § 46, reen. R. C. § 8507, reen. C. L. ib.

Cross ref. Restoration of convict to citizenship by governor: § 9207.

§ 9406. [8508] **Aid of convict on discharge.** When any convict is discharged from the prison the warden shall furnish such convict with a decent suit of clothing (if he is not already provided for) at the expense of the state, and shall pay such convict, from any funds belonging to the penitentiary, a sum not exceeding $10 and shall deliver to said convict any property received from him which has not been disposed of according to law. ['90-91, p. 21, § 29.]

Hist. '90-91, p. 21, § 29, reen. '99, p. 13, § 28, reen. R. C. § 8508, reen. C. L. ib.

Comp. leg.—N. D. Analogous: C. Cr. P. § 11226.

ARTICLE 5.

THE PRISON LIBRARY.

§ 9407. [8510] **Continuing appropriation for library.** The sum of $75 per annum is appropriated out of any moneys in the state treasury not otherwise appropriated, to the warden of the state prison of the state of Idaho, to purchase suitable books for a library for the use of the prisoners in said prison. [R. S. § 8510.]

Hist. R. S. § 8510, reen. R. C. ib., reen. C. L. ib.

§ 9408. [8511] **Report of warden.** The warden shall report to the governor 30 days before the meeting of the legislature the number and kind of books purchased each year, and the prices paid therefor, the condition of the library, and the effect upon the conduct, mental improvement and morals of the prisoners by reason of the establishment of such library. [R. S. § 8511.]

Hist. R. S. § 8511, reen. R. C. ib., reen. C. L. ib.

§ 9409. [8512] **Warrants for support of library.** The auditor is authorized to draw his warrant on the treasurer for the sum of $75 each year in favor of the warden of the prison, and the treasurer is required to pay the same out of any funds not otherwise appropriated. [R. S. § 8512.]

Hist. R. S. § 8512, reen. R. C. ib., reen. C. L. ib.

ARTICLE 6.

CARE OF FEMALE CONVICTS.

§ 9410. [8515] **Prison commissioners to make contract.** The board of state prison commissioners shall enter into a contract with the authorities of some state of the United States having a state prison, state penitentiary, woman's reformatory or prison, or other penal institution, provided with a woman's ward, or division or department for the confinement and detention of female convicts, for the reception and detention, care, maintenance and employment of all females convicted of felony in any of the courts of Idaho and sentenced to a term of imprisonment therefor. [R. C. § 8515.]

Hist. '05, p. 33, § 1; am. R. C. § 8515, reen. C. L. ib.

§ 9411. [8516] **Conveyance to prison.** From and after the making of said contract and until provision shall have been made at the penitentiary of this state for a separate department or ward for female prisoners, all females convicted of felony in any of the courts of this state and sentenced to a term of imprisonment in the state prison, including those that may,

at the date of entering into said contract, be confined therein, shall be conveyed, as is now provided by law, by the warden of the penitentiary, or his assistants, to the institution named in such contract, and delivered to the authorities of said institution, there to be confined until their respective sentences shall have expired, or until they shall be otherwise discharged by law. ['05, p. 33, § 2.]

Hist. '05, p. 33,§ 2, reen. R. C. § 8516, reen. C. L. ib.

§ 9412. [8517] **Attendance at courts.** Should the presence of any such prisoner be required in any judicial proceeding in this state, the warden of the state penitentiary shall, upon being so directed by the board of state prison commissioners, or upon the order or direction, in writing, of any court of competent jurisdiction, or of a judge thereof, procure such prisoner and bring her to the place directed in such order, and hold her in custody subject to the further order and direction of the board, or of the court or of a judge thereof, until she shall be lawfully discharged from custody; or said warden may, by direction of the board or of said court, or a judge thereof, deliver such prisoner into the custody of the sheriff of the county where such conviction was had, or may, by like order, return such prisoner to the institution from which she was taken. ['05, p. 33, § 3.]

Hist. '05, p. 33, § 3, reen. R. S. § 8517, reen. C. L. ib.

§ 9413. [8518] **Expiration of contract.** Upon the expiration of any contract entered into under the authority of this title, all prisoners of this state confined in such institution shall be returned by the warden to the penitentiary of this state, or delivered to such other institution as said board of state prison commissioners shall have contracted with under the authority given by this title. The board shall make provision for the return to this state of such prisoners as shall desire to return, upon the expiration of their terms of imprisonment. The warden shall be allowed and paid all his necessary expenses and disbursements incurred while performing any duty enjoined upon him by this title, to be audited and allowed by the state board of examiners, and paid out of the penitentiary fund. ['05, p. 33, § 4.]

Hist. '05, p. 33, § 4, reen. R. C. § 8518, reen. C. L. ib.

§ 9414. [8519] **Cost of maintenance.** The cost of maintenance of such prisoners shall be payable out of the fund for the maintenance of the state penitentiary. ['05, p. 33, § 5.]

Hist. '05, p. 33, § 5, reen. R. C. § 8519, reen. C. L. ib.

CHAPTER 337.

COUNTY JAILS.

§ 9415. [8525] **By whom kept and for what use.** The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases.
2. For the detention of persons charged with crime and committed for trial.
3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law.

4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime. [R. S. § 8525.]

Hist. (See '64, p. 475, § 17) R. S. § 8525, reen. R. C. ib., reen. C. L. ib.

N. D. Similar: C. Cr. P. § 11321. See also: C. Cr. P. § 11308.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1597; Kerr's C. ib.

§ 9416. [8526] **Separate rooms required.** Each county jail must contain a sufficient number of rooms to allow all persons belonging to either one of the following classes to be confined separately and distinctly from persons belonging to either of the other classes:

1. Persons committed on criminal process and detained for trial.
2. Persons already convicted of crime and held under sentence.
3. Persons detained as witnesses or held under civil process, or under an order imposing punishment for contempt.
4. Males separately from females. [R. S. § 8526.]

Hist. (See '64, p. 475, §§ 19, 20) R. S. § 8526, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1598; Kerr's C. ib.

§ 9417. [8527] **Prisoners to be kept separate.** Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room. [R. S. § 8527.]

Hist. '64, p. 475, § 20, R. S. § 8527, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1599; Kerr's C. ib.

§ 9418. [8528] **Prisoners must be actually confined.** A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the jail until he is legally discharged; and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape. [R. S. § 8528.]

Hist. '64, p. 475, § 32, R. S. § 8528, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1600; Kerr's C. ib.

Cross ref. Penalty for permitting escape: § 8151.

§ 9419. [8529] **Reception of federal prisoners.** The sheriff must receive and keep in the county jail any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this state; provision being made by the United States for the support of such prisoner. [R. S. § 8529.]

Hist. '64, p. 475, § 31, R. S. § 8529, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11346.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1601; Kerr's C. ib.

§ 9420. [8530] **Same: Sheriff answerable for such prisoners.** A sheriff to whose custody a prisoner is committed, as provided in the last section, is answerable for his safe-keeping in the courts of the United States, according to the laws thereof. [R. S. § 8530.]

Hist. '64, p. 475, § 42, R. S. § 8530, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1602; Kerr's C. ib.

§ 9421. [8531] **Use of jail of contiguous county.** When there is no jail in the county, or when the jail becomes unfit or unsafe for the confinement of prisoners, the probate judge may, by a written appointment filed with the county recorder, designate the jail of a contiguous county for the confinement of the prisoners of his county, or of any of them, and may at any time modify or annul the appointment. [R. S. § 8531.]

Hist. '64, p. 475, § 21, R. S. § 8531, reen. R. C. ib., reen. C. L. ib.

N. D. Analogous: C. Cr. P. § 11322.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1603; similar as amended: Kerr's C. ib.

§ **9422.** [8532] **Same: Prisoner must be received.** A copy of the appointment, certified by the county recorder, must be served on the sheriff or keeper of the jail designated, who must receive into his jail all prisoners authorized to be confined therein, pursuant to the last section, and who is responsible for the safe keeping of the persons so committed, in the same manner and to the same extent as if he was sheriff of the county for whose use his jail is designated, and with respect to the persons so committed he is deemed the sheriff of the county from which they were removed. [R. S. § 8532.]

Hist. '64, p. 475, § 22, R. S. § 8532, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "clerk" for "recorder": Pen. C. 1872, § 1604; Kerr's C. ib.

§ **9423.** [8533] **Same: Revocation of order.** When a jail is erected in the county for the use of which the designation was made, or its jail is rendered fit and safe for the confinement of prisoners, the probate judge of that county must, by a written revocation, filed with the county recorder thereof, declare that the necessity for the designation has ceased, and that it is revoked. [R. S. § 8533.]

Hist. '64, p. 475, § 23, R. S. § 8533, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" for "probate," and "clerk" for "recorder": Pen. C. 1872, § 1605; similar as amended: Kerr's C. ib.

§ **9424.** [8534] **Same: Return of prisoners.** The county recorder must immediately serve a copy of the revocation upon the sheriff of the county, who must thereupon remove the prisoners to the jail of the county from which the removal was had. [R. S. § 8534.]

Hist. (See '64, p. 475, § 24) R. S. § 8534, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "clerk" for "recorder": Pen. C. 1872, § 1606; Kerr's C. ib.

§ **9425.** [8535] **Removal of prisoners in case of fire.** When a county jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff or jailer must remove them to a safe and convenient place, and there confine them as long as may be necessary to avoid the danger. [R. S. § 8535.]

Hist. '64, p. 475, § 25, R. S. § 8535, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1607; Kerr's C. ib.

§ **9426.** [8536] **Same: In case of pestilence.** When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, the probate judge may, by a written appointment, designate a safe and convenient place in the county, or the jail in a contiguous county, as the place of their confinement. The appointment must be filed in the office of the county recorder and authorize the sheriff to remove the prisoners to the place or jail designated, and there confine them until they can be safely returned to the jail from which they were taken. [R. S. § 8536.]

Hist. '64, p. 475, § 26, R. S. § 8536, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same except "county" for "probate" judge, and "clerk" for "recorder": Pen. C. 1872, § 1608; Kerr's C. ib.

§ **9427.** [8537] **Service of papers on sheriff for prisoner.** A sheriff or jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner with a note thereon of the time of its service. For a neglect to do

so he is liable to the prisoner for all damages occasioned thereby. [R. S. § 8537.]

Hist. '64, p. 475, § 28, R. S. § 8537, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1609; Kerr's C. ib.

§ 9428. [8538] **Employment of guard.** The sheriff, when necessary, may, with the assent in writing of the probate judge, or in a city, of the mayor thereof, employ a temporary guard for the protection of the county jail, or for the safe keeping of the prisoners, the expenses of which are a county charge. [R. S. § 8538.]

Hist. '64, p. 475, § 29, R. S. § 8538, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1610; Kerr's C. ib.

Construed: This section has reference to temporary and emergency cases where it is necessary to employ such assistants or guards for the immediate protection of the jail or the safekeeping of the prisoners therein, such as where assaults are made upon the county jail or efforts are made to release prisoners therefrom, or a riot or outbreak occurs in the jail, or in case of fire or an epidemic; it has no application to cases where it is necessary for the sheriff to employ assistants to aid in the execution of the processes of law. Lansdon v. Washington Co. (1909) 16 I. 618, 102 P. 344.

§ 9429. [8539] **Reception and board of prisoners.** The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation to be determined by the board of commissioners, and, except as provided in the next section, to be paid out of the county treasury. [R. S. § 8539.]

Hist. '64, p. 475, § 30, R. S. § 8539, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1611; Kerr's C. ib.

N. D. See C. Cr. P. § 11314.

Cited: Mombert v. Bannock Co. (1904) 9 I. 470, 75 P. 239.

§ 9430. [8540] **Security for board of civil prisoners.** Whenever a person is committed upon process in a civil action or proceeding, except when the people of this state are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or orders of court. [R. S. § 8540.]

Hist. '64, p. 475, § 31, R. S. § 8540, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1612; Kerr's C. ib.

N. D. See C. Cr. P. § 11331.

§ 9431. Labor of prisoners on public works. Persons confined in the county jail under a judgment of conviction rendered in any criminal case, either under a judgment of imprisonment or a judgment for the payment of a fine and costs, may be required by an order of the board of county commissioners to perform labor on the public works or ways in the county. ['15, c. 141, § 1, p. 299.]

Hist. (See '69, p. 90, § 1) R. S. § 8541, reen. R. C. ib.; am. '15, c. 141, § 1, p. 299, reen. C. L. § 8541.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1613; Kerr's C. ib.

§ 9432. [8542] **Same: Rules and regulations.** The board of commissioners making such order may prescribe and enforce the rules and regulations under which such labor is to be performed. [R. S. § 8542.]

Hist. R. S. § 8542, reen. R. C. ib., reen. C. L. ib.

Comp. leg.—Cal. Same: Pen. C. 1872, § 1614; additional provisions as amended: Kerr's C. ib.

§ 9433. [8542b] **Same: Commissioners to prescribe regulations.** The county commissioners of each county are hereby empowered, and it is their duty, to make orders and prescribe proper rules and regulations, consistent with economy and the safe guarding of such prisoners, for the employment of all prisoners referred to in the preceding section. ['95, p. 100, § 2.]

Hist. '95, p. 100, § 2, reen. '99, p. 253, § 2, reen. R. C. § 8542b, reen. C. L. ib.

§ 9434. [8542c] **Sheriff must observe regulations.** The sheriff of each county is hereby required, and it is his duty, to faithfully observe and carry out all the orders, rules and regulations of the county commissioners of his county, made or given for the employment of prisoners in his charge as herein provided. ['95, p. 100, § 3.]

Hist. '95, p. 100, § 3, reen. '99, p. 253, § 3, reen. R. C. § 8542c, reen. C. L. ib.

§ 9435. No prisoner exempt from labor. No prisoner liable to employment as provided in this chapter shall be exempt therefrom except by reason of physical disability. [C. L. § 8542d.]

Hist. '95, p. 100, § 4, reen. '99, p. 253, § 4, reen. R. C. § 8542d; modified by '15, c. 141, p. 298; compiled and reen. C. L. § 8542d.

§ 9436. Commutation for good behavior. Every person serving a jail sentence in a county jail in the state of Idaho who has a good record as a prisoner and who performs the tasks asigned him in an orderly and peaceable manner, shall upon the recommendation of the sheriff and prosecuting attorney be allowed five days off of each and every month of his sentence, by the probate judge. ['15, c. 130, p. 287.]

Hist. '15, c. 130, p. 287, reen. C. L. § 8542e.

§ 9437. [8543] **Inspection of jail by commissioners.** The county commissioners must inspect the county jail, and once every three months inquire into the state thereof as respects the security thereof, treatment and condition of the prisoners, and take all necessary precaution against escape, sickness or infection. [R. S. § 8543.]

Hist. (See '64, p. 596, § 2) R. S. § 8543, reen. R. C. ib., reen. C. L. ib. **Comp. leg.—N. D.** See C. Cr. P. § 11327.

§ 9438. [8544] **Jailer to return list of prisoners.** Every jailer, five days prior to the opening of each term of the district court in his county, must return to the clerk of the board of commissioners of his county a certified list of all the prisoners then in his custody, with the time and causes of their confinement, and the length of the term for which they were committed, and he must also return to said clerk, within five days after the close of said court, the name, and cause and term of commitment, of every prisoner committed during said term of court; and any jailer who neglects to make such return, for every such neglect must pay a fine not exceeding $50 nor less than $20, to be imposed at the next succeeding term of said court, on information of said commissioners of such neglect. [R. S. § 8544.]

Hist. (See '64, p. 596, § 6) R. S. § 8544, reen. R. C. ib., reen. C. L. ib.

§ 9439. [8545] **Imprisonment for fine.** Whenever any prisoner, under conviction for any criminal offense, is confined in any jail for nonpayment of any fine, the district court, upon satisfactory evidence of such inability, may, in lieu thereof, confine such person in the county jail at the rate of $2 per day until the fine imposed is satisfied. [R. S. § 8545.]

Hist. (See '64, p. 596, § 8) R. S. § 8545, reen. R. C. ib., reen. C. L. ib. **Cross ref.** Judgment of imprisonment for failure to pay fine: § 9038.

§ 9440. [8546] **Governor may order removal of prisoners.** Whenever, from any sufficient cause, the sheriff considers it expedient that a prisoner be removed from the jail of his county, on application in writing to the governor of the state, by the sheriff and commissioners of such county, the governor may order such prisoner to be removed to some other jail within the state, there to be detained in the same manner and by the same process as in the jail from whence he was removed, until remanded back, by a similar process, or discharged according to law. [R. S. § 8546.]

Hist. '64, p. 596, § 9, R. S. § 8546, reen. R. C. ib., reen. C. L. ib.

§ 9441. [8547] **Same: Expenses of removal.** All the expense of removing and maintaining prisoners incurred under the preceding section must be defrayed by the county from which they were so removed. [R. S. § 8547.]

Hist. '64, p. 596, § 10, R. S. § 8547, reen. R. C. ib., reen. C. L. ib.

PART V. GENERAL CODE PROVISIONS.

TITLE LXIII.

Hist. The first section of this title in Compiled Laws declared an emergency in the enactment of that code; it has been omitted as temporary. The enactment of Compiled Laws was approved Jan. 25, 1919.

Part V of Compiled Laws, entitled as above, "General Code Provisions," is not applicable to Compiled Statutes as a code, since no formal enactment of Compiled Statutes as such has been made. It is inserted in this compilation as referring only to Compiled Laws, but an additional section (§ 9459) has been added to embrace the local and special laws enacted at the 1919 session.

CHAPTER 338.

CONSTRUCTION OF STATUTES.

§ 9443. [3] **Codes not retroactive.** No part of these compiled laws is retroactive, unless expressly so declared. [R. S. § 3.]

Hist. C. C. P. '81, § 2, R. S. § 3, reen. R. C. ib., reen. C. L. 500:3.

Comp. leg.—Cal. Same: Pol. C. 1872, § 3; Kerr's C. ib.

Intention: If the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared within the meaning of this section. The express words "this statute is to be deemed retroactive" are not necessary. Peavy v. McCombs (1914) 26 I. 143, 140 P. 965.

When validity dependent on nonretroactive effect: The general rule that all statutes are to be so construed, if possible, as to be valid, requires that the statute shall never be given a retrospective operation, when to do so would render it unconstitutional, and the words of the statute admit of any other construction. Lawrence v. Defenbach (1912) 23 I. 78, 128 P. 81.

§ 9444. [4] **Codes liberally construed.** The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice. [R. S. § 4.]

Hist. C. C. P. '81, § 3, R. S. § 4, reen. R. C. ib., reen. C. L. 500:4. The second sentence was also embodied in the mechanics' lien law, '93, p. 49, c. 5, § 2, reen. '99, p. 147, c. 5, § 2, reen. R. C. § 5150; reen. C. L. 500:4.

Comp. leg.—Cal. Same: Pol. C. 1872, § 4; Kerr's C. ib.

Cited: S. v. Inhabitants of Pocatello (1891) 3 I. 174, 28 P. 411; Glidden v. Whittier et al. (1891) 46 F. Rep. 437; McDonald v. Burke (1892) 3 I. 266, 35 Am. St. Rep. 276, 28 P. 440; Wright v. Westheimer (1891) 3 I. 232, 28 P. 430; Blackfoot Stock Co. v. Delamue (1892) 3 I. 291, 29 P. 97; Kelly v. Leachman (1893) 3 I. 672, 34 P. 813; S. v. Reed (1894) 3 I. 754, 35 P. 706; Simmons Hdw. Co. v. Alturas Com. Co. (1895) 4 I. 334, 39 P. 550; Shaw v. Manville (1895) 4 I. 369, 39 P. 559; Guynn v. McDaneld (1895) 4 I. 605, 43 P. 74; Re Dowling (1896) 4 I. 715, 43 P. 871; Wheeler v. Com. Bk. of Moscow (1896) 5 I. 15, 46 P. 830; Vollmer v. Spencer (1897) 5 I. 557, 51 P. 609; Barnes v. Buffalo Pitts Co. (1899) 6 I. 519, 57 P. 267; Salisbury v. Lane (1900) 7 I. 370, 63 P. 383; S. v. Watkins (1900) 7 I. 35, 59 P. 1106; First Nat. Bk. of Pocatello v. Bunting & Co. (1900) 7 I. 387, 63 P. 694; Phillips v. Salmon River Min. Co. (1903) 9 I. 149, 72 P. 886; Mellen v. McMannis (1904) 9 I. 418, 75 P. 98; Knutsen v. Phillips (1909) 16 I. 267, 101 P. 596; Coast L. Co. v. Wood (1910) 18 I. 28, 108 P. 336; Smith v. Field (1911) 19 I. 558, 114 P. 668, Ann. Cas. 1912C 354; Parsons v. Wrble (1912) 21 I. 695, 702, 123 P. 638; (In brief of counsel) S. v. Am. Surety Co. (1914) 26 I. 652; (In dis. op.) S. v. Dunlap (1916) 28 I. 784, 808, 156 P. 1141; S. v. Altwater (1916) 29 I. 107, 110, 157 P. 256; Donaldson v. Thousand Springs P. Co. (1917) 29 I. 754, 162 P. 334.

(In relation to mechanics' lien law, R. C. § 5150) Mine etc. Co. v. Idaho Con. Mines Co. (1911) 20 I. 300, 309, 118 P. 301; Hill v. Twin Falls etc. Co. (1912) 22 I. 274, 125 P. 204; Smith v. Faris-Kesl C. Co. (1915) 27 I. 407, 150 P. 25.

Statutes in derogation of common law: This section changes the rule that statutes in derogation of common law must be strictly construed. Darby v. Heargerty (1887) 2 I. 282, 13 P. 85; McQueen v. Moscow (1915) 28 I. 146, 152 P. 799.

§ 9445. [5] **Codes continue existing law.** The provisions of these compiled laws, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments. [R. S. § 5.]

Hist. C. C. P. '81, § 4, R. S. § 5, reen. R. C. ib., reen. C. L. 500:5.

Comp. leg.—Cal. Same: Pol. C. 1872, § 5; Kerr's C. ib.

Amendments in revisions: Changes made by revision of statute, as distinguished from legislative enactment, will not be regarded as altering the law, unless it is clear such was intention, and if statute as revised is ambiguous, reference may be had to prior statutes. Libby v. Pelham (1907) 30 I. 614, 166 P. 575.

§ 9446. [6] **Tenure of offices preserved.** All persons who at the time these compiled laws take effect hold office under any of the acts repealed, continue to hold the same according to the tenure thereof, except those offices which are not continued by these compiled laws. [R. S. § 6.]

Hist. R. S. § 6, reen. R. C. ib., reen. C. L. 500:6.

Comp. leg.—Cal. This same provision is found in the Pol. Code of 1872, § 6, but was later amended by adding the words "and excepting offices filled by appointment": Kerr's C. § 6.

§ 9447. [7] **Certain offices to cease.** When any office is abolished by the repeal of any act, and such act is not in substance reenacted or continued in the compiled laws, such office ceases at the time the compiled laws take effect. [R. S. § 7.]

Hist. R. S. § 7, reen. R. C. ib., reen. C. L. 500:7.

Comp. leg.—Cal. Same: Pol. C. 1872, § 7; Kerr's C. ib.

§ 9448. [8] **Accrued rights and pending actions not affected.** No action or proceeding commenced before the compiled laws take effect, and no right accrued, is affected by their provisions, but the proceedings therein must conform to the requirements of the compiled laws as far as applicable. [R. S. § 8.]

Hist. C. C. P. '81, § 5, R. S. § 8, reen. R. C. ib., reen. C. L. 500:8.

Comp. leg.—Cal. Same: Pol. C. 1872, § 8; Kerr's C. ib.

Cited: Sebree v. Smith (1888) 2 I. 357, 16 P. 477.

§ 9449. [9] **Limitations not tolled.** When a limitation or period of time prescribed in any existing statute for acquiring a right, or barring a remedy, or for any other purpose, has begun to run before these compiled laws go into effect, and the same or any limitation is prescribed in these compiled laws, the time which has already run shall be deemed part of the time herein prescribed as such limitation. [R. S. § 9.]

Hist. C. C. P. '81, § 6, R. S. § 9, reen. R. C. ib., reen. C. L. 500:9.

Comp. leg.—Cal. Somewhat similar: Pol. C. 1872, § 9; same as amended: Kerr's C. ib.

§ 9450. Holidays. Holidays, within the meaning of these compiled laws, are:

Every Sunday;
January 1 (New Year's);
February 22 (Washington's birthday);
May 30 (Decoration day);
June 15 (Idaho Pioneer day);
July 4 (Independence day);
First Monday in September (Labor day);
October 12 (Columbus day);
December 25 (Christmas)

Every day on which an election is held throughout the state; and

Every day appointed by the president of the United States, or by the governor of this state, for a public fast, thanksgiving or holiday. [C. L. 500:10.]

Hist. C. C. P. '81, § 7, R. S. § 10, reen. R. C. ib.; am. '09, p. 27, H. B. 126; am. '11, c. 102, p. 344; am. '11, c. 158, p. 482; compiled and reen. C. L. 500:10.

Cross ref. Nonjudicial days: § 6481.

Comp. leg.—Cal. Similar: Pol. C. 1872, § 10; by later amendments the number of holidays is increased: Kerr's C. ib.

§ 9451. [11] **Computation of time.** The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last is a holiday, and then it is also excluded. [R. S. § 11.]

Hist. C. C. P. '81, § 8, R. S. § 11, reen. R. C. ib., reen. C. L. § 500:11.

Comp. leg.—Cal. Same: Pol. C. 1872, § 12; Kerr's C. ib. Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 149 P. 499.

Applied: This section and § 12 R. C. have no application to the requirement of the direct primary law (C. L. 27:5) that nomination papers be filed at least 30 days prior to the date of the primary. Seawell v. Gifford (1912) 22 I. 295, 125 P. 182, Ann. Cas. 1914A 1132.

These sections do apply to the time of filing an acceptance of nomination (C. L. 27:10). Ib.

This section provides the rule for computing time as to § 7420. Service on March 31st fixing hearing April 10th is a 10 days' notice. Empire Mill Co. v. Dist. Ct. (1915) 27 I. 383, 149 P. 499; 27 I. 400, 149 P. 505.

§ 9452. [12] **Same: Obligations maturing on holidays.** Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed. [R. S. § 12.]

Hist. C. C. P. '81, § 9, R. S. § 12, reen. R. C. ib., reen. C. L. 500:12.

Comp. leg.—Cal. Same: Pol. C. 1872, § 13; Kerr's C. ib.

Cited: S. v. Gilbert (1902) 8 I. 346, 69 P. 62; Sabin v. Burke (1894) 4 I. 179, 37 P. 352; Seawell v. Gifford (1912) 22 I. 295, 125 P. 182, Ann. Cas. 1914A 1132. See annotations to § 9451.

§ 9453. [13] **Seal defined.** When the seal of a court, public officer or person is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper, alone, as well as upon wax or a wafer affixed thereto. [R. S. § 13.]

Hist. C. C. P. '81, § 10, R. S. § 13, reen. R. C. ib., reen. C. L. 500:13.

Comp. leg.—Cal. Same: Pol. C. 1872, § 14; Kerr's C. ib.

§ 9454. [14] **Joint authority construed.** Words giving a joint authority to three or more public officers, or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. [R. S. § 14.]

Hist. C. C. P. '81, § 11, R. S. § 14, reen. R. C. ib., reen. C. L. 500:14.

Comp. leg.—Cal. Same: Pol. C. 1872, § 15; Kerr's C. ib.

Cited: (Erroneously for R. S. § 16) Sencerbox v. First Nat. Bk. (1908) 14 I. 95, 93 P. 369.

Construction: This section does not eliminate the question of notice when required by the constitution or statutes, but is evidence of the legislative intent to authorize a majority of all deriving their powers from the legislature to act in every matter over which they have authority, unless otherwise expressed by statute. Ackley v. Perrin (1905) 10 I. 531, 79 P. 192.

§ 9455. [15] **Construction of words and phrases.** Words and phrases are construed according to the context and the approved usage of the language, but technical words and pharses, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition. [R. S. § 15.]

Hist. C. C. P. '81, § 12, R. S. § 15, reen. R. C. ib., reen. C. L. 500:15.

Comp. leg.—Cal. Same: Pol. C. 1872, § 16; Kerr's C. ib.

Cited: T. v. Evans (1888) 2 I. 425, 17 P. 139; Sencerbox v. First Nat. Bk. (1908) 14 I. 95, 93 P. 369; Ada Co. v. Boise etc. Club (1911) 20 I. 421, 118 P. 1086, 38 L. R. A. (N. S.) 101; S. v. Paulsen (1912) 21 I. 686, 694, 123 P. 588; Ingard v. Barker (1915) 27 I. 124, 136, 147 P. 293.

Words without technical meaning: A statute written in the plain and ordinary language in common every-day use, dealing with a subject that is neither technical nor scientific, should be construed as the ordinary reading public would read and understand it. Howard v. Grimes Pass P. M. Co. (1911) 21 I. 12, 15, 120 P. 170, Ann. Cas. 1913C 284.

When words have no technical meaning or when they have not been used or employed in a technical sense in the statute, they should be given their ordinary significance as popularly understood. S. v. Morris (1916) 28 I. 599, 155 P. 296.

§ 9456. [16] **Statutory terms defined.** Words used in these compiled laws in the present tense, include the future as well as the present; words used in the masculine gender, include the feminine and neuter; the singular number includes the plural and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration, and every mode of oral statement, under oath or affimation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person can not write, his name being written near it, and witnessed by a person who writes his own name as a witness.

The following words have, in the compiled laws, the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property.
2. The words "real property" are coextensive with lands, tenements and hereditaments, possessory rights and claims.
3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.
4. The word "month" means a calendar month, unless otherwise expressed.
5. The word "will" includes codicils.
6. The word "writ" signifies an order or percept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process," a writ or summons issued in the course of judicial proceedings.
7. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the District and territories. [R. S. § 16.]

Hist. C. C. P. '81, § 13, R. S. § 16, reen. R. C. ib., reen. C. L. 500:16. Partially duplicated in mechanics' lien law: '93, p. 49, c. 5, § 1, reen. '99, p. 147, c. 5, § 1, reen. R. C. § 5149, reen. C. L. 500:16.

Cross ref. For code definitions see Index under Words and Phrases.

Comp. leg.—Cal. Somewhat similar: Pol. C. 1872, § 17; amended: Kerr's C. ib.

Cited: Singular and plural: Houser v. Hobart (1912) 22 I. 735, 127 P. 997, 43 L. R. A. (N. S.) 410. **Person:** Ada Co. v. Boise etc. Club (1911) 20 I. 421, 427, 429, 118 P. 1086, 38 L. R. A. (N. S.) 101. **Subd. 2:** Real property. Hall v. Blackman (1902) 8 I. 272, 288, 68 P. 19; Johnson v. Hurst (1904) 10 I. 308, 325, 77 P. 784. **Subd. 3:**. Personal property. Murphy v. Montandon (1892) 3 I. 325, 29 P. 851, 35 A. S. R. 279; (Erroneously as R. S. § 14) Sencerbox v. First Nat. Bk. (1908) 14 I. 95, 93 P. 369; Meholin v. Carlson (1910) 17 I. 742, 107 P. 755, 134 A. S. R. 286. **Subd. 4.** Month (Con. op.) Harpold v. Doyle (1909) 16 I. 671, 693, 102 P. 158.

Mark: Sufficiency of attestation: A mark made in place of a signature is sufficiently witnessed by the notary's signature affixed to his certificate of acknowledgment of the instrument. First Nat. Bk. of Hailey v. Glenn (1904) 10 I. 224, 77 P. 623, 109 A. S. R. 204.

§ 9457. [17] **General repeal of existing law.** No statute law is continued in force because it is consistent with the provisions of the compiled laws on the same subject, but in all cases provided for therein all statute laws heretofore in force in this state, whether consistent

or not with the provisions of the compiled laws, unless expressly continued in force, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in these compiled laws provided; nor does it affect any local or special statute not expressly repealed; nor does it affect any outstanding unexpended appropriation. [R. C. § 17.]

Hist. Based on R. S. § 17; am. R. C. § 17, reen. C. L. 500:17. Unexpended outstanding appropriations are excepted from the scope of the repeal, as in R. C.

Comp. leg.—Cal. Similar: Pol. C. 1872, § 18; Kerr's C. ib.

Cited: Cunningham v. George (1892) 3 I. 456, 31 P. 809; Evans v. Huston (1915) 27 I. 563, 567, 150 P. 14; N. P. Ry. Co. v. Hirzel (1916) 29 I. 458, 161 P. 854.

Repeal: Some doubt is cast upon the completeness of this repeal by the dictum of the court in Sanders v. Coeur d'Alene (1915) 27 I. 353, 149 P. 290.

§ 9458. Special and local laws continued. The following acts and parts of acts are the local and special statutes which are continued in force, except in so far as the same have been modified, amended, superseded or repealed by other legislation. All others are hereby repealed.

(1) All those special and local laws continued in force by an act entitled "An act to provide for continuing in force certain special and local laws and repealing all others," approved February 10, 1887, which said local and special laws are embraced within the publication known as "Local and special laws of Idaho territory," printed by direction of the 14th session of the territorial legislative assembly.

(2) All those special and local laws continued in force by the Revised Codes of Idaho, 1908, section 17.

(3) An act entitled, "An act establishing insurance fund of capitol building annex, deaf, dumb and blind asylum insurance fund," etc., approved Feb. 24, 1909. ['09, p. 21, H. B. 38.]

(4) An act amendatory of the establishment of the graded public schools of the city of Lewiston, approved March 6, 1909. ['09, p. 43, H. B. 105.]

(5) An act providing for the sale and conveyance by the state board of land commissioners of a tract of land situated within the village of Blackfoot, Idaho, approved March 11, 1909. ['09, p. 65, H. B. 135.]

(6) An act amending the charter of Boise City, approved March 11, 1909. ['09, p. 113, H. B. 297.]

(7) An act amending an act entitled "An act to create the independent school district of Emmettsville," approved March 15, 1909. ['09, p. 188, H. B. 189.]

(8) An act entitled "An act levying and requiring the collection of a special ad valorem tax for the payment of interest upon certain bonds issued by the state of Idaho," etc., approved March 11, 1909. ['09, p. 304, H. B. 308.]

(9) An act amending the charter of the city of Bellevue, approved March 11, 1909. ['09, p. 320, H. B. 254.]

(10) An act amending an act entitled, "An act to create independent school district of Emmettsville," approved March 13, 1909. ['09, p. 340, H. B. 129.]

(11) An act "providing for the issuing, sale and redemption of state bonds * * * for the purpose of improving the Idaho soldiers' home," approved March 16, 1909. ['09, p. 365, H. B. 304.]

(12) An act "providing for the issuing of state bonds * * * for the additional buildings and improvements of the northern Idaho insane asylum," approved March 16, 1909. ['09, p. 368, H. B. 302.]

(13) An act "providing for the issuing, sale and redemption of state

bonds * * * for the purpose of completing the cell house at the state penitentiary," approved March 16, 1909. ['09, p. 370, H. B. 303.]

(14) An act entitled, "An act providing for the issuance and sale of state bonds to the amount of $55,000 * * * for the Idaho industrial training school," etc., approved March 16, 1909. ['09, p. 376, H. B. 95.]

(15) An act entitled, "An act to provide for the establishment, building and equipment of a state school for the deaf and the blind; to provide for the issuance, sale and redemption of bonds," etc., sections 7 to 14, inclusive, approved March 16, 1909. ['09, p. 379, H. B. 194.]

(16) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $52,000 and appropriating the proceeds thereof to the university of Idaho," etc., approved March 16, 1909. ['09, p. 382, H. B. 8.]

(17) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $36,000 and appropriating the proceeds thereof to the academy of Idaho," etc., approved March 16, 1909. ['09, p. 385, H. B. 37.]

(18) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $15,000 * * * for the construction of a wagon bridge across the Salmon river," etc., approved March 17, 1909. ['09, p. 390, H. B. 85.]

(19) An act entitled, "An act providing for the issuing and sale of state bonds in the sum of $10,000 * * * for the construction of a wagon bridge across the Snake river between the counties of Lincoln and Cassia, Idaho," etc., approved March 16, 1909. ['09, p. 397, H. B. 198.]

(20) An act entitled, "An act providing for the issue, sale and redemption of state bonds for the purpose of erecting and equipping a gymnasium building for Lewiston normal school," etc., approved March 17, 1909. ['09, p. 404, H. B. 27.]

(21) An act entitled, "'An act providing for the issuance and sale of state bonds in the aggregate sum of $73,000 * * * to the university of Idaho," etc., approved March 17, 1909. ['09, p. 407, H. B. 12.]

(22) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $18,000 * * * for the construction of a wagon bridge across the Kootenai river at Bonners Ferry in Bonner county, Idaho," etc., approved March 17, 1909. ['09, p. 413, S. B. 15.]

(23) An act entitled, "An act to provide for the completion of the Paris-Franklin road in the counties of Bear Lake and Oneida," etc., approved March 17, 1909. ['09, p. 419, H. B. 174.]

(24) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $60,000 * * * to the continuance of the construction of the capitol building at Boise, Idaho," etc., approved March 16, 1909. ['09, p. 423, H. B. 74.]

(25) An act entitled, "An act providing for the issuance and sale of bonds in the sum of $36,000 for the purpose of building and equipping a gymnasium for the Albion state normal school," etc., approved March 17, 1909. ['09, p. 426, H. B. 81.]

(26) Section 6 of an act authorizing the relinquishment of Marble Creek lands, approved Feb. 8, 1911. ['11, c. 6, § 6, p. 18.]

(27) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $10,000 * * * for the construction of a wagon bridge across the Snake river at a point north of the north end of

Overland avenue of the village of Burley," etc. Became a law without approval Feb. 13, 1911. ['11, c. 7, p. 18.]

(28) An act entitled, "An act appropriating the sum of $15,000 for the construction of a wagon bridge across the Salmon river," etc., approved Feb. 18, 1911. ['11, c. 16, p. 39.]

(29) An act entitled, "An act appropriating $3059.10 for 8740.28 acres of state lands within the Black Canyon irrigation district," etc., approved Feb. 27, 1911. ['11, c. 22, p. 47.]

(30) An act entitled, "An act authorizing the governor and secretary of state to convey certain lots in Morehead's addition to the city of Weiser," etc., approved March 3, 1911. ['11, c. 36, p. 76.]

(31) An act entitled, "An act to provide for the establishment, building and equipping of the Idaho state sanitarium," etc., approved March 4, 1911. ['11, c. 41, p. 86.]

(32) An act entitled, "An act authorizing the state board of education to cause to be erected a building near Gooding * * * as a part of the Idaho state school for the deaf and the blind," etc., approved March 4, 1911. ['11, c. 42, p. 97.]

(33) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $750,000 * * * to the completion of the construction of the central section of the capitol building at Boise," etc., approved March 7, 1911. ['11, c. 47, p. 104.]

(34) An act entitled, "An act providing for the issuing of state bonds to the amount of $35,000 for the additional buildings and improvements of the northern Idaho insane asylum," etc., approved March 7, 1911. ['11, c. 53, p. 118.]

(35) An act entitled, "An act authorizing the state board of land commissioners * * * to extend the time of final payment due on all certificates of sale for school lands in the year 1911," etc., approved March 9, 1911. ['11, c. 66, p. 188.]

(36) An act entitled, "An act providing for the issuing, sale and redemption of state bonds * * * for the purpose of improving the Idaho state penitentiary at Boise," approved March 10, 1911. ['11, c. 69, p. 191.]

(37) Section 3 of an act validating previously incorporated religious and benevolent corporations, approved March 11, 1911. ['11, c. 74, § 3, p. 229.]

(38) An act entitled, "An act providing for the issuing, sale and redemption of state bonds * * * for the purpose of improving the Idaho industrial training school at St. Anthony," approved March 13, 1911. ['11, c. 77, p. 251.]

(39) An act entitled, "An act providing for the issuing, sale and redemption of state bonds * * * for the purpose of improving the Idaho soldiers' home," etc., approved March 13, 1911. ['11, c. 79, p. 254.]

(40) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $75,000 * * * to the university of Idaho," etc., approved March 13, 1911. ['11, c. 84, p. 315.]

(41) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $25,000 * * * for the construction of a wagon bridge across the Snake river near the city of Payette," etc., approved Feb. 1, 1911. ['11, c. 87, p. 329.]

(42) An act entitled, "An act authorizing the board of county commissioners of Lemhi county to submit question of incurring indebtedness

* * * for the construction of the Big Creek wagon road," etc., approved Feb. 16, 1911. ['11, c. 104, p. 346.]

(43) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $7500 * * * for the construction of a wagon bridge across the Salmon river four miles below the Barr's bridge," etc., approved Feb. 17, 1911. ['11, c. 105, p. 347.]

(44) An act entitled, "An act providing for the issuance and sale of state bonds in the sum of $15,000 * * * for the construction of a wagon bridge across the Snake river near the Loveridge ferry," etc., approved Feb. 17, 1911. ['11, c. 106, p. 352.]

(45) An act entitled, "An act to provide for the macadamizing of about five miles of the public highway, along and adjoining * * * the Oregon Short Line railroad, Bingham county, Idaho," etc., approved Feb. 18, 1911. ['11, c. 108, p. 358.]

(46) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $20,000 * * * for the construction of a wagon road between * * * the city of Boise and the Payette lakes," etc., approved Feb. 18, 1911. ['11, c. 109, p. 362.]

(47) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $9000 * * * for the construction of a draw bridge across the St. Joe river at St. Maries," etc., approved Feb. 21, 1911. ['11, c. 113, p. 368.]

(48) An act entitled, "An act appropriating the sum of $2671.16 for the purchase of * * * the Heyburn toll wagon bridge across Snake river * * * between * * * Heyburn * * * and Burley," etc., approved March 1, 1911. ['11, c. 126, p. 413.]

(49) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $25,000 * * * for the construction of a wagon road between Kootenai and Idaho-Montana state line near Cabinet," etc., approved March 3, 1911. ['11, c. 134, p. 420.]

(50) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $5000 * * * for the construction of a wagon road between * * * Leadore and a point on the northerly side of Lemhi river near the town of May," etc., approved March 3, 1911. ['11, c. 138, p. 430.]

(51) An act entitled, "An act to provide for the construction * * * of roadbed on * * * a public highway known as the Whitebird, Dumacque and Grave Creek wagon road in Idaho county," etc., approved March 3, 1911. ['11, c. 143, p. 438.]

(52) An act entitled, "An act providing for the issuing * * * of state bonds in the sum of $10,000 * * * for the construction of a wagon bridge across the Snake river, near Brownlee or Robinette," etc., approved March 3, 1911. ['11, c. 144, p. 444.]

(53) An act entitled, "An act authorizing the state board of land commissioners * * * to sell * * * certain state lands in Bingham county," etc., approved March 4, 1911. ['11, c. 151, p. 455.]

(54) An act entitled, "An act to provide for the completion of Paris-Franklin road in the counties of Bear Lake and Oneida," etc., approved March 4, 1911. ['11, c. 153, p. 458.]

(55) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $6000 for the construction of a wagon bridge across the Snake river * * * between Twin Falls and Lincoln counties," etc., approved March 7, 1911. ['11, c. 156, p. 476.]

(56) An act entitled, "An act providing for the issuing * * * of state bonds in the sum of $5500 * * * for the construction of a

wagon bridge across the south fork of Snake river," etc., approved March 8, 1911. ['11, c. 180, p. 582.]

(57) An act entitled, "An act providing for the issuing * * * of state bonds in the sum of $6000 * * * for the construction of a wagon bridge across the Snake river between the counties of Lincoln and Twin Falls," etc., approved March 9, 1911. ['11, c. 202, p. 667.]

(58) An act entitled, "An act levying and requiring the collection of a special ad valorem tax with which to pay the bonds and interest * * * in certain acts of the eleventh session of the legislature," etc., approved March 10, 1911. ['11, c. 210, p. 682.]

(59) Saving clause in repeal of poll tax law. Approved Jan. 27, 1912. ['12, c. 2, § 2, p. 6.]

(60) An act concerning the dissolution of school districts traversed by county lines and boundaries, approved Feb. 11, 1913. ['13, c. 9, p. 48.]

(61) An act entitled, "An act authorizing the state board of land commissioners to sell * * * certain state lands in Bingham county," etc., approved March 1, 1913. ['13, c. 43, p. 146.]

(62) An act entitled, "An act providing for the issuance * * * of bonds in the sum of $6000 * * * for the construction of buildings to be erected in Lincoln county * * * for * * * experiment station," etc., approved March 1, 1913. ['13, c. 44, p. 148.]

(63) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $10,000 * * * for the * * * construction of buildings upon * * * the Lava Hot Springs," etc., approved March 4, 1913. ['13, c. 49, p. 155.]

(64) An act entitled, "An act appropriating $14,770.28 out of the Carey act trust fund * * * for the reclamation of state lands within the Gem irrigation district in Owyhee county," etc., approved March 5, 1913. ['13, c. 62, p. 296.]

(65) An act entitled, "An act authorizing the state board of land commissioners * * * to extend the time of payment due on all certificates of sale for state school lands in the year 1913 for five years," etc., approved March 8, 1913. ['13, c. 78, p. 333.]

(66) An act entitled, "An act authorizing the state treasurer to refund certain sums of money to widows," etc., approved March 8, 1913. ['13, c. 79, p. 334.]

(67) An act entitled, "An act providing for the issuance * * * of state bonds for * * * purchasing that portion of the interstate bridge over Snake river between Lewiston * * * and Clarkston," etc., approved March 10, 1913. ['13, c. 80, p. 334.]

(68) An act authorizing the use of moneys now in the public building endowment fund, by the capitol building commission," etc., approved March 10, 1913. ['13, c. 104, p. 424.]

(69) An act entitled, "An act authorizing the state land board to extend the time for payments for a period of 10 years to purchasers of state lands," etc., approved March 11, 1913. ['13, c. 131, p. 481.]

(70) An act entitled, "An act levying and requiring the collection of a special ad valorem tax with which to pay the bonds and interest * * * in certain acts of the eleventh session of legislature," etc., approved March 11, 1913. ['13, c. 135, p. 486.]

(71) An act entitled, "An act providing for the completion of the macadamizing * * * a public highway, along and adjoining * * * the Oregon Short Line railroad in Bingham county," etc., approved March 10, 1913. ['13, c. 139, p. 490.]

(72) An act entitled, "An act to amend sections 2 and 15 of chapter 134 of the laws of 1911," etc. (the original act relating to a bond issue for a road in Bonner county), approved March 12, 1913. ['13, c. 164, p. 532.]

(73) An act entitled, "An act authorizing the board of trustees of the capitol building to sell * * * the Central school building," etc., approved March 5, 1913. ['13, c. 176, p. 552.]

(74) An act entitled, "An act to provide for the issuance * * * of state bonds in the sum of $10,000 * * * for the construction of a wagon road between the city of Boise * * * and the state line between Idaho and Montana," etc., approved March 13, 1913. ['13, c. 182, p. 580.]

(75) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $200,000 * * * for the payment of a portion of the cost * * * for constructing a system of state highways in the state of Idaho," etc., approved March 13, 1913. ['13, c. 183, p. 585.]

(76) An act entitled, "An act providing for the issuing * * * of state bonds * * * for the purpose of purchasing 84 acres of land for the state to be used in connection with the state penitentiary," approved March 15, 1913. ['13, c. 192, p. 635.]

(77) An act entitled, "An act authorizing the state land board to extend the time for payment for a period of two years * * * to purchasers of state lands," etc., approved Feb. 26, 1915. ['15, c. 19, p. 70.]

(78) An act entitled, "An act authorizing the state board of land commissioners to sell * * * certain state land situate in Clearwater county," etc., approved March 3, 1915. ['15, c. 32, p. 102.]

(78a) An act amending an act providing for the issuance of state bonds in the sum of $200,000 for state highways, approved March 13, 1913 [500:17a (75)], amendatory act approved March 7, 1915. ('15, c. 36, p. 115.) ['19, c. 159, p. 518.]

(79) An act entitled, "An act ratifying the action of the board of trustees of Oakley independent school district No. 2 in Cassia county in issuing certain warrants," etc., approved March 15, 1915. ['15, c. 107, p. 249.]

(80) An act entitled, "An act providing for the issuance * * * of state bonds in the sum of $1,000,000 * * * for the payment of a portion of the cost * * * of constructing a system of state highways in the state of Idaho," etc., approved March 20, 1917. ['17, c. 64, p. 197.]

(81) An act entitled, "An act changing the northern and western boundary lines of independent school district of Boise City," etc., approved March 20, 1917. ['17, c. 77, p. 240.]

(82) An act entitled, "An act to provide for the revision, compilation and codification of the laws of the state of Idaho," etc., approved March 20, 1917. ['17, c. 78, p. 241.]

(83) An act amending the charter of the city of Lewiston, approved March 12, 1917. ['17, c. 87, p. 303.]

(84) An act entitled, "An act to provide for the erection of a monument to the memory of Governor Frank Steunenberg," etc., approved March 20, 1917. ['17, c. 94, p. 324.]

(85) An act entitled, "An act conferring authority upon the electors residing within certain territory * * * to vote at the general election * * * in November, 1918, upon the question whether such described territory shall be detached from Bannock county and attached to Franklin county," etc., approved Feb. 8, 1917. ['17, c. 96, p. 327.]

(86) An act amending an act to provide for the establishment of

graded public schools in the city of Lewiston, approved March 14, 1917. ['17, c. 134, p. 444.]

(87) An act entitled, "An act establishing an experimental and demonstration farm for the high altitude agricultural areas of the state of Idaho," etc., approved March 20, 1917. ['17, c. 143, p. 458.]

(88) An act entitled, "An act approving and confirming the purchase by the state board of land commissioners, in behalf of the state of Idaho of the irrigation system of the King's Hill irrigation and power company," aproved March 13, 1917. ['17, c. 160, p. 487.]

(89) An act entitled, "An act to authorize the governor to convey the title * * * in the King Hill project * * * to the United States for reconstruction," etc., approved March 16, 1917. ['17, c. 162, p. 492.]

Hist. Analogous to R. C. § 17, reen. C. L. 500:17a. Subd. 78a was omitted from Compiled Laws through inadvertence, attention being called thereto in the commissioner's report. It was inserted by '19, c. 159, p. 518. Repeating what was said by Code Commissioner MacLane: "This enumeration is made without any attempt on the part of the commissioner to determine how far these special or local acts are still in force, and they are continued in force only so far they have not been superseded, repealed, amended or modified by subsequent legislation."

§ 9459. Special and local laws of 1919. The following acts and parts of acts are the local and special statutes which were passed at the 1919 session of the legislature and which not being general laws, have not been incorporated in these codes.

(1) An act entitled, "Conferring authority upon the electors residing within certain territory herein described to vote at the general election to be held in Nov. 1920, upon the question whether such described territory shall be detached from Idaho county and annexed to Valley county," approved Feb. 19, 1919. ['19, c. 101, p. 366.]

(2) An act entitled, "Reverting title to the state of Idaho of lots numbered one, two, three, four, six, seven, and eight of block numbered nine of Morehead's addition to the city of Weiser," approved March 1, 1919. ['19, c. 113, p. 398.]

(3) An act entitled, "Appropriating $30,000 for the construction of improvements on the south fork of the Snake river in Jefferson and Madison counties," approved March 8, 1919. ['19, c. 29, p. 106.]

(4) An act entitled, "To provide for the improvement of the Lewiston state normal school," etc., approved March 8, 1919. ['19, c. 28, p. 105.]

(5) An act entitled, "To appropriate the sum of $10,000 to build a steel bridge over the Kootenai river at Leonia," etc., approved March 11, 1919. ['19, c. 40, p. 138.]

(6) An act entitled, "Making an appropriation for the purchase of additional grounds for the Idaho Technical Institute," approved March 12, 1919. ['19, c. 124, p. 410.]

(7) An act entitled, "To approve and confirm the action of the state board of land commissioners of the state of Idaho, in extending the time for settlers to make final proof of reclamation," etc., approved March 12, 1919. ['19, c. 132, p. 426.]

(8) An act entitled, "To provide for completing the construction of the new capitol building at Boise, Idaho," etc., approved March 12, 1919. ['19, c. 45, p. 143.]

(9) An act entitled, "Providing for the issuance and sale of state bonds in the sum of $200,000, appropriating the proceeds of the sale thereof for the payment of a portion of the cost of laying out, surveying and constructing a system of state highways," etc., approved March 13, 1919. ['19, c. 49, p. 149.]

(10) An act entitled, "Amending sections 2, 7, 9, and 12 of chapter 64 of the session laws of 1917, providing for the issuance and sale of state highway bonds," etc., approved March 13, 1919. ['19, c. 50, p. 153.]

(11) An act entitled, "Giving independent school and rural high school districts the power until September 1, 1919, to issue funding bonds," etc., approved March 14, 1919. ['19, c. 55, p. 164.]

(12) An act entitled, "To provide for the preparation and indexing for, and the printing and distribution of the Compiled Laws," etc., approved March 14, 1919, ['19, c. 63, p. 197.]

(13) An act entitled, "Authorizing the state treasurer to refund certain sums of money to widows," etc., approved March 14, 1919. ['19, c. 66, p. 242.]

(14) An act entitled, "For the construction of a state highway between the terminals of Star, Idaho, and McCall, Idaho," etc., approved March 14, 1919. ['19, c. 59, p. 180.]

(15) An act entitled, "Providing for the issuance and sale of state bonds in the sum of $2,000,000, appropriating the proceeds of the sale thereof for the payment of a portion of the cost of laying out, surveying and constructing a system of state highways," etc., approved March 14, 1919. ['19, c. 193, p. 578.]

(16) An act entitled, "Creating a commission to decide upon a uniform style and design of memorial to be erected at each county seat in the state of Idaho," etc., approved March 15, 1919. ['19, c. 67, p. 242.]

(17) An act entitled, "To provide for the investigation and auditing of all accounts, books and records of each and every state office and state department of the state of Idaho," etc., approved March 17, 1919. ['19, c. 82, p. 293.]

(18) An act entitled, "Providing for the construction of a wagon road from a point near Neal, Elmore county, Idaho," etc., approved March 17, 1919. ['19, c. 174, p. 548.]

(19) An act entitled, "Appropriating the sum of $119,456 out of the general fund of the state for the reclamation of state lands within the Gem Irrigation District in Owyhee county," etc., approved March 17, 1919. ['19, c. 79, p. 285.]

(20) An act entitled, "Appropriating the sum of $25,000 for the purpose of helping defray expenses of drainage, widening, and cleaning the channel of the Spokane river at the outlet of Coeur d'Alene lake," etc., approved March 17, 1919. ['19, c. 80, p. 287.]

(21) An act entitled, "Providing for the improvement of Shoshone Falls Park," etc., approved March 17, 1919. ['19, c. 189, p. 572.]

(22) An act entitled, "Authorizing and directing the borrowing of $3,000,000 by the state of Idaho for the purpose of paying outstanding claims," etc., approved March 18, 1919. ['19, c. 94, p. 346.]

(23) An act entitled, "Authorizing and directing the borrowing of $1,800,000 by the state of Idaho, for the purpose of paying outstanding claims and accruing claims, charges and appropriations against the state highway fund," etc., approved March 18, 1919. ['19, c. 95, p. 353.]

§ 9460. [18] **Common law in force.** The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state. [R. S. § 18.]

Hist. '64, p. 527, § 1, R. S. § 18, reen. R. C. ib., reen. C. L. 500:18.

Comp. leg.—Cal. Similar: Pol. C. 1872, § 4468; Kerr's C. ib.

Nev. Similar: Gen. St. 3201. N. P. Ry. Co. v. Hirzel (1916) 29 I. 438, 454, 161 P. 854.

Champerty and maintenance: The com-

mon law rule of champerty and maintenance is not in force in this state. Merchants' Protective Assn. v. Jacobsen (1912) 22 I. 636, 127 P. 315.

Inheritance by alien: The common law rule that an alien had no inheritable blood and could not claim through an intestate has been modified in this state by § 7805. Connolly v. Reed (1912) 22 I. 29, 125 P. 213.

Riparian rights: The doctrine of riparian rights is a part of the common law and consequently a part of the law of this state. (Dis. op.) Drake v. Earhart (1890) 2 I. 750, 23 P. 541.

A riparian owner upon the streams of this state, both navigable and non-navigable, takes to the thread of the stream, subject, however, to an easement for the use of the public. Johnson v. Johnson (1908) 14 I. 561, 95 P. 499, 24 L. R. A. (N. S.) 1240.

The common law doctrine of riparian rights in so far as those rights conflict with the right of an appropriator of the waters of a stream, is repugnant to, and in conflict with, the constitution and statutes of this state, and to that extent has been abrogated thereby. Hutchinson v. Watson Slough Ditch Co. (1909) 16 I. 484, 101 P. 1059, 133 A. S. R. 125.

This section only adopts so much of the common law as is applicable to the conditions of this state. The English doctrine of riparian rights on navigable streams has been repeatedly held not applicable to this country. N. P. Ry. Co. v. Hirzel (1916) 29 I. 438, 161 P. 854.

§ 9461. Prior legislation repealed. All general acts and parts and clauses of acts of a general nature passed prior to the fifteenth session of the state legislature, are hereby repealed, and these compiled laws are in force in lieu thereof; but such repeal does not affect any act done, or any right accruing or acrued, or any suit or proceeding had or commenced in any civil cause before the said repeal takes effect, but all rights and liabilities under said repealed acts continue, in the same manner as if said repeal had not been made. [C. L. 500:19.]

Hist. R. S. § 19; am. R. C. ib.; am. C. L. 500:19.

Comp. leg.—Cal. See Pol. C. 1872, § 18; Kerr's C. ib.

Cited: Cunningham v. George (1892) 3 I. 456, 31 P. 809.

Scope of revision: Whatever is included in a statutory revision must be construed together as the law; all that formerly existed but is not included is repealed. T. v. Evans (1890) 2 I. 651, 23 P. 232.

§ 9462. [20] **Past offenses may be prosecuted.** All offenses committed and all penalties or forfeitures incurred prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made. [R. S. § 20.]

Hist. R. S. § 20, reen. R. C. ib., reen. C. L. 500:20.

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